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# FEDERAL STATUTES ANNOTATED

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## SUPPLEMENT, 1919

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Containing all the Laws of a Permanent and General  
Nature Enacted by the Sixty-fifth and Sixty-sixth  
Congress between July 18, 1918, and January 1, 1920

WITH

SUPPLEMENTAL NOTES CONTINUING THE ANNOTATION IN THE  
PRIOR VOLUMES

---

EDWARD THOMPSON COMPANY  
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1920

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## PREFACE

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The statutes collected in this Supplement connect, without break or duplication, with those contained in the 1918 Supplement. They are the general, permanent, and public acts passed by Congress between July 18, 1918, and January 1, 1920. These acts are classified according to the scheme of titles in the main work, and in using this Supplement the reader should examine the corresponding title to locate the late, amendatory, or repealing legislation upon the topic under consideration.

The latter part of the volume is devoted to the supplemental notes. These supplemental notes connect directly with and continue those in the 1918 Supplement, and present all the subsequent decisions construing the statutes contained in the prior volumes. The arrangement is by title, volume, page, and section as the statutes are found in preceding volumes, and the investigator has merely to turn to the corresponding title, volume, page and section as shown by the captions in this Supplement to find the late cases. The omission of a title or of page and section captions implies that no new cases have been found.

Tables of titles, Revised Statutes sections, and statutes chronologically arranged are included, together with a table connecting the notes with the first edition and supplements thereto.

The Eighteenth and the proposed Nineteenth Constitutional Amendments, with supplemental notes to the Constitution, are included in this volume.



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# FEDERAL STATUTES ANNOTATED

## 1919 SUPPLEMENT

### AGRICULTURE

*Act of Oct. 1, 1918, ch. 178, 1.*

*Traveling Expenses — Official Business, 1.*

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#### CROSS-REFERENCES

See also *ANIMALS; CENSUS; FOOD AND DRUGS; FOOD AND FUEL; WAREHOUSES*

**An Act Making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and nineteen.**

[*Act of Oct. 1, 1918, ch. 178, 40 Stat. L. 973.*]

\* \* \* [Traveling expenses — official business.] Whenever, during the fiscal year ending June thirtieth, nineteen hundred and nineteen, the Secretary of Agriculture shall find that the expenses of travel can be reduced thereby, he may, in lieu of actual traveling expenses, under such regulations as he may prescribe, authorize the payment of not to exceed 2 cents per mile for a motorcycle or 6 cents per mile for an automobile, used for necessary travel on official business: *Provided*, That there shall be no payment of mileage for the use or travel of motorcycle or automobile furnished or owned by or maintained by the Government of the United States. [40 Stat. L. 990.]

\* \* \* **[Georgia Experiment Station.]** That hereafter the Secretary of Agriculture be, and he is hereby, authorized and directed to certify to the Secretary of the Treasury for payment, and the Secretary of the Treasury is authorized and directed to pay the appropriation for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and all future appropriations, to the Georgia Experiment Station, as authorized by the Act of March second, eighteen hundred and eighty-seven (Twenty-fourth Statutes, page four hundred and forty), commonly referred to as the Hatch Act, and the Act of March sixteenth, nineteen hundred and six (Thirty-fourth Statutes, page sixty-three), known as the Adams Act, and all amendments to said Acts, in accordance with the act of the General Assembly of Georgia, approved December twenty-ninth, eighteen hundred and eighty-eight, establishing the Georgia Experiment Station, and the act of August eighteenth, nineteen hundred and six, accepting the benefits of the Adams Act (Georgia laws, nineteen hundred and six, page eleven hundred and sixty-one): *Provided further*, That nothing herein shall be construed as limiting the authority of the Secretary of Agriculture over and respecting the supervision of the operation of the said Georgia Experiment Station as set forth in said Acts of Congress. [40 Stat. L. 998.]

For the Hatch Act, mentioned in the text, see 1 Fed. Stat. Ann. (2d ed.) 212; 1 Fed. Stat. Ann. (1st ed.) 9.

For the Adams Act, mentioned in the text, see 1 Fed. Stat. Ann. (2d ed.) 216; 1909 Supp. Fed. Stat. Ann. 3.

\* \* \* **[Perishable farm products—certificates as to quality and condition—evidence.]** For enabling the Secretary of Agriculture to investigate and certify to shippers and other interested parties the quality and condition of fruits, vegetables, and other perishable farm products when received at such important central markets as the Secretary of Agriculture may from time to time designate, under such rules and regulations as he may prescribe, including payment of such fees as will be reasonable and as nearly as may be to cover the cost for the service rendered: *Provided*, That certificates issued by the authorized agents of the department shall be received in all courts of the United States as prima facie evidence of the truth of the statements therein contained, \$113,000. [40 Stat. L. 1002.]

\* \* \* **[Nitrate of soda.]** That any moneys heretofore or hereafter received by the United States for or in connection with the disposition of nitrate of soda pursuant to section twenty-seven of the Act entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," approved August tenth, nineteen hundred and seventeen (Public, Numbered Forty-one, Sixty-fifth Congress), are hereby appropriated and made immediately available as a revolving fund to be used at the discretion of the President for further carrying out the purposes of said section and extending its operation throughout the period of the existing war as ascertained and proclaimed in accordance with section twenty-four of said Act: *Provided*, That nothing herein shall be construed as prohibiting the sale or disposal of any nitrates remaining on hand at the time of, or contracted for previous to, such termination. [40 Stat. L. 1007.]

For Act of Aug. 10, 1917, sec. 27, see 1918 Supp. Fed. Stat. Ann. 46.

[SEC. 1.] \* \* \* [Department of Agriculture — housing — requisition of buildings, etc.— compensation.] That the Secretary of Agriculture is authorized, for the official purposes of the Department of Agriculture, and within the limits of the appropriations for rent made by this or any other Act making appropriations for the Department of Agriculture, to requisition the use of, and take possession of, any building or any space in any building, and the appurtenances thereof which are now or heretofore have been used for such purposes, in the District of Columbia, other than a dwelling house occupied as such or a building occupied by any other branch of the United States Government; and he shall ascertain and pay just compensation for such use. If the amount of compensation so ascertained be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of such amount, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation for such use in the manner provided by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code. [40 Stat. L. 1048.]

This is from the Act of Nov. 21, 1918, ch. 212, entitled "An Act To enable the Secretary of Agriculture to carry out, during the fiscal year ending June thirtieth, nineteen hundred and nineteen, the purposes of the Act entitled 'An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products,' and for other purposes."

For Jud. Code, sec. 24, par. 20, see 4 Fed. Stat. Ann. (2d ed.) 1059; 1912 Supp. Fed. Stat. Ann. 140.

For Jud. Code, sec. 145, see 5 Fed. Stat. Ann. (2d ed.) 649; 1912 Supp. Fed. Stat. Ann. 200.

# **An Act Making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1920.**

[Act of July 24, 1919, ch. 26, 41 Stat. L. 246.]

\* \* \* [Distribution of seeds, etc.— congressional supply.] That the Secretary of Agriculture, after due advertisement and on competitive bids, is authorized to award the contract for the supplying of printed packets and envelopes and the packeting, assembling, and mailing of the seeds, bulbs, shrubs, vines, cuttings, and plants, or any part thereof, for a period of not more than five years nor less than one year, if by such action he can best protect the interests of the United States. An equal proportion of five-sixths of all seeds, bulbs, shrubs, vines, cuttings, and plants, shall upon their request, after due notification by the Secretary of Agriculture, that the allotment to their respective districts is ready for distribution, be supplied to Senators, Representatives, and Delegates in Congress for distribution among their constituents, or mailed by the department upon the receipt of their addressed franks, in packages of such weight as the Secretary of Agriculture and the Postmaster General may jointly determine: *Provided, however,* That upon each envelope or wrapper containing packages of seeds the contents thereof shall be plainly indicated, and the Secretary shall not distribute to any Senator, Representative, or Delegate seeds entirely unfit for the climate and locality he represents, but shall distribute the same so that each Member may have seeds of equal value, as near as may be, and the best adapted to the locality he represents: *Provided also,* That the seeds allotted to Senators and Representatives for distribution in the districts embraced within the twenty-fifth and thirty-fourth parallels of latitude shall be ready for delivery not later than the 10th day of January: *Provided also,* That

any portion of the allotments to Senators, Representatives, and Delegates in Congress remaining uncalled for on the 1st day of April shall be distributed by the Secretary of Agriculture, giving preference to those persons whose names and addresses have been furnished by Senators and Representatives in Congress and who have not before during the same season been supplied by the departments: *And provided also*, That the Secretary shall report, as provided in this Act, the place, quantity, and price of seeds purchased, and the date of purchase; but nothing in this paragraph shall be construed to prevent the Secretary of Agriculture from sending seeds to those who apply for the same. And the amount herein appropriated shall not be diverted or used for any other purpose but for the purchase, testing, propagation, and distribution of valuable seeds, bulbs, mulberry and other rare and valuable trees, shrubs, vines, cuttings, and plants. [41 Stat. L. 246.]

A similar paragraph to the above has been contained in previous Agricultural Appropriation Acts.

\* \* \* [Photographic films—sale or rental.] That the Secretary of Agriculture is authorized, under such rules and regulations and subject to such conditions as he may prescribe, to loan, rent, or sell copies of films: *Provided*, That in the sale or rental of films educational institutions or associations for agricultural education not organized for profit shall have preference; all moneys received from such rentals or sales to be covered into the Treasury of the United States as miscellaneous receipts. [41 Stat. L. 259.]

A similar paragraph to the above has been contained in previous Agricultural Appropriation Acts.

\* \* \* [Leave of absence to employees in territorial possessions.] That hereafter employees of the Department of Agriculture assigned to permanent duty in the Virgin Islands shall be entitled to the same privileges as to leave of absence as are conferred upon employees assigned to Alaska, Hawaii, Porto Rico, and Guam by the Act of June 30, 1914 (Thirty-eighth Statutes at Large, page 441), and if any employee of the agricultural experiment stations of the United States in Alaska, Hawaii, Porto Rico, Guam, or the Virgin Islands shall elect to postpone the taking of any or all of the annual leave to which he may be entitled under the said Act of June 30, 1914, he may, in the discretion of the Secretary of Agriculture, subject to the interests of the public service, be allowed to take at one time unused annual leave which may have accumulated within not to exceed four years, and be paid at the rate prevailing during the year such leave of absence has accumulated. [41 Stat. L. 262.]

For Act of June 30, 1914, mentioned in the text, see 1 Fed. Stat. Ann. (2d ed.) 206; 1916 Supp. Fed. Stat. Ann. 2.

\* \* \* [Bureau of markets—enforcement of acts—oaths—examination of witnesses—production of books and papers.] That hereafter, in the performance of the duties required of the Bureau of Markets in the administration or enforcement of provisions of Acts (United States Cotton Futures Act, Thirty-ninth Statutes at Large, page 476; United States Grain Standards Act, Thirty-ninth Statutes at Large, page 482; United States Warehouse Act, Thirty-ninth Statutes at Large, page 486; Standard Container Act, Thirty-ninth Statutes at Large, page 673; and the Acts making annual appropriations for the Department of Agriculture) relating to the Department of Agriculture,

the Secretary of Agriculture, or any representative specifically authorized in writing by him for the purpose, shall have power to administer oaths, examine witnesses, and call for the production of books and papers. [41 Stat. L. 267.]

For Cotton Futures Act, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 359.

For Grain Standards Act, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 7.

For Standard Container Act, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 12.

For Warehouse Act, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. (2d ed.) 909; 1918 Supp. Fed. Stat. Ann. (1st ed.) 1057.

\* \* \* [American bison — Secretary of Agriculture to supply.] That hereafter the Secretary of Agriculture may, in his discretion and under such conditions as he may prescribe, supply to any municipality or public institution not more than one American bison from any surplus which may exist in any herd under the control of the Department of Agriculture; and, in order to aid in the propagation of the species, animals may be loaned to or exchanged with other owners of American bison. [41 Stat. L. 270.]

\* \* \* [Moneys contributed from outside sources for carrying on departmental activities — payment.] That hereafter in carrying on the activities of the Department of Agriculture involving cooperation with State, county and municipal agencies, associations of farmers, individual farmers, universities, colleges, boards of trade, chambers of commerce, or other local associations of business men, business organizations, and individuals within the State, Territory, district or insular possession in which such activities are to be carried on, moneys contributed from such outside sources, except in the case of the authorized activities of the Forest Service, shall be paid only through the Secretary of Agriculture or through State, county or municipal agencies, or local farm bureaus or like organizations, cooperating for the purpose with the Secretary of Agriculture. [41 Stat. L. 270.]

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## ALASKA

*Act of July 19, 1919, ch. 24, 5.*

*Sec. 1. Register and Receiver at Juneau — Consolidation of Offices, 5.*

*Act of Oct. 18, 1919, ch. 76, 6.*

*Government Railroad — Construction — Amount of Expenditures — Original Act Amended, 6.*

### CROSS-REFERENCE

See also *MINERAL LANDS, MINES AND MINING*.

[SEC. 1.] \* \* \* [Register and receiver at Juneau — consolidation of offices.] That the President is authorized to consolidate the offices of register and receiver at Juneau, Alaska, and to appoint, by and with the advice and consent of the Senate, a register for said office. All the powers, duties, obligations, and penalties imposed by law upon both the register and receiver of said office shall be exercised by and imposed upon the register, whose compensation shall be a salary of \$3,000 per annum; and all fees and commissions collected by said register, when earned, shall be paid into the Treasury without abatement or deduction. [41 Stat. L. 194.]

This is from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

**An Act To amend an Act of Congress approved March 12, 1914, authorizing the President of the United States to locate, construct, and operate railroads in the Territory of Alaska, and for other purposes.**

[*Act of Oct. 18, 1919, 41 Stat. L. 293.*]

[**Government railroad — construction — amount of expenditures — original act amended.**] That the Act entitled "An Act to authorize the President of the United States to locate, construct, and operate railroads in the Territory of Alaska, and for other purposes," be amended by inserting at the conclusion of section 2 the following:

"*Provided*, That in order to complete on or before December 31, 1922, the construction and equipment of the railroad between Seward and Fairbanks, together with necessary sidings, spurs, and lateral branches, the additional sum of \$17,000,000 is hereby authorized to be appropriated, to be immediately and continuously available until expended." [41 Stat. L. 293.]

This Act became a law without the approval of the President. It was received by him October 7, 1919, and not returned to the house of Congress in which it originated within the time prescribed by the Constitution of the United States.

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## ALIEN PROPERTY CUSTODIAN

See **TRADING WITH THE ENEMY**

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## ALIENS

See **COPYRIGHT; IMMIGRATION; NATURALIZATION; TRADING WITH THE ENEMY**

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## AMBASSADORS

See **DIPLOMATIC AND CONSULAR OFFICERS**

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## AMERICAN LEGION

*Act of Sept. 16, 1919, ch. 59, 6.*

*Sec. 1. American Legion — Incorporation, 6.*

*2. Organization, 7.*

*3. Purpose, 8.*

*4. Powers, 8.*

*5. Membership — Qualifications, 8.*

*6. Organization as Nonpolitical, 8.*

*7. Acquisition of Assets of Similar Unincorporated Organization, 8.*

*8. Exclusive Right to Use of Name, 8.*

*9. Report to Congress, 8.*

*9½. Authorized Agent for Service of Process, 9.*

*10. Reservation of Right to Repeal or Amend, 9.*

**An Act to incorporate the American Legion.**

[*Act of Sept. 16, 1919, ch. 59, 41 Stat. L. 284.*]

[**SEC. 1.**] \* \* \* [**American Legion — incorporation.**] That the following persons, to wit: William S. Beam, of North Carolina; Charles H. Brent,

of New York; William H. Brown, of Connecticut; G. Edward Buxton, junior, of Rhode Island; Bennett C. Clark, of Missouri; Richard Derby, of New York; L. H. Evridge, of Texas; Milton J. Foreman, of Illinois; Ruby D. Garrett, of Missouri; Fred J. Griffith, of Oklahoma; Roy C. Haines, of Maine; John F. J. Herbert, of Massachusetts; Roy Hoffman, of Oklahoma; Fred B. Humphreys, of New Mexico; John W. Inzer, of Alabama; Stuart S. Janney, of Maryland; Luke Lea, of Tennessee; Henry Leonard, of Colorado; Henry D. Lindsley, of Texas; Ogden L. Mills, of New York; Thomas W. Miller, of Delaware; Edward Myers, of Pennsylvania; Franklin D'Olier, of Pennsylvania; W. G. Price, junior, of Pennsylvania; S. A. Ritchie, of New York; Theodore Roosevelt, junior, of New York; Albert A. Sprague, of Illinois; John J. Sullivan, of Washington; Dale Shaw, of Iowa; Daniel G. Stivers, of Montana; H. J. Turney, of Ohio; George A. White, of Oregon; Eric Fisher Wood, of Pennsylvania; George H. Wood, of Ohio; Mathew H. Murphy, of Alabama; Andrew P. Martin, of Arizona; J. J. Harrison, of Arkansas; Henry G. Mathewson, of California; H. A. Saidy, of Colorado; Alfred M. Phillips, junior, of Connecticut; George N. Davis, of Delaware; A. H. Blanding, of Florida; Walter Harris, of Georgia; E. C. Boom, of Idaho; George G. Seaman, of Illinois; Raymond S. Springer, of Indiana; Mathew A. Tinley, of Iowa; W. A. Phares, of Kansas; Henry De Haven Moorman, of Kentucky; T. Semmes Walmsley, of Louisiana; A. L. Robinson, of Maine; James A. Gary, junior, of Maryland; George C. Waldo, of Michigan; Harrison Fuller, of Minnesota; Alexander Fitzhugh, of Mississippi; H. C. Clark, of Missouri; Charles E. Pew, of Montana; John G. Maher, of Nebraska; J. G. Scrugham, of Nevada; Frank Knox, of New Hampshire; Hobart Brown, of New Jersey; Charles M. De Bremon, of New Mexico; C. K. Burgess, of North Carolina; Julius Baker, of North Dakota; F. C. Galbraith, of Ohio; Ross N. Lillard, of Oklahoma; E. J. Eivers, of Oregon; George F. Tyler, of Pennsylvania; Alexander H. Johnson, of Rhode Island; Julius H. Walker, of South Carolina; M. L. Shade, of South Dakota; Roane Waring, of Tennessee; Claude V. Birkhead, of Texas; Wesley E. King, of Utah; Charles Francis Cocke, of Virginia; H. Nelson Jackson, of Vermont; Harvey I. Moss, of Washington; Jackson Arnold, of West Virginia; John C. Davis, of Wisconsin; A. H. Beach, of Wyoming; E. Lester Jones, of the District of Columbia; Lawrence Judd, of Hawaii; Robert R. Landon, of the Philippine Islands; and such persons as may be chosen who are members of the "American Legion," an unincorporated patriotic society of the soldiers, sailors, and marines of the Great War, 1917-1918, known as the "American Legion," and their successors, are hereby created and declared to be a body corporate. The name of this corporation shall be "The American Legion." [41 Stat. L. 284.]

SEC. 2. [Organization.] That said persons named in section 1 and such other persons as may be selected from among the membership of the American Legion, an unincorporated society of the soldiers, sailors, and marines of the Great War of 1917-1918, are hereby authorized to meet to complete the organization of said corporation by the selection of officers, the adoption of a constitution and by-laws, and to do all other things necessary to carry into effect the provisions of this Act, at which meeting any person duly accredited as a delegate from any local or State organization of the existing unincorporated organization known as the "American Legion" shall be permitted to participate in the proceedings thereof. [41 Stat. L. 284.]

SEC. 3. **[Purpose.]** That the purpose of this corporation shall be: To promote peace and good will among the peoples of the United States and all the nations of the earth; to preserve the memories and incidents of the Great War of 1917–1918; to cement the ties of love and comradeship born of service; and to consecrate the efforts of its members to mutual helpfulness and service to their country. [41 Stat. L. 285.]

SEC. 4. **[Powers.]** That the corporation created by this act shall have the following powers: To have perpetual succession with power to sue and be sued in courts of law and equity; to receive, hold, own, use, and dispose of such real estate and personal property as shall be necessary for its corporate purposes; to adopt a corporate seal and alter the same at pleasure; to adopt a constitution, by-laws, and regulations to carry out its purposes, not inconsistent with the laws of the United States or of any State; to use in carrying out the purposes of the corporation such emblems and badges as it may adopt; to establish and maintain offices for the conduct of its business; to establish State and Territorial organizations and local chapter or post organizations; to publish a magazine or other publications, and generally to do any and all such acts and things as may be necessary and proper in carrying into effect the purposes of the corporation. [41 Stat. L. 285.]

SEC. 5. **[Membership — qualifications.]** That no person shall be a member of this corporation unless he served in the naval or military service of the United States at some time during the period between April 6, 1917, and November 11, 1918, both dates inclusive, or who, being citizens of the United States at the time of enlistment, served in the military or naval services of any of the Governments associated with the United States during the Great War. [41 Stat. L. 285.]

SEC. 6. **[Organization as nonpolitical.]** That the organization shall be non-political and, as an organization, shall not promote the candidacy of any person seeking public office. [41 Stat. L. 285.]

SEC. 7. **[Acquisition of assets of similar unincorporated organization.]** That said corporation may acquire any or all the assets of the existing unincorporated national organization known as the "American Legion" upon discharging or satisfactorily providing for the payment and discharge of all its liabilities. [41 Stat. L. 285.]

SEC. 8. **[Exclusive right to use of name.]** That said corporation and its State and local subdivisions shall have the sole and exclusive right to have and to use in carrying out its purposes the name "The American Legion." [41 Stat. L. 285.]

SEC. 9. **[Report to Congress.]** That the said corporation shall, on or before the 1st day of January in each year, make and transmit to the Congress a report of its proceedings for the preceding calendar year, including a full and complete report of its receipts and expenditures: *Provided, however,* That said report shall not be printed as public documents. [41 Stat. L. 285.]



SEC. 9½. **[Authorized agent for service of process.]** That as a condition precedent to the exercise of any power or privilege herein granted or conferred the American Legion shall file in the office of the secretary of state of each State the name and postoffice address of an authorized agent in such State upon whom legal process or demands against the American Legion may be served. [41 Stat. L. 285.]

SEC. 10. **[Reservation of right to repeal or amend.]** That the right to repeal, alter, or amend this act at any time is hereby expressly reserved. [41 Stat. L. 285.]

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## ANIMALS

*Act of Oct. 1, 1918, ch. 178, 9.*

*Eradication of Foot-and-Mouth and Other Contagious Diseases of Animals, 9.*

*Act of Nov. 21, 1918, ch. 212, 10.*

*Sec. 3. Tick-infested Cattle — Admission for Immediate Slaughter 10.*

*Act of July 24, 1919, ch. 26, 11.*

*Cattle Reacting to Tuberculin Test — Shipment in Interstate Commerce — Immediate Slaughter, 11.*

*Cattle Reacting to Tuberculin Test After Shipment in Interstate Commerce — Reshipment to Owner, 11.*

*Interstate Shipments of Meats — Equine Meats — Tagging — Penalties, 11.*

*Bureau of Animal Industry — Employees — Payment for Overtime Work, 12.*

### CROSS-REFERENCES

See **GAME ANIMALS AND BIRDS; INDIANS**

\* \* \* **[Eradication of foot-and-mouth and other contagious diseases of animals.]** In case of an emergency arising out of the existence of foot-and-mouth disease, rinderpest, contagious pleuro-pneumonia, or other contagious or infectious disease of animals which, in the opinion of the Secretary of Agriculture, threatens the live-stock industry of the country, he may expend in the city of Washington or elsewhere, out of any money in the Treasury not otherwise appropriated, the sum of \$1,000,000, which sum is hereby appropriated, or so much thereof as he determines to be necessary, in the arrest and eradication of any such disease, including the payment of claims growing out of past and future purchases and destruction, in cooperation with the States, of animals affected by or exposed to, or of materials contaminated by or exposed to, any such disease, wherever found and irrespective of ownership, under like or substantially similar circumstances, when such owner has complied with all lawful quarantine regulations: *Provided*, That the payment for animals hereafter purchased may be made on appraisement based on the meat, dairy, or breeding value, but in case of appraisement based on breeding value no appraisement of any animal shall exceed three times its meat or dairy value, and except in case of an extraordinary emergency, to be determined by the Secretary of Agriculture, the payment by the United States Government for any animal shall not exceed one-half of any such appraisements. [40 Stat. L. 1006.]

This is from the Agricultural Appropriation Act of Oct. 1, 1918, ch. 178.

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**SEC. 3. [Tick-infested cattle — admission for immediate slaughter.]** That the Act entitled "An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products," approved August tenth, nineteen hundred and seventeen, be, and the same hereby is, amended so as to strike out, in section nine, after the words "Caribbean Sea," the following: "into those parts of the United States below the southern cattle quarantine line at such ports of entry as may be designated by said joint regulations and also," so that the section as amended will read as follows:

"SEC. 9. That the Act of August thirtieth, eighteen hundred and ninety, entitled 'An Act providing for an inspection of meats for exportation, prohibiting the importation of adulterated articles of food or drink, and authorizing the President to make proclamation in certain cases, and for other purposes' (Twenty-sixth Statutes at Large, page four hundred and fourteen), is hereby amended so as to authorize the Secretary of Agriculture, within his discretion and under such joint regulations as may be prescribed by the Secretary of Agriculture and the Secretary of the Treasury, to permit the admission into the United States for immediate slaughter at ports of entry to be designated in said joint regulations of tick-infested cattle which are otherwise free from disease and which have not been exposed to the infection of any other disease within sixty days next before their exportation from Mexico, South and Central America, the islands of the Gulf of Mexico and the Caribbean Sea, subject to the provisions of sections seven, eight, nine, and ten of said Act of August thirtieth, eighteen hundred and ninety: *Provided*, That the importation of tick-infested cattle from any country referred to in this section in which foot-and-mouth disease exists, which existence shall be determined by the Secretary of Agriculture, is prohibited: *Provided further*, That all cattle imported under the provisions of this section shall be slaughtered in accordance with the provisions of the Act of June thirtieth, nineteen hundred and six (Thirty-fourth Statutes at Large, page six hundred and seventy-four), commonly called the meat-inspection amendment, and the rules and regulations promulgated thereunder by the Secretary of Agriculture, and that their hides shall be disposed of under rules and regulations to be prescribed by the Secretary of Agriculture: *And provided further*, That the slaughter of all such cattle imported into the Territory of Porto Rico may be deferred for such time and under such restrictions as the Secretary of Agriculture may by regulation prescribe, and that the Secretary of Agriculture, within his discretion and under such joint regulations as may be prescribed by the Secretary of Agriculture and the Secretary of the Treasury, may permit the exportation of tick-infested cattle from the Virgin Islands to Porto Rico when said cattle are otherwise free from disease." [40 Stat. L. 1048.]

This is from the Act of Nov. 21, 1918, ch. 212, entitled "An Act To enable the Secretary of Agriculture to carry out, during the fiscal year ending June thirtieth, nineteen hundred and nineteen, the purposes of the Act entitled 'An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products,' and for other purposes."

For Act of Aug. 10, 1917, § 9, before the amendment here given in the text, see 1918 Supp. Fed. Stat. Ann. 61.

For Act of Aug. 30, 1890, ch. 839, mentioned in the text, see 1 Fed. Stat. Ann. (1st ed.) 442; 1 Fed. Stat. Ann. (2d ed.) 374.

The Act of June 30, 1906, ch. 3913, mentioned in the text, was superseded by the similar provisions of the Act of March 4, 1907, ch. 2907, given in 1909 Supp. Fed. Stat. Ann. 46; 1 Fed. Stat. Ann. (2d ed.) 397.

\* \* \* **[Cattle reacting to tuberculin test — shipment in interstate commerce — immediate slaughter.]** That the Act approved May 29, 1884 (Twenty-third Statutes at Large, page 31), be, and the same is hereby, amended to permit cattle which have reacted to the tuberculin test to be shipped, transported, or moved from one State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, for immediate slaughter, in accordance with such rules and regulations as shall be prescribed by the Secretary of Agriculture. [41 Stat. L. 239.]

This and the three following paragraphs are from the Agricultural Appropriation Act of July 24, 1919, ch. 26. A like provision was contained in the Agricultural Appropriation Act of Oct. 1, 1918.

For Act of May 29, 1884, here amended, see 1 Fed. Stat. Ann. (2d ed.) 406; 1 Fed. Stat. Ann. (1st ed.) 451.

\* \* \* **[Cattle reacting to tuberculin test after shipment in interstate commerce — reshipment to owner.]** That the Secretary of Agriculture may, in his discretion, and under such rules and regulations as he may prescribe, permit cattle which have been shipped for breeding or feeding purposes from one State, Territory, or the District of Columbia, to another State, Territory, or the District of Columbia, and which have reacted to the tuberculin test subsequent to such shipment, to be reshipped in interstate commerce to the original owner. [41 Stat. L. 240.]

This is from the Agricultural Appropriation Act of July 24, 1919, ch. 26. A like provision was contained in the Agricultural Appropriation Act of Oct. 1, 1918.

\* \* \* **[Interstate shipments of meats — equine meats — tagging — penalties.]** For additional expenses in carrying out the provisions of the meat-inspection Act of June 30, 1906 (Thirty-fourth Statutes at Large, page 674), as amended by the Act of March 4, 1907 (Thirty-fourth Statutes at Large, page 1256), there is hereby appropriated for the fiscal year ending June 30, 1920, \$903,960, of which sum \$100,000 may be used for the inspection of equine meat in the manner provided in said Act, as amended. And, hereafter, no person, firm, or corporation or officer, agent, or employee thereof shall transport or offer for transportation, and no carrier of interstate or foreign commerce, shall transport or receive for transportation from one State or Territory or the District of Columbia to any other State or Territory or the District of Columbia or to any place under the jurisdiction of the United States or to any foreign country any of such meat or food products thereof unless plainly and conspicuously labeled, marked, branded or tagged "Horse-meat" or "Horse-meat Product" as the case may be, under such rules and regulations as may be prescribed by the Secretary of Agriculture. All the penalties, terms and provisions in said Act, as amended, except the exemption therein applying to animals slaughtered by any farmer on a farm, to retail butchers and retail dealers in meat food products supplying their customers are hereby made applicable to horses, their carcasses, parts of carcasses and meat food products thereof, and the establishments and other places where such animals are slaughtered or the meat or meat food products thereof are prepared or packed for the interstate or foreign commerce, and to all persons, firms, corporations and officers, agents and employees thereof who slaughter such animals or prepare or handle such meat or meat food products for interstate or foreign commerce. [41 Stat. L. 241.]

This is from the Agricultural Appropriation Act of July 24, 1919, ch. 26.

For Act of March 4, 1907, mentioned in the text, see 1 Fed. Stat. Ann. (2d ed.) 397; 1909 Supp. Fed. Stat. Anno. 46.

\* \* \* [Bureau of Animal Industry — employees — payment for overtime work.] That, hereafter, the Secretary of Agriculture is authorized, in his discretion, to pay employees of the Bureau of Animal Industry employed in establishments subject to the provisions of the Meat Inspection Act of June 30, 1906, for all overtime work performed at such establishments, at such rates as he may determine, and to accept from such establishments wherein such overtime work is performed reimbursement for any sums paid out by him for such overtime work. [41 Stat. L. 241.]

This is from the Agricultural Appropriation Act of July 24, 1919, ch. 26.  
For Act of June 30, 1906, mentioned in the text, see 1 Fed. Stat. Ann. (2d ed.) 398; 1909 Supp. Fed. Stat. Ann. 4.

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## ANTI-TRUST LAWS

See TRADE COMBINATIONS AND TRUSTS

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## ARMY

See SOLDIERS' AND SAILORS' CIVIL RELIEF; MILITIA; WAR DEPARTMENT AND MILITARY ESTABLISHMENT

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## ARTICLES OF WAR

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

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## AUTOMOBILES

See CRIMINAL LAW

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## AVIATION

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

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## BANKS

See CORPORATIONS; NATIONAL BANKS

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## BIRDS

See GAME ANIMALS AND BIRDS

**BONDS**

See PUBLIC DEBT

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**CABLES**

See TELEGRAPHS, TELEPHONES AND CABLES

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**CANALS**

See RAILROADS; RIVERS, HARBORS AND CANALS

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**CATTLE**

See ANIMALS; INDIANS

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**CEMETERIES**

*Act of July 19, 1919, ch. 24, 13.*

*Sec. 1. National Cemetery — Railroads — Right of Way, 13.*

*Approaches to National Cemetery — Maintenance, 13.*

[SEC. 1.] \* \* \* **[National cemetery — railroads — right of way.]** That no railroads shall be permitted upon the right of way which may have been acquired by the United States to a national cemetery, or to encroach upon any roads or walks constructed thereon and maintained by the United States. [41 Stat. L. 183.]

This and the paragraph following are from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

\* \* \* **[Approaches to national cemetery — maintenance.]** No part of any appropriation for national cemeteries or the repair of roadways thereto shall be expended in the maintenance of more than a single approach to any national cemetery. [41 Stat. L. 184.]

## CENSUS

*Act of March 1, 1919, ch. 86, 15.*

*Sec. 1. Census Office — Suspension of Unnecessary Work, 15.*

*Act of March 3, 1919, ch. 97, 15.*

*Sec. 1. Fourteenth and Subsequent Decennial Censuses — Provision for Taking — Territory Included, 15.*

- 2. Decennial Census Period — Completion and Publication of Reports, 15.*
- 3. Additional Employees — Enumeration — Manner of Appointment — Preference to Certain Classes, 15.*
- 4. Assistant Director — Appointment Clerk — Duties — Disbursing Clerk — Bond, 16.*
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- 7. Additional Employees — Test Examinations — Temporary Employment — Residence — Transfers and Promotions — Term of Service, 17.*
- 8. Scope of Fourteenth Census — Character of Inquiries — Statistics by Whom Collected, 18.*
- 9. Supervisors — Designation — Number — Boundaries of Districts — Qualification of Supervisors — Vacancies, 19.*
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- 24. Owner, etc., of Company or Any Kind of Organization — Duty to Furnish Information, 25.*
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*Sec. 32. Statistics of Products of Manufacturing Industries — Collection and Publication, 26.*

*33. Population or Agricultural Returns — Certified Copies to States or Courts of Record — Individuals Furnished Data — Statistical Compilations, 27.*

*34. Prior Statutes How Affected by Act, 27.*

[SEC. 1.] • • • [Census office—suspension of unnecessary work.] That the Secretary of Commerce is authorized, in his discretion, to suspend during the decennial census period such work of the Census Office, other than the Fourteenth Census, as he may deem advisable. [40 Stat. L. 1256.]

This is from the Legislative, Executive and Judicial Appropriation Act of March 1, 1910, ch. 86.

### **An Act To provide for the fourteenth and subsequent decennial censuses.**

[Act of March 3, 1919, ch. 97, 40 Stat. L. 1291.]

[SEC. 1.] [Fourteenth and subsequent decennial censuses—provision for taking—territory included.] That a census of the population, agriculture, manufactures, forestry and forest products, and mines and quarries of the United States shall be taken by the Director of the Census in the year nineteen hundred and twenty and every ten years thereafter. The census herein provided for shall include each State, the District of Columbia, Alaska, Hawaii, and Porto Rico. A census of Guam and Samoa shall be taken in the same year by the respective governors of said islands and a census of the Panama Canal Zone by the governor of the Canal Zone in accordance with plans prescribed or approved by the Director of the Census. [40 Stat. L. 1291.]

SEC. 2. [Decennial census period—completion and publication of reports.] That the period of three years beginning the first day of July next preceding the census provided for in section one of this Act shall be known as the decennial census period, and the reports upon the inquiries provided for in said section shall be completed and published within such period. [40 Stat. L. 1292.]

SEC. 3. [Additional employees—enumeration—manner of appointment—preference to certain classes.] That during the decennial census period, and no longer, there may be employed in the Census Office, in addition to the force provided for by the legislative, executive, and judicial appropriation Act for the fiscal year immediately preceding the decennial census period, an assistant director, who shall be an experienced practical statistician; a chief statistician, who shall be a person of known and tried experience in statistical work; a disbursing clerk; an appointment clerk; a private secretary to the director; four stenographers; eight expert chiefs of division; and ten statistical experts. The assistant director shall be appointed by the President, by and with the advice and consent of the Senate. The chief statistician, the disbursing clerk, the appointment clerk, the chiefs of divisions, and the private secretary to the director shall be appointed without examination by the Secretary of Commerce upon the recommendation of the Director of the Census. The statistical experts and the stenographers shall be appointed in conformity with the civil service Act and rules: *Provided, That whenever practicable women and honorably dis-*

charged soldiers and sailors shall be employed in the positions herein provided for. [40 Stat. L. 1292.]

**SEC. 4. [Assistant director — appointment clerk — duties — disbursing clerk — bond.]** That the assistant director shall perform such duties as may be prescribed by the Director of the Census. In the absence of the director, the assistant director shall serve as director, and in the absence of the director and assistant director, the chief clerk shall serve as director.

The appointment clerk shall perform the duties assigned him by the Director of the Census. The disbursing clerk of the Census Office shall, at the beginning of the decennial census period, give bond to the Secretary of the Treasury in the sum of \$100,000, surety to be approved by the Solicitor of the Treasury, which bond shall be conditioned that the said officer shall render, quarter yearly, a true and faithful account to the proper accounting officers of the Treasury of all moneys and properties which shall be received by him by virtue of his office during the said decennial census period. Such bond shall be filed in the office of the Secretary of the Treasury, to be by him put in suit upon any breach of the conditions thereof. [40 Stat. L. 1292.]

**SEC. 5. [Compensation of officials.]** That during the decennial census period the annual compensation of the officials of the Census Office shall be as follows: The Director of the Census, \$7,500; the assistant director, \$5,000; the chief clerk and three chief statisticians for the divisions of population, manufactures, and agriculture, respectively, \$4,000 each; three other chief statisticians for the divisions of vital statistics and statistics of cities, and the chief statistician provided for in section three of this Act, \$3,600 each; the geographer, \$3,000; the disbursing clerk, \$3,000; the appointment clerk, \$2,750; the chiefs of division, \$2,500 each; the private secretary to the director, \$2,250; the statistical experts, \$2,000 each; and the stenographers provided for in section three of this Act, \$1,800 each. [40 Stat. L. 1292.]

**SEC. 6. [Additional employees — enumeration — number — preference to certain classes.]** That in addition to the force hereinbefore provided for and to that authorized by the legislative, executive, and judicial appropriation Act for the fiscal year immediately preceding the decennial census period, there may be employed in the Census Office during the decennial census period, and no longer, as many clerks with salaries at the rates of \$1,800, \$1,680, \$1,560, \$1,440, \$1,380, \$1,320, \$1,260, \$1,200, \$1,140, \$1,080, \$1,020, \$960, and \$900; one engineer at \$1,200; and two photostat operators, at \$1,200 each; as many skilled laborers, with salaries at the rate of not less than \$720 nor more than \$1,000 per annum; and as many messengers, assistant messengers, messenger boys, watchmen, unskilled laborers, and charwomen as may be found necessary for the proper and prompt performance of the duties herein required; these additional clerks and employees to be appointed by the Director of the Census: *Provided*, That the total number of such additional clerks with salaries at the rate of \$1,440 or more per annum shall at no time exceed one hundred and fifty: *Provided further*, That employees engaged in the compilation or tabulation of statistics by the use of mechanical devices may be compensated on a piece-price basis to be fixed by the director: *Provided*, That hereafter in making appointments to clerical and other positions in the executive departments and in independent



governmental establishments preference shall be given to honorably discharged soldiers, sailors, and marines, and widows of such, if they are qualified to hold such positions. [40 Stat. L. '1292.]

The last proviso of sec. 6 was amended by Act of July 11, 1919, ch. 6, set forth on p. 327, post.

**SEC. 7. [Additional employees — test examinations — temporary employment — residence — transfers and promotions — term of service.]** That the additional clerks and other employees provided for by section six shall be subject to such special test examinations as the Director of the Census may prescribe, subject to the approval of the United States Civil Service Commission, these examinations to be conducted by the United States Civil Service Commission, to be open to all applicants without regard to political party affiliations, and to be held at such places in each State as may be designated by the Civil Service Commission. Certifications shall be made by the Civil Service Commission upon request of the Director of the Census from the eligible registers so established, in conformity with the law of apportionment as now provided for the classified service, and selections therefrom shall be made by the Director of the Census, in the order of rating: *Provided*, That the requirement as to conformity with the law of apportionment shall not apply to messenger boys, unskilled laborers, and charwomen: *Provided further*, That hereafter all examinations of applicants for positions in the Government service, from any State or Territory, shall be had in the State or Territory in which such applicant resides, and no person shall be eligible for such examination or appointment unless he or she shall have been actually domiciled in such State or Territory for at least one year previous to such examination: *Provided further*, That the Civil Service Commission shall hold examinations of applicants temporarily absent from the places of their legal residence or domicile in the District of Columbia and elsewhere in the United States where examinations are usually held, upon proof satisfactory to the commission that such applicants are bona fide residents of the States or Territories in which such applicants claim to have legal residence or domicile: *Provided further*, That nothing herein shall be so construed as to abridge the existing law of apportionment or change the requirements of existing law as to legal residence or domicile of such applicants: *And provided further*, That no person afflicted with tuberculosis shall be appointed and that each applicant for appointment shall accompany his or her application with a certificate of health from some reputable physician: *And provided further*, That in no instance shall more than one person be appointed from the same family: *And provided further*, That when the exigencies of the service require, the director may appoint for temporary employment not exceeding six months' duration from the aforesaid list of eligibles those who, by reason of residence or other conditions, are immediately available; and may also appoint for not exceeding six months' duration persons having had previous experience in operating mechanical appliances in census work whose efficiency records in operating such appliances are satisfactory to him, and may accept such records in lieu of the civil-service examination: *And provided further*, That employees in other branches of the departmental classified service who have had previous experience in census work may be transferred without examination to the Census Office to serve during the whole or a part of the decennial census period, and at the end of such service the employees so transferred shall be eligible to appointment to positions in any department held by them at date of transfer to the Census Office without examination, but no employee so transferred shall within one year after such transfer receive higher

salary than he is receiving at the time of the transfer: *And provided further*, That during the decennial census period and no longer the Director of the Census may fill vacancies in the permanent force of the Census Office by the promotion or transfer of clerks or other employees employed on the temporary force authorized by section six of this Act: *And provided further*, That at the expiration of the decennial census period the term of service of all employees so transferred and of all other temporary officers and employees appointed under the provisions of this Act shall terminate, and such officers and employees shall not be eligible to appointment or transfer into the classified service of the Government by virtue of their examination or appointment under this Act: *And provided further*, That in the selection of the additional clerks and employees provided for by section six the Director of the Census is authorized to use, so far as practicable, the reemployment registers established by Executive order of November twenty-ninth, nineteen hundred and eighteen, so far as the same applies to permanent appointments by competition. [40 Stat. L. 1293.]

**SEC. 8. [Scope of Fourteenth Census — character of inquiries — statistics by whom collected.]** That the Fourteenth Census shall be restricted to inquiries relating to population, to agriculture, to manufactures, to forestry and forest products, and to mines and quarries. The schedules relating to population shall include for each inhabitant the name, place of abode, relationship to head of family, color, sex, age, conjugal condition, place of birth, place of birth of parents, nationality or mother tongue of all persons born in foreign countries, nationality or mother tongue of parents of foreign birth, number of years in the United States, citizenship, occupation, whether or not employer or employee, whether or not engaged in agriculture, school attendance, literacy, tenure of home and the encumbrance thereon, and the name and address of each blind or deaf and dumb person.

The schedules relating to agriculture shall include name, color, sex, and country of birth of occupant of each farm, tenure, acreage of farm, acreage of woodland, value of farm and improvements, and the encumbrance thereon, value of farm implements, number of live stock on farms, ranges, and elsewhere, and the acreage of crops and the quantities of crops and other farm products for the year ending December thirty-first next preceding the enumeration. Inquiries shall be made as to the quantity of land reclaimed by irrigation and drainage and the crops produced; also as to the location and character of irrigation and drainage enterprises, and the capital invested in such enterprises.

The schedules of inquiries relating to manufactures, to forestry and forest products, and to mines and quarries shall include the name and location of each establishment; character of organization, whether individual, corporate, or other form; character of business or kind of goods manufactured; amount of capital actually invested; number of proprietors, firm members, copartners and officers, and the amount of their salaries; number of employees and the amount of their wages; quantity and cost of materials used in manufactures; principal miscellaneous expenses; quantity and value of products; time in operation during the year; character and quantity of power used; and character and number of machines employed.

The census of manufactures, of forestry and forest products, and of mines and quarries shall relate to the year ending December thirty-first, next preceding the enumeration of population, and shall be confined to manufacturing

establishments and mines and quarries which were in active operation during all or a portion of that year. The census of manufactures shall furthermore be confined to manufacturing establishments conducted under what is known as the factory system, exclusive of the so-called neighborhood, household, and hand industries.

Whenever he shall deem it expedient, the Director of the Census may charge the collection of these statistics upon special agents or upon detailed employees, to be employed without respect to locality.

The number, form, and subdivision of inquiries provided for in section eight shall be determined by the Director of the Census. [40 Stat. L. 1294.]

**SEC. 9. [Supervisors — designation — number — boundaries of districts — qualification of supervisors — vacancies.]** That the Director of the Census shall, at least six months prior to the date fixed for commencing the enumeration at the fourteenth and each succeeding decennial census, designate the number, whether one or more, of supervisors of census for each State, the District of Columbia, Alaska, Hawaii, and Porto Rico, and shall define the districts within which they are to act; except that the Director of the Census, in his discretion, need not designate supervisors for Alaska, Hawaii, and Porto Rico, but in lieu thereof may employ special agents as hereinafter provided. The supervisors shall be appointed by the Secretary of Commerce upon the recommendation of the Director of the Census: *Provided*, That the whole number of supervisors shall not exceed four hundred: *Provided further*, That so far as practicable and desirable the boundaries of the supervisors' districts shall conform to the boundaries of the congressional districts: *And provided further*, That if in any supervisor's district the supervisor has not been appointed and qualified ninety days preceding the date fixed for the commencement of the enumeration, or if any vacancy shall occur thereafter, either through death, removal, or resignation of a supervisor, or from any other cause, the Director of the Census may appoint a temporary supervisor or detail an employee of the Census Office to act as supervisor for that district. [40 Stat. L. 1295.]

**SEC. 10. [Duties of supervisors — enumerators.]** That each supervisor of census shall be charged with the performance within his own district of the following duties: To consult with the Director of Census in regard to the division of his district into subdivisions most convenient for the purpose of the enumeration, which subdivisions or enumeration districts shall be defined and the boundaries thereof fixed by the Director of the Census; to designate to the director suitable persons and with his consent to employ such persons as enumerators, one or more for each subdivision; to communicate to enumerators the necessary instructions and directions relating to their duties; to examine and scrutinize the returns of the enumerators, and in the event of discrepancies or deficiencies appearing in any of the said returns, to use all diligence in causing the same to be corrected or supplied; to forward the completed returns of the enumerators to the director at such time and in such manner as shall be prescribed, and to make up and forward to the director the accounts of each enumerator in his district for service rendered, which accounts shall be duly certified to by the enumerator, and the same shall be certified as true and correct if so found by the supervisor, and said accounts so certified shall be accepted and paid by the director. The duties imposed upon the supervisor by this Act shall be performed

in any and all particulars in accordance with the orders and instructions of the Director of the Census. [40 Stat. L. 1295.]

**SEC. 11. [Compensation of supervisors — allowances.]** That each supervisor of the census shall, upon the completion of his duties to the satisfaction of the Director of the Census, receive the sum of \$1,500, and in addition thereto \$1 for each thousand or major fraction of a thousand of population enumerated in his district, such sums to be in full compensation for all services rendered and expenses incurred by him: *Provided*, That of the above-named compensation a sum not to exceed \$600, in the discretion of the Director of the Census, may be paid to any supervisor prior to the completion of his duties in one or more payments, as the Director of the Census may determine: *Provided further*, That in emergencies arising in connection with the work of preparation for or during the progress of the enumeration in his district, or in connection with the reenumeration of any subdivision, a supervisor may, in the discretion of the Director of the Census, be allowed actual and necessary traveling expenses and an allowance in lieu of subsistence not exceeding \$4 per day during his necessary absence from his usual place of residence: *And provided further*, That an appropriate allowance to supervisors for clerk hire may be made when deemed necessary by the Director of the Census. [40 Stat. L. 1296.]

**SEC. 12. [Enumerators — duties — qualification.]** That each enumerator shall be charged with the collection in his subdivision of the facts and statistics required by the population and agricultural schedules and such other schedules as the Director of the Census may determine shall be used by him in connection with the census, as provided in section eight of this Act. It shall be the duty of each enumerator to visit personally each dwelling house in his subdivision, and each family therein, and each individual living out of a family in any place of abode, and by inquiry made of the head of each family, or of the member thereof deemed most competent and trustworthy, or of such individual living out of a family, to obtain each and every item of information and all particulars required by this Act, as of date January first of the year in which the enumeration shall be made; and in case no person shall be found at the usual place of abode of such family, or individual living out of a family, competent to answer the inquiries made in compliance with the requirements of this Act, then it shall be lawful for the enumerator to obtain the required information as nearly as may be practicable from the family or families or person or persons living nearest to such place of abode who may be competent to answer such inquiries. It shall be the duty also of each enumerator to forward the original schedules, properly filled out and duly certified, to the supervisor of his district as his returns under the provisions of this Act; and in the event of discrepancies or deficiencies being discovered in these schedules he shall use all diligence in correcting or supplying the same. In case an enumeration district embraces all or any part of any incorporated borough, village, town, or city, and also other territory not included within the limits of such incorporated borough, village, town, or city, it shall be the duty of the enumerator to clearly and plainly distinguish and separate, upon the population schedules, the inhabitants of such borough, village, town, or city from the inhabitants of the territory not included therein. No enumerator shall be deemed qualified to enter upon his duties until he has received from the supervisor of the district to which he belongs a commission, signed by the supervisor, authorizing him to perform the duties of enumerator, and setting forth the boundaries of the subdivision within which such duties are to be performed. [40 Stat. L. 1296.]

**SEC. 13. [Enumeration districts.]** That the territory assigned to each supervisor shall be divided into as many enumeration districts as may be necessary to carry out the purposes of this Act, and, in the discretion of the Director of the Census, two or more enumeration districts may be given to one enumerator, and the boundaries of all the enumeration districts shall be clearly described by civil divisions, rivers, roads, public surveys, or other easily distinguishable lines: *Provided*, That enumerators may be assigned for the special enumeration of institutions, when desirable, without reference to the number of inmates. [40 Stat. L. 1296.]

**SEC. 14. [Removal of enumerators — incomplete or erroneous enumeration.]** That any supervisor of census may, with the approval of the Director of the Census, remove any enumerator in his district and fill the vacancy thus caused or otherwise occurring. Whenever it shall appear that any portion of the census provided for in this Act has been negligently or improperly taken, and is by reason thereof incomplete or erroneous, the Director of the Census may cause such incomplete and unsatisfactory enumeration and census to be amended or made anew. [40 Stat. L. 1297.]

**SEC. 15. [Interpreters to assist enumerators — duties — compensation.]** That the Director of the Census may authorize and direct supervisors of census to employ interpreters to assist the enumerators of their respective districts in the enumeration of persons not speaking the English language, but no authorizations shall be given for such employment in any district until due and proper effort has been made to employ an enumerator who can speak the language or languages for which the services of an interpreter would otherwise be required. It shall be the duty of such interpreters to accompany the enumerators and faithfully translate the latter's inquiries and the replies thereto, but in no case shall any such interpreter perform the duties of the enumerator unless commissioned as such by the Director of the Census. The compensation of such interpreters shall be fixed by the Director of the Census in advance, and shall not exceed \$5 per day for each day actually and necessarily employed. [40 Stat. L. 1297.]

**SEC. 16. [Compensation of enumerators — determination — allowances — residence of supervisors and enumerators.]** That the compensation of enumerators shall be determined by the Director of the Census as follows: In subdivisions where he shall deem such remuneration sufficient, an allowance of not less than 2 nor more than 4 cents for each inhabitant; not less than 20 nor more than 30 cents for each establishment of productive industry reported; not less than 20 nor more than 30 cents for each farm reported; not less than 20 nor more than 50 cents for each irrigation or drainage enterprise reported; and 10 cents for each barn and inclosure containing live stock not on farms. In other subdivisions the Director of the Census may fix a mixed rate of not less than \$1 nor more than \$2 per day and, in addition, an allowance of not less than 1 nor more than 3 cents for each inhabitant enumerated, and not less than 15 nor more than 20 cents for each farm and each establishment of productive industry reported. In other subdivisions per diem rates shall be fixed by the director according to the difficulty of enumeration, having special reference to the regions to be canvassed and the sparsity of settlement or other considerations pertinent thereto. The compensation allowed to an enumerator in any such

district shall not be less than \$3 nor more than \$6 per day of eight hours' actual field work, and no payment shall be made for time in excess of eight hours for any one day. The subdivisions or enumeration districts to which the several rates of compensation shall apply shall be designated by the Director of the Census at least two weeks in advance of the enumeration. No claim for mileage or traveling expenses shall be allowed any enumerator in either class of subdivisions, except in extreme cases, and then only when authority has been previously granted by the Director of the Census; and the decision of the director as to the amount due any enumerator shall be final: *Provided*, That within the limits of continental United States each supervisor to be appointed or selected under this Act shall be an actual resident of the district, and each enumerator to be appointed or selected under this Act shall, so far as practicable, be an actual resident of the subdivision within which his duties are to be performed; but an enumerator may be appointed if he be an actual resident of the city, township, or other civil division of which the subdivision in which his duties are to be performed is a part. [40 Stat. L. 1297.]

**SEC. 17. [Death of supervisor or enumerator — payment to widow or representative for services rendered.]** That in the event of the death of any supervisor or enumerator after his appointment and entrance on his duties, the Director of the Census is authorized to pay to the widow or legal representative of such supervisor or enumerator such sum as he may deem just and fair for the services rendered by such supervisor or enumerator. [40 Stat. L. 1298.]

**SEC. 18. [Special agents — appointment — duties — compensation and allowances.]** That special agents may be appointed by the Director of the Census to carry out the provisions of this Act and of the Act to provide for a permanent Census Office, approved March sixth, nineteen hundred and two, and Acts amendatory thereof or supplemental thereto; and such special agents shall perform such duties in connection with the enforcement of said Acts as may be required of them by the Director of the Census. The special agents thus appointed shall receive compensation at rates to be fixed by the Director of the Census, such compensation, however, not to exceed \$6 per diem except as hereinafter provided: *Provided*, That during the decennial census period the Director of the Census may fix the compensation of not to exceed twenty-five special agents, who shall be persons of known and tried experience in statistical work, at an amount not to exceed \$10 per diem: *Provided further*, That the Director of the Census may, in his discretion, fix the compensation of special agents on a piece-price basis without limitation as to the amount earned per diem: *And provided further*, That the special agents appointed under this section shall be entitled to necessary traveling expenses and an allowance in lieu of subsistence not to exceed \$4 per diem during necessary absence from their usual places of residence; but no pay or allowance in lieu of subsistence shall be allowed special agents when employed in the Census Office on other than the special work committed to them, and no appointments of special agents shall be made for clerical work: *And provided further*, That the Director of the Census shall have power, and is hereby authorized, to appoint special agents to assist the supervisors whenever he may deem it proper, in connection with the work of preparation for, or during the progress of, the enumeration or in connection with the reenumeration of any district or a part thereof; or he may, in his discretion, employ for this purpose any of the permanent or temporary employees of the Census Office;

and the special agents and employees of the Census Office so appointed or employed shall perform such duties in connection with the enforcement of this Act as may be required of them by the Director of the Census or by the supervisors of the districts to which they are assigned, and when engaged in the work of enumeration or reenumeration shall have like authority with and perform the same duties as the enumerators in respect to the subjects committed to them under this Act. [40 Stat. L. 1298.]

For Act of March 6, 1902, mentioned in the text, see 2 Fed. Stat. Ann. (2d ed.) 29; 1 Fed. Stat. Ann. (1st ed.) 736.

**SEC. 19. [Oath or affirmation—fitness as prerequisite to appointment of employees.]** That every supervisor, supervisor's clerk, enumerator, interpreter, special agent, or other employee shall take and subscribe to an oath or affirmation, to be prescribed by the Director of the Census. All appointees and employees provided for in this Act shall be appointed or employed and examined, if examination is required by this Act, solely with reference to their fitness to perform the duties required of them by the provisions of this Act and without reference to their political party affiliations. [40 Stat. L. 1298.]

**SEC. 20. [Enumeration taken as of what date—completion.]** That the enumeration of the population required by section one of this Act shall be taken as of the first day of January, and it shall be the duty of each enumerator to commence the enumeration of his district on the day following, unless the Director of the Census in his discretion shall defer the enumeration in said district by reason of climatic or other conditions which would materially interfere with the proper conduct of the work; but in any event it shall be the duty of each enumerator to prepare the returns hereinbefore required to be made and to forward the same to the supervisor of his district within thirty days from the commencement of the enumeration of his district: *Provided*, That in any city having two thousand five hundred inhabitants or more under the preceding census the enumeration of the population shall be completed within two weeks from the commencement thereof. [40 Stat. L. 1298.]

**SEC. 21. [Offenses—influencing appointments for consideration.]** That if any person shall receive or secure to himself any fee, reward, or compensation as a consideration for the appointment or employment of any person as supervisor, enumerator, or clerk, or other employee, or shall in any way receive or secure to himself any part of the compensation paid to any supervisor, enumerator, clerk, or other employee, he shall be deemed guilty of a felony, and upon conviction thereof shall be fined not more than \$3,000 and be imprisoned not more than five years. [40 Stat. L. 1299.]

**SEC. 22. [Offenses—neglect or refusal to perform duties—disclosing information received—perjury—false statements or information.]** That any supervisor, supervisor's clerk, enumerator, interpreter, special agent, or other employee who, having taken and subscribed the oath of office required by this Act, shall, without justifiable cause, neglect or refuse to perform the duties enjoined on him by this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding \$500; or if he shall, without the authority of the Director of the Census, publish or communicate any information coming into his possession by reason of his employment under the provisions of this Act, or the Act to provide for a permanent Census Office or Acts amenda-

tory thereof or supplemental thereto, he shall be guilty of a felony and shall upon conviction thereof be fined not to exceed \$1,000 or be imprisoned not to exceed two years, or both so fined and imprisoned in the discretion of the court; or if he shall willfully and knowingly swear or affirm falsely as to the truth of any statement required to be made or subscribed by him under oath by or under authority of this Act or of the Act to provide for a permanent Census Office or Acts amendatory thereof or supplemental thereto, he shall be deemed guilty of perjury, and upon conviction thereof shall be fined not exceeding \$2,000 or imprisoned not exceeding five years, or both; or if he shall willfully and knowingly make a false certificate or a fictitious return he shall be guilty of a felony, and upon conviction of either of the last-named offenses he shall be fined not exceeding \$2,000 or be imprisoned not exceeding five years, or both; or if any person who is or has been an enumerator shall knowingly or willfully furnish or cause to be furnished, directly or indirectly, to the Director of the Census or to any supervisor of the census any false statement or false information with reference to any inquiry for which he was authorized and required to collect information he shall be guilty of a felony, and upon conviction thereof shall be fined not exceeding \$2,000 or be imprisoned not exceeding five years, or both. [40 Stat. L. 1299.]

**SEC. 23. [Duty to furnish information to census takers — failure to furnish correct information.]** That it shall be the duty of all persons over eighteen years of age when requested by the Director of the Census; or by any supervisor, enumerator, or special agent, or other employee of the Census Office, acting under the instructions of the said director, to answer correctly, to the best of their knowledge, all questions on the census schedules applying to themselves and to the families to which they belong or are related, and to the farm or farms of which they or their families are the occupants; and any person over eighteen years of age who, under the conditions hereinbefore stated, shall refuse or willfully neglect to answer any of these questions, or shall willfully give answers that are false, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding \$100.

And it is hereby made unlawful for any individual, committee, or other organization of any kind whatsoever, to offer or render to any supervisor, supervisor's clerk, enumerator, interpreter, special agent, or other officer or employee of the Census Office engaged in making an enumeration of population, either directly or indirectly, any suggestion, advice, or assistance of any kind, with the intent or purpose of causing an inaccurate enumeration of population to be made, either as to the number of persons resident in any district or community, or in any other respect; and any individual, or any officer or member of any committee or other organization of any kind whatsoever, who directly or indirectly offers or renders any such suggestion, advice, information, or assistance, with such unlawful intent or purpose, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding \$5,000.

And it shall be the duty of every owner, proprietor, manager, superintendent, or agent of a hotel, apartment house, boarding or lodging house, tenement, or other building, when requested by the Director of the Census, or by any supervisor, enumerator, special agent, or other employee of the Census Office, acting under the instructions of the said director, to furnish the names of the occupants of said hotel, apartment house, boarding or lodging house, tenement, or other building, and to give thereto free ingress and egress to any duly accredited



representative of the Census Office, so as to permit of the collection of statistics for census purposes, including the proper and correct enumeration of all persons having their usual place of abode in said hotel, apartment house, boarding or lodging house, tenement, or other building; and any owner, proprietor, manager, superintendent, or agent of a hotel, apartment house, boarding or lodging house, tenement, or other building who shall refuse or willfully neglect to give such information or assistance under the conditions hereinbefore stated shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding \$500. [40 Stat. L. 1299.]

**SEC. 24. [Owner, etc., of company or any kind of organization — duty to furnish information.]** That it shall be the duty of every owner, official, agent, person in charge, or assistant to the person in charge, of any company, business, institution, establishment, religious body, or organization of any nature whatsoever, to answer completely and correctly to the best of his knowledge all questions relating to his respective company, business, institution, establishment, religious body, or other organization, or to records or statistics in his official custody, contained on any census schedule prepared by the Director of the Census under the authority of this Act, or of the Act to provide for a permanent Census Office, approved March sixth, nineteen hundred and two, or of Acts amendatory thereof or supplemental thereto; and any person violating the provisions of this section by refusing or willfully neglecting to answer any of said questions, or by willfully giving answers that are false, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding \$10,000, or imprisoned for a period not exceeding one year, or both so fined and imprisoned. [40 Stat. L. 1300.]

For Act of March 6, 1902, mentioned in the text, see 1 Fed. Stat. Ann. (1st ed.) 736; 2 Fed. Stat. Ann. (2d ed) 29.

**SEC. 25. [Restriction on use made of information furnished.]** That the information furnished under the provisions of the next preceding section shall be used only for the statistical purposes for which it is supplied. No publication shall be made by the Census Office whereby the data furnished by any particular establishment can be identified, nor shall the Director of the Census permit anyone other than the sworn employees of the Census Office to examine the individual reports. [40 Stat. L. 1300.]

**SEC. 26. [Fines and penalties — enforcement.]** That all fines and penalties imposed by this Act may be enforced by indictment or information in any court of competent jurisdiction. [40 Stat. L. 1300.]

**SEC. 27. [Authorization of expenditures for expenses.]** That the Director of the Census may authorize the expenditure of necessary sums for the actual and necessary traveling expenses of the officers and employees of the Census Office, including an allowance in lieu of subsistence not exceeding \$4 per day during their necessary absence from the Census Office, or, instead of such an allowance, their actual subsistence expenses, not to exceed \$5 per day; and he may authorize the incidental, miscellaneous, and contingent expenses necessary for the carrying out of this Act, as herein provided, and not otherwise, including advertising in newspapers, the purchase of manuscripts, books of reference, and periodicals, the rental of sufficient quarters in the District of Columbia and

elsewhere and the furnishing thereof, and expenditures necessary for compiling, printing, publishing, and distributing the results of the census, the purchase of necessary paper and other supplies, the purchase, rental, exchange, construction, and repair of mechanical appliances, the compensation of such permanent and temporary clerks as may be employed under the provisions of this Act and the Act establishing the permanent Census Office and Acts amendatory thereof or supplemental thereto, and all other expenses incurred under authority conveyed in this Act. [40 Stat. L. 1300.]

**SEC. 28. [Printing—requisition on public printer.]** That the Director of the Census is hereby authorized to make requisition upon the Public Printer for such printing as may be necessary to carry out the provisions of this Act, to wit: Blanks, schedules, circulars, pamphlets, envelopes, work sheets, and other items of miscellaneous printing; that he is further authorized to have printed by the Public Printer, in such editions as the director may deem necessary, preliminary and other census bulletins, and final reports of the results of the several investigations authorized by this Act or by the Act to establish a permanent Census Office and Acts amendatory thereof or supplemental thereto, and to publish and distribute said bulletins and reports. [40 Stat. L. 1301.]

**SEC. 29. [Mail matter—free postage—abuse of privilege—penalty.]** That all mail matter, of whatever class or weight, relating to the census and addressed to the Census Office, or to any official thereof, and indorsed "Official business, Census Office," shall be transmitted free of postage, and by registered mail if necessary, and so marked: *Provided*, That if any person shall make use of such indorsement to avoid the payment of postage or registry fee on his or her private letter, package, or other matter in the mail, the person so offending shall be guilty of a misdemeanor and subject to a fine of \$300, to be prosecuted in any court of competent jurisdiction. [40 Stat. L. 1301.]

**SEC. 30. [Information furnished by different departments of government.]** That the Secretary of Commerce, whenever he may deem it advisable, on request of the Director of the Census, is hereby authorized to call upon any other department or office of the Government for information pertinent to the work herein provided for. [40 Stat. L. 1301.]

**SEC. 31. [Census of agriculture and live stock—provisions for taking—scope.]** That there shall be in the year nineteen hundred and twenty-five, and once every ten years thereafter, a census of agriculture and live stock, which shall show the acreage of farm land, the acreage of the principal crops, and the number and value of domestic animals on the farms and ranges of the country. The schedule employed in this census shall be prepared by the Director of the Census. Such census shall be taken as of the first day of January and shall relate to the preceding calendar year. The Director of the Census may appoint enumerators or special agents for the purpose of this census in accordance with the provisions of the permanent census Act. [40 Stat. L. 1301.]

**SEC. 32. [Statistics of products of manufacturing industries—collection and publication.]** That the Director of the Census be, and he is hereby, authorized and directed to collect and publish, for the years nineteen hundred and twenty-

one, nineteen hundred and twenty-three, nineteen hundred and twenty-five, and nineteen hundred and twenty-seven, and for every tenth year after each of said years, statistics of the products of manufacturing industries; and the director is hereby authorized to prepare such schedules as in his judgment may be necessary. [40 Stat. L. 1301.]

**SEC. 33. [Population or agricultural returns — certified copies to states or courts of record — individuals furnished data— statistical compilations.]** That the Director of the Census be, and he is hereby, authorized, at his discretion, upon the written request of the governor of any State or Territory or of a court of record, to furnish such governor or court of record with certified copies of so much of the population or agricultural returns as may be requested, upon the payment of the actual cost of making such copies and \$1 additional for certification; and that the Director of the Census is further authorized, in his discretion, to furnish to individuals such data from the population schedules as may be desired for genealogical or other proper purposes, upon payment of the actual cost of searching the records and \$1 for supplying a certificate; and that the Director of the Census is authorized to furnish transcripts of tables and other records and to prepare special statistical compilations for State or local officials, private concerns, or individuals upon the payment of the actual cost of such work: *Provided, however,* That in no case shall information furnished under the authority of this Act be used to the detriment of the person or persons to whom such information relates. All moneys hereafter received by the Bureau of the Census in payment for labor and materials used in furnishing transcripts of census records or special statistical compilations from such records shall be deposited to the credit of the appropriation for collecting statistics. [40 Stat. L. 1301.]

**SEC. 34. [Prior statutes how affected by Act.]** That the Act establishing the permanent Census Office, approved March sixth, nineteen hundred and two, and Acts amendatory thereof and supplemental thereto, except as are herein amended, shall remain in full force. That the Act entitled "An Act to provide for the thirteenth and subsequent decennial censuses," approved July second, nineteen hundred and nine, and Acts amendatory thereof, and all other laws and parts of laws inconsistent with the provisions of this Act, are hereby repealed. [40 Stat. L. 1302.]

For Act of March 6, 1902, mentioned in the text, see 2 Fed. Stat. Ann. (2d ed.) 29; 1 Fed. Stat. Ann. (1st ed.) 736.

For Act of July 2, 1909, mentioned in the text, see 2 Fed. Stat. Ann. (2d ed.) 38; 1909 Supp. Fed. Stat. Ann. 715.

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## CERTIFICATES OF INDEBTEDNESS

See PUBLIC DEBT

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## CHECKS

See NATIONAL BANKS

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## CITIZENSHIP

See NATURALIZATION

## CIVIL SERVICE

*Act of March 1, 1919, ch. 86, 28.*

*Sec. 1. Detail of Clerks, 28.*

*Soldiers, Sailors and Marines — Eligibility for Appointment — Civil Service Status, 28.*

*Act of Nov. 4, 1919, ch. 93, 28.*

*Sec. 1. Civil Service Commission — Temporary Employees, 28.*

*3. Bureau of Efficiency — Investigations — Statistics, 28.*

[SEC. 1.] \* \* \* **[Detail of clerks.]** No detail of clerks or other employees from the executive departments or other Government establishments in the District of Columbia, to the Civil Service Commission for the performance of duty in the District of Columbia, shall be made for or during the fiscal year 1920. The Civil Service Commission shall, however, have power in case of emergency to transfer or detail any of its employees herein provided for to or from its office force, field force, or rural carrier examining board. [40 Stat. L. 1223.]

This and the following paragraph are from the Legislative, Executive and Judicial Appropriation Act of March 1, 1919, ch. 86.

\* \* \* **[Soldiers, sailors and marines — eligibility for appointment — civil service status.]** That the period of time during which soldiers, sailors, and marines, both enlisted and drafted men, who, prior to entering the service of their country, had a civil service status, and whose names appear upon the eligible list of the Civil Service Commission, shall not be counted against them in the determination of their eligibility for appointment under the law, rules and regulations of the Civil Service Commission now in effect, and at the time of demobilization their civil service status shall be the same as when they entered the service. [40 Stat. L. 1224.]

See note to preceding paragraph.

[SEC. 1.] \* \* \* **[Civil Service Commission — temporary employees.]** For temporary employees for the Civil Service Commission, \$50,000; *Provided*, That not more than two persons shall be employed hereunder at a rate of compensation exceeding \$1,400 per annum and no person shall be employed hereunder at a rate of compensation exceeding \$1,800 per annum. [41 Stat. L. 327.]

This and sec. 3 which follows are from the "First Deficiency Appropriation Act, fiscal year 1920," ch. 93, enacted Nov. 4, 1919.

**SEC. 3. [Bureau of Efficiency — investigations — statistics.]** That the Bureau of Efficiency is directed to investigate the scope and character of statistics needed by the Government, and the methods of collecting, compiling, and presenting statistical information by the several executive departments and independent Government establishments and submit to Congress a report of its findings together with such recommendations as it deems proper. [41 Stat. L. 343.]

See note to preceding paragraph.

## CLAIMS

*Act of July 11, 1919, ch. 8, 29.*

*Prosecution of Claims by Former Government Employees, 29.*

*Act of Oct. 22, 1919, ch. 78, 29.*

*Property Taken by Government During Labor Strikes — Arms and Ammunition, 29*

### CROSS-REFERENCES

See also *LABOR; NAVY; PUBLIC CONTRACTS; TRADING WITH THE ENEMY.*

\* \* \* **Prosecution of claims by former Government employees:** That it shall be unlawful for any person who, as a commissioned officer of the Army, or officer or employee of the United States, has at any time since April 6, 1917, been employed in any Bureau of the Government and in such employment been engaged on behalf of the United States in procuring or assisting to procure supplies for the Military Establishment, or who has been engaged in the settlement or adjustment of contracts or agreements for the procurement of supplies for the Military Establishment, within two years next after his discharge or other separation from the service of the Government, to solicit employment in the presentation or to aid or assist for compensation in the prosecution of claims against the United States arising out of any contracts or agreements for the procurement of supplies for said Bureau, which were pending or entered into while the said officer or employee was associated therewith. A violation of this provision of this chapter shall be punished by a fine of not more than \$10,000 or imprisonment for not more than one year, or both. \* \* \* [41 Stat. L. 131.]

This is from the Army Appropriation Act of July 11, 1919, ch. 8.

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**An Act For the payment of claims for loss of private property on account of the loss of firearms and ammunition taken by the United States troops during the labor strikes in the State of Colorado in 1914.**

[*Act of Oct. 22, 1919, ch. 78, 41 Stat. L. 295.*]

[**Property taken by Government during labor strikes — arms and ammunition.**] That the sum of \$7,800, or so much thereof as may be necessary, is hereby appropriated, to be immediately available and to remain available until June 30, 1920, for payment of claims on account of loss of firearms and ammunition taken by the United States troops from civilians in the State of Colorado during the labor strike troubles which occurred in the calendar year 1914: *Provided*, That settlement of such claims shall be made by the Auditor for the War Department upon the approval and recommendation of the Secretary of War, where the amount of the loss has been ascertained by the War Department, and payment thereof will be accepted by the owners of the property in full satisfaction of such claims. [41 Stat. L. 295.]

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## CLERKS

See JUDICIAL OFFICERS

## COAST GUARD

*Act of Jan. 12, 1919, ch. 8, 30.*

*Uniform, Accouterments, and Equipment — Furnishing by Government, 30.*

*Act of March 1, 1919, ch. 86, 30.*

*Sec. 1. Services of Skilled Draftsmen, etc., 30.*

**An Act Providing for the purchase of uniforms, accouterments, and equipment by officers of the Navy, Marine Corps, and Coast Guard, and midshipmen at the Naval Academy from the Government at cost.**

[*Act of Jan. 12, 1919, ch. 8, 40 Stat. L. 1054.*]

[**Uniforms, accouterments, and equipment — furnishing by government.**] That hereafter uniforms, accouterments, and equipment shall, upon the request of any officer \* \* \* of the Coast Guard while operating with the Navy \* \* \* or cadets at the Coast Guard Academy, be furnished by the Government at cost, subject to such restrictions and regulations as the Secretary of the Navy may prescribe. [40 Stat. L. 1054.]

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[**SEC. 1.**] \* \* \* [**Services of skilled draftsmen, etc.**] The services of skilled draftsmen, and such other technical services as the Secretary of the Treasury may deem necessary, may be employed only in the office of the Coast Guard in connection with the construction and repair of Coast Guard cutters, to be paid from the appropriation "Repairs to Coast Guard cutters": *Provided*, That the expenditures on this account for the fiscal year 1920 shall not exceed \$6,800. A statement of the persons employed hereunder, their duties, and the compensation paid to each shall be made to Congress each year in the annual estimates. [40 Stat. L. 1231.]

This is from the Legislative, Executive and Judicial Appropriation Act of March 1, 1919, ch. 86.

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## COINAGE, MINTS AND ASSAY OFFICES

*Act of Dec. 2, 1918, ch. 1, 30.*

*Purchase of Metal for Minor Coinage — Minor Coinage Profit Fund — R. S. Sec. 3528 amended, 30.*

**An Act To amend section thirty-five hundred and twenty-eight of the Revised Statutes.**

[*Act of Dec. 2, 1918, ch. 1, 40 Stat. L. 1051.*]

[**Purchase of metal for minor coinage — minor coinage profit fund — R. S. sec. 3528 amended.**] That section thirty-five hundred and twenty-eight of the Revised Statutes be, and the same is hereby, amended to read as follows:

"**Sec. 3528.** For the purchase of metal for the minor coinage, authorized by this Act, a sum not exceeding \$400,000 in lawful money of the United States shall, upon the recommendation of the Director of the Mint and in such sums as he may designate, with the approval of the Secretary of the Treasury, be transferred to the credit of the superintendents of the mints at Philadelphia, San Francisco, and Denver, at which establishments, until otherwise provided

by law, such coinage shall be carried on. The superintendents, with the approval of the Director of the Mint as to price, terms, and quantity shall purchase the metal required for such coinage by public advertisement, and the lowest and best bid shall be accepted, the fineness of the metals to be determined on the mint assay. The gain arising from the coinage of such metals into coin of a nominal value, exceeding the cost thereof, shall be credited to the special fund denominated the minor coinage profit fund; and this fund shall be charged with the wastage incurred in such coinage, and with the cost of distributing said coins, as hereinafter provided. The balance remaining to the credit of this fund, and any balance of the profits accrued from minor coinage under former Acts, shall be, from time to time, and at least twice a year, covered into the Treasury of the United States." [40 Stat. L. 1051.]

For R. S. sec. 3528, before the above amendment, see 2 Fed. Stat. Ann. (2d ed.) 359; 2 Fed. Stat. Ann. (1st ed.) 139.

## COMMERCE

See CORPORATIONS

## COMMERCE DEPARTMENT

*Act of Jan. 25, 1919, ch. 10, 31.*

*Annual Report of Commerce and Navigation — R. S. sec. 336 amended, 31.*

*Act of March 1, 1919, ch. 86, 31.*

*Sec. 1. Bureau of Foreign and Domestic Commerce — Receipts — Disposition, 31.*

*Purchases — Services Rendered for Department — Advertisements for Proposals, 32.*

**An Act To amend section three hundred and thirty-six of the Revised Statutes of the United States relating to the annual report on the statistics of commerce and navigation of the United States with foreign countries.**

[*Act of Jan. 25, 1919, ch. 10, 40 Stat. L. 1055.*]

[**Annual report of commerce and navigation — R. S. Sec. 336 amended,**]

That section three hundred and thirty-six of the Revised Statutes of the United States be, and the same is hereby, amended by striking out the word "fiscal" immediately preceding the word "year" at the end of the first sentence of said section, and by inserting in lieu thereof the word "calendar." [40 Stat. L. 1055.]

For R. S. sec. 336, before the amendment shown in the text, see 7 Fed. Stat. Ann. (1st ed.) 127; 2 Fed. Stat. Ann. (2d ed.) 485.

[SEC. 1.] \* \* \* [**Bureau of Foreign and Domestic Commerce — receipts — disposition.**] That all moneys hereafter received by the Bureau of Foreign and Domestic Commerce in payment of photographic and other mechanical reproduction of special statistical compilations from its records shall be covered into the Treasury as a miscellaneous receipt. [40 Stat. L. 1256.]

This and the paragraph which follows are from the Legislative, Executive and Judicial Appropriation Act of March 1, 1919, ch. 86.

\* \* \* [Purchases—services rendered for Department—advertisements for proposals.] Hereafter section 3709 of the Revised Statutes of the United States shall not be construed to apply to any purchase or service rendered for the Department of Commerce when the aggregate amount involved does not exceed the sum of \$25. [40 Stat. L. 1262.]

See note to preceding paragraph.

For R. S. sec. 3709 mentioned in the text see 6 Fed. Stat. Ann. 93; 8 Fed. Stat. Ann. (2d ed.) 336.

## COMPTROLLER OF CURRENCY

See NATIONAL BANKS

## CONGRESS

*Act of Feb. 24, 1919, ch. 18, 32.*

*Sec. 1303. Legislative Drafting Service—Creation—Membership—Compensation, etc.—Duties—Appropriation, 32.*

*Act of July 11, 1919, ch. 6, 33.*

*Sec. 1. Supplies—Motor Equipment for Senate—Transfer by Secretary of War, 33.*

### CROSS-REFERENCES

See also *AGRICULTURE; ELECTIONS; INDIANS; PUBLIC OFFICERS AND EMPLOYEES; PUBLIC PRINTING; PUBLIC PROPERTY, BUILDINGS AND GROUNDS.*

**SEC. 1303. [Legislative Drafting Service—creation—membership—compensation, etc.—duties—appropriation.]** (a) That there is hereby created a Legislative Drafting Service under the direction of two draftsmen, one of whom shall be appointed by the President of the Senate, and one by the Speaker of the House of Representatives, without reference to political affiliations and solely on the ground of fitness to perform the duties of the office. Each draftsman shall receive a salary of \$5,000 a year, payable monthly. The draftsmen shall, subject to the approval of the President of the Senate and the Speaker of the House of Representatives, employ and fix the compensation of such assistant draftsmen, clerks, and other employees, and purchase such furniture, office equipment, books, stationery, and other supplies, as may be necessary for the proper performance of the duties of the service and as may be appropriated for by Congress.

(b) The Drafting Service shall aid in drafting public bills and resolutions or amendments thereto on the request of any committee of either House of Congress, but the Library Committee of the Senate and the Library Committee of the House of Representatives, respectively, may determine the preference, if any, to be given to such requests of the committees of either House, respectively. The draftsmen shall, from time to time, prescribe rules and regulations for the conduct of the work of the service for the committees of each House, subject to the approval of the Library Committee of each House, respectively.



(c) For the remainder of the current fiscal year there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$25,000, or so much thereof as may be necessary, for the purpose of defraying the expenses of the establishment and maintenance of the service, including the payment of salaries herein authorized. One-half of all appropriations for the service shall be disbursed by the Secretary of the Senate and one-half by the Clerk of the House of Representatives. [40 Stat. L. 1141.]

This is from the Act of Feb. 24, 1919, ch. 18, entitled "An Act to provide revenue and for other purposes." The rest of the Act will be found in the title "Internal Revenue" *infra*, p. 82.

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[SEC. 1.] \* \* \* [Supplies — motor equipment for Senate — transfer by Secretary of War.] That the Secretary of War be, and he is hereby, authorized in his discretion to transfer without charge to the Sergeant at Arms of the United States Senate such motor equipment as is suitable to the needs of the Senate and which is no longer required for the use of the War Department. [41 Stat. L. 57.]

This is from the "Third Deficiency Appropriation Act" of July 11, 1919, ch. 6.

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## CONSERVATION

See FOOD AND FUEL

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## CONSTITUTION

For the Eighteenth Amendment to the Federal Constitution see *infra*, p. ----

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## CONSULS

See DIPLOMATIC AND CONSULAR OFFICERS

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## CONTRACTS

See PUBLIC CONTRACTS; RIVERS, HARBORS AND CANALS

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## COPYRIGHT

Act of Dec. 18, 1919, ch. —, 33.

*Persons Entitled to Copyright — Aliens — Ad Interim Protection of Book Published Abroad — Sections 8 and 21 Amended*, 33.

**An Act To amend sections 8 and 21 of the Copyright Act, approved  
March 4, 1909.**

[Act of Dec. 18, 1919, ch. —, 41 Stat. L. —.]

[Persons entitled to copyright — aliens — ad interim protection of book published abroad — sections 8 and 21 amended.] That sections 8 and 21 of

the Act entitled "An Act to amend and consolidate the Acts respecting copyright," approved March 4, 1909, be amended to read as follows:

"SEC. 8. That the author or proprietor of any work made the subject of copyright by this Act, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this Act: *Provided, however,* That the copyright secured by this Act shall extend to the work of an author or proprietor who is a citizen or subject of a foreign State or nation only:

"(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

"(b) When the foreign State or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this Act or by treaty; or when such foreign State or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

"The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this Act may require: *Provided, however,* That all works made the subject of copyright by the laws of the United States first produced or published abroad after August 1, 1914, and before the date of the President's proclamation of peace, of which the authors or proprietors are citizens or subjects of any foreign State or nation granting similar protection for works by citizens of the United States, the existence of which shall be determined by a copyright proclamation issued by the President of the United States, shall be entitled to the protection conferred by the copyright laws of the United States from and after the accomplishment, before the expiration of fifteen months after the date of the President's proclamation of peace, of the conditions and formalities prescribed with respect to such works by the copyright laws of the United States: *Provided further,* That nothing herein contained shall be construed to deprive any person of any right which he may have acquired by the republication of such foreign work in the United States prior to the approval of this Act.

"SEC. 21. That in the case of a book first published abroad in the English language on or after the date of the President's proclamation of peace, the deposit in the copyright office, not later than sixty days after its publication abroad, of one complete copy of the foreign edition, with a request for the reservation of the copyright and a statement of the name and nationality of the author and of the copyright proprietor and of the date of publication of the said book, shall secure to the author or proprietor an ad interim copyright, which shall have all the force and effect given to copyright by this Act, and shall endure until the expiration of four months after such deposit in the copyright office." [41 Stat. L. —.]

For the Copyright Act, certain sections of which are amended in the text, see 2 Fed. Stat. Ann. (2d ed.) 543; 1909 Supp. Fed. Stat. Ann. 80.

## CORPORATIONS

*Act of March 3, 1919, ch. 100, 35.*

*Sec. 9. War Finance Corporation — Advances to Promote Commerce with Foreign Nations — To Whom Made — Conditions and Limitations, 35.*

*10. Earnings — Reserve Fund — Federal Reserve Banks as Depositaries and Fiscal Agents — Liquidation of Assets — Winding up Affairs, 36.*

*Act of Nov. 21, 1918, ch. 212, 36*

*Sec. 5. War Finance Corporation — Advances to Banks and Trust Companies — Power to Make — Amount — Security, 36*

### CROSS-REFERENCE

See also *NATIONAL BANKS*

**SEC. 9. [War Finance Corporation — advances to promote commerce with foreign nations — to whom made — conditions and limitations.]** That the War Finance Corporation Act is hereby amended by adding to Title I thereof a new section, to read as follows:

“SEC. 21. (a) That the Corporation shall be empowered and authorized, in order to promote commerce with foreign nations through the extension of credits, to make advances upon such terms, not inconsistent with the provisions of this section, as it may prescribe, for periods not exceeding five years from the respective dates of such advances:

“(1) To any person, firm, corporation, or association engaged in the business in the United States of exporting therefrom domestic products to foreign countries, if such person, firm, corporation, or association is, in the opinion of the board of directors of the Corporation, unable to obtain funds upon reasonable terms through banking channels. Any such advance shall be made only for the purpose of assisting in the exportation of such products, and shall be limited in amount to not more than the contract price therefor, including insurance and carrying or transportation charges to the foreign point of destination if and to the extent that such insurance and carrying or transportation charges are payable in the United States by such exporter to domestic insurers and carriers. The rate of interest charged on any such advance shall not be less than 1 per centum per annum in excess of the rate of discount for ninety-day commercial paper prevailing at the time of such advance at the Federal reserve bank of the district in which the borrower is located; and

“(2) To any bank, banker, or trust company in the United States which after this section takes effect makes an advance to any such person, firm, corporation, or association for the purpose of assisting in the exportation of such products. Any such advance shall not exceed the amount remaining unpaid of the advances made by such bank, banker, or trust company to such person, firm, corporation, or association for such purpose.

“(b) The aggregate of the advances made by the Corporation under this section remaining unpaid shall never at any time exceed the sum of \$1,000,000,000.

“(c) Notwithstanding the limitation of section 1 the advances provided for by this section may be made until the expiration of one year after the termination of the war between the United States and the German Government as fixed by proclamation of the President. Any such advance made by the Corporation

shall be made upon the promissory note or notes of the borrower, with full and adequate security in each instance by indorsement, guaranty, or otherwise. The Corporation shall retain power to require additional security at any time. The Corporation in its discretion may upon like security extend the time of payment of any such advance through renewals, the substitution of new obligations, or otherwise, but the time for the payment of any such advance shall not be extended beyond five years from the date on which it was originally made." [40 Stat. L. 1313.]

This and section 10, which follows, are from the Act of March 3, 1919, ch. 100, entitled "An Act To amend the Liberty Bond Acts and the War Finance Corporation Act, and for other purposes."

The War Finance Corporation Act here amended will be found in 1918 Supp. Fed. Stat. Ann. 107 et seq.

**SEC. 10. [Earnings — reserve fund — Federal Reserve Banks as depositaries and fiscal agents — liquidation of assets — winding up affairs.]** That section 15 of the War Finance Corporation Act is hereby amended to read as follows:

"SEC. 15. That all net earnings of the Corporation not required for its operations shall be accumulated as a reserve fund until such time as the Corporation liquidates under the terms of this title. Such reserve fund shall, upon the direction of the board of directors, with the approval of the Secretary of the Treasury, be invested in bonds and obligations of the United States, issued or converted after September 24, 1917, or upon like direction and approval may be deposited in member banks of the Federal Reserve System, or in any of the Federal reserve banks, or be used from time to time, as well as any other funds of the Corporation, in the purchase or redemption of any bonds issued by the Corporation. The Federal reserve banks are hereby authorized to act as depositaries for and as fiscal agents of the Corporation in the general performance of the powers conferred by this title. Beginning twelve months after the termination of the war, the date of such termination to be fixed by a proclamation of the President of the United States, the directors of the Corporation shall proceed to liquidate its assets and to wind up its affairs, but the directors of the Corporation, in their discretion, may, from time to time, prior to such date, sell and dispose of any securities or other property acquired by the Corporation. Any balance remaining after the payment of all its debts shall be paid into the Treasury of the United States as miscellaneous receipts, and thereupon the Corporation shall be dissolved." [40 Stat. L. 1314.]

See note to preceding section.

The War Finance Corporation Act here amended will be found in 1918 Supp. Fed. Stat. Ann. 107 et seq.

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**SEC. 5. [War Finance Corporation — advances to banks and trust companies — power to make — amount — security.]** That the proviso to paragraph two, section seven, of the Act approved April fifth, nineteen hundred and eighteen, entitled "An Act to provide further for the national security and defense, and for the purpose of assisting in the prosecution of the war to provide credits for industries and enterprises in the United States necessary or contributory to the prosecution of the war, and to supervise the issuance of securities, and for other purposes," be, and is hereby, amended to read as follows:

"*Provided*, That every such advance shall be secured in the manner described in the preceding part of this section and (except in the case of an advance secured by a loan for agricultural purposes or a loan based on live stock) in addition thereto by collateral security, to be furnished by the bank, banker, or

trust company of such character as shall be prescribed by the board of directors of a value at the time of such advance (as estimated and determined by the board of directors of the Corporation) equal to at least thirty-three per centum of the amount advanced by the Corporation. The Corporation shall retain power to require additional security at any time." [40 Stat. L. 1049.]

This is from the Act of Nov. 21, 1918, ch. 212, entitled "An Act To enable the Secretary of Agriculture to carry out, during the fiscal year ending June thirtieth, nineteen hundred and nineteen, the purposes of the Act entitled 'An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products,' and for other purposes."

For Act of April 5, 1918, § 7, par. 2, here amended, see 1918 Supp. Fed. Stat. Ann. 109.

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## CORRUPT PRACTICES

See ELECTIONS

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## COTTON

See INTERNAL REVENUE

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## COURTS

See JUDICIAL OFFICERS; JUDICIARY

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## COURTS MARTIAL

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

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## CRIMINAL LAW

*Act of Oct. 29, 1919, ch. 89, 37.*

*Sec. 1. National Motor Vehicle Theft Act, 37.*

*2. Definitions — "Motor Vehicle" — "Interstate or Foreign Commerce," 38.*

*3. Transporting Stolen Motor Vehicle — Penalty, 38.*

*4. Receiving, etc., or Disposing of Stolen Motor Vehicle, 38.*

*5. Venue of Prosecutions, 38.*

### CROSS-REFERENCE

See also *PENAL LAWS*

**An Act To punish the transportation of stolen motor vehicles in interstate or foreign commerce.<sup>1</sup>**

[*Act of Oct. 29, 1919, ch. 89, 41 Stat. L. 324.*]

[SEC. 1.] [**National Motor Vehicle Theft Act.**] That this Act may be cited as the National Motor Vehicle Theft Act. [41 Stat. L. 324.]

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<sup>1</sup> This Act became a law without the approval of the President, it not having been returned by him to the house of Congress in which it originated within the time prescribed by the Constitution.

SEC. 2. [Definitions — “motor vehicle” — “interstate or foreign commerce.”] That when used in this Act:

(a) The term “motor vehicle” shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails;

(b) The term “interstate or foreign commerce” as used in this Act shall include transportation from one State, Territory, or the District of Columbia, to another State, Territory, or the District of Columbia, to a foreign country, or from a foreign country to any State, Territory, or the District of Columbia. [41 Stat. L. 324.]

SEC. 3. [Transporting stolen motor vehicle—penalty.] That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than \$5,000, or by imprisonment of not more than five years, or both. [41 Stat. L. 325.]

SEC. 4. [Receiving, etc., or disposing of stolen motor vehicle.] That whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished by a fine of not more than \$5,000, or by imprisonment of not more than five years, or both. [41 Stat. L. 325.]

SEC. 5. [Venue of prosecutions.] That any person violating this Act may be punished in any district in or through which such motor vehicle has been transported or removed by such offender. [41 Stat. L. 325.]

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## CURRENCY

See COINAGE, MINTS AND ASSAY OFFICES; LEGAL TENDER

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## CUSTOMS DUTIES

*Act of July 20, 1918, ch. 159, 38.*

*Port of Bar Harbor — Immediate Transportation Privileges, 38.*

*Act of July 20, 1918, ch. 158, 39.*

*Port of Oswego — Immediate Transportation Privileges, 39.*

*Act of Aug. 31, 1918, ch. 165, 39.*

*Sec. 1. Articles for Red Cross — Payment of Import Duty, 39.*

*2. Regulations Prescribed, 39.*

*Act of March 2, 1919, ch. 93, 39.*

*Port of Gulfport — Immediate Transportation Privileges, 39.*

*Act of July 19, 1919, ch. 24, 40.*

*Sec. 1. Tariff Commission — Disbursing Clerk, 40.*

**An Act For the establishment of Bar Harbor, in the State of Maine, as a port of entry and delivery for the immediate transportation without appraisement of dutiable merchandise.**

[*Act of July 20, 1918, ch. 159, 40 Stat. L. 917.*]

[Port of Bar Harbor—immediate transportation privileges.] That the privileges of the first and seventh sections of the Act approved June tenth,

eighteen hundred and eighty, as amended, governing the immediate transportation of dutiable merchandise without appraisement, be and are hereby extended to the port of Bar Harbor, in the district of Portland, in the State of Maine. [40 Stat. L. 917.]

For Act of June 10, 1880, as amended, see 2 Fed. Stat. Ann. (2d ed.) 1119; 2 Fed. Stat. Anno. (1st ed.) 712.

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**An Act For the establishment of Oswego, in the State of New York, as a port of entry for immediate transportation without appraisement of dutiable merchandise.**

[Act of July 20, 1918, ch. 158, 40 Stat. L. 916.]

[Port of Oswego — immediate transportation privileges.] That the privileges of the first section of the Act approved June tenth, eighteen hundred and eighty, governing the immediate transportation of dutiable merchandise without appraisement, be, and are hereby, extended to the port of Oswego, in the State of New York. [40 Stat. L. 916.]

For Act of June 10, 1880, as amended, see 2 Fed. Stat. Ann. (2d ed.) 1119; 2 Fed. Stat. Ann. (1st ed.) 712.

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**An Act To authorize the importation without the payment of duty of sundry articles for the American National Red Cross to be donated or used by it solely to or for the benefit of the land or naval forces of the United States or its allies, or for the relief of the civilian population of the United States or of its allies.**

[Act of Aug. 31, 1918, ch. 165, 40 Stat. L. 954.]

[SEC. 1.] [Articles for Red Cross — payment of import duty.] That during the continuance of the state of war now existing, and during the period of one year thereafter, there may be imported into the United States free of the payment of any import duty any articles of clothing, medicines, drugs, hospital supplies and equipment, goods, wool and cotton, and the products thereof, donated by any person or persons abroad and consigned to the American National Red Cross: *Provided*, That such articles or supplies are not to be sold but are only to be donated or used by it solely to or for the benefit of the land or naval forces of the United States or of the allies of the United States, or for the relief of the civilian population of the United States or any of its said allies. [40 Stat. L. 954.]

SEC. 2. [Regulations prescribed.] That the Secretary of the Treasury shall prescribe such regulations as may be necessary to carry this Act into effect. [40 Stat. L. 954.]

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**An Act For the establishment of Gulfport, Mississippi, as a port of entry and delivery for immediate transportation without appraisement of dutiable merchandise.**

[Act of March 2, 1919, ch. 93, 40 Stat. L. 1272.]

[Port of Gulfport — immediate transportation privileges.] That the privileges of the first and seventh sections of the Act approved June tenth, eighteen hundred and eighty, governing the immediate transportation of dutiable mer-

chandise without appraisement be, and are hereby, extended to the port of Gulfport, Mississippi. [40 Stat. L. 1272.]

For Act of June 10, 1880, secs. 1, 7, mentioned in the text, see 2 Fed. Stat. Ann. (2d ed.) 1119, 1124; 2 Fed. Stat. Ann. (1st ed.) 712, 715.

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[SEC. 1.] \* \* \* [Tariff Commission — disbursing clerk.] That the disbursing clerk of the Treasury Department shall act in a similar capacity for the United States Tariff Commission. [41 Stat. L. 182.]

This is from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

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## DAYLIGHT SAVING

See TIME

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## DEPOSITIONS

See PUBLIC LANDS

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## DIPLOMATIC AND CONSULAR OFFICERS

*Act of March 4, 1919, ch. 123, 40.*

*Consular Assistants — Salaries — Rate, 40.*

*Res. of Sept. 29, 1919, No. 16, ch. 72, 40.*

*Ambassador to Belgium, 40.*

\* \* \* [Consular assistants — salaries — rate.] That from and after the 1st day of July, 1918, the salaries of consular assistants shall be at the rate of \$1,500 for the first year of continuous service, \$1,650 for the second year of continuous service, \$1,800 for the third year, and \$2,000 for the fourth year of continuous service and for each year thereafter, and section 1704, Revised Statutes, its amendatory Act of June 11, 1874, and all other Acts inconsistent with its provision are hereby so amended. [40 Stat. L. 1334.]

This is from the Diplomatic and Consular Service Appropriation Act of March 4, 1919, ch. 123.

For R. S. sec. 1704, mentioned in the text, see 3 Fed. Stat. Ann. (2d ed.) 29; 1909 Supp. Fed. Stat. Ann. 119.

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### Joint Resolution Authorizing the appointment of an ambassador to Belgium.

[Res. of Sept 29, 1919, No. 16, ch. 72, 41 Stat. L. 291.]

[Ambassador to Belgium.] That the President be, and he is hereby, authorized to appoint, as the representative of the United States, an ambassador to the Kingdom of Belgium, who shall receive as compensation the sum of \$17,500 per annum. [41 Stat. L. 291.]



**DISTILLED SPIRITS**

See INTOXICATING LIQUORS

**DISTRICT ATTORNEYS**

See JUDICIAL OFFICERS

**DISTRICT OF COLUMBIA***Act of Oct. 22, 1919, ch. 80, 42.***TITLE II.—DISTRICT OF COLUMBIA RENTS.**

- Sec. 101. Terms Defined — " Rental Property " — " Person " — " Hotel " — " Apartment " — " Owner " — " Tenant " — " Service " — " Commission," 42.*
- 102. Rent Commission — Creation — Appointment of Commissioners — Term — Vacancies — Organization — Seal, 42.*
- 103. Salaries and Expenditures — Employees, 43.*
- 104. Advisory Assistant to Commission — Data Supplied Commission by Government Employees, 43.*
- 105. Access to Records — Attendance and Testimony of Witnesses — Production of Books, etc., 43.*
- 106. Rents to Be Reasonable — Determination by Commission, 44.*
- 107. Determination of Commission Fixing Reasonable Rent — When Effective — Adjustment of Any Differences in Rent, 44.*
- 108. Appeal from Commission's Determination — Additional Evidence — Modification of or New Findings, 44.*
- 109. Rights of Tenant on Expiration of Term — Effect of Sale of Leased Property, 45.*
- 110. Determination of Commission as Affected by Pendency of Appeal, 46.*
- 111. Determination of Commission Fixing Reasonable Rates — Effect — Change in Ownership or Tenancy, 46.*
- 112. Noncompliance with Determination of Commission — Collection of Excess Rent — Penalty, 46.*
- 113. Withdrawal of Service from Tenant — Unsafe or Insanitary Condition of Leased Premises — Liability of Landlord, 46.*
- 114. Duty of Commission to Sue in Behalf of Tenant — Costs, 47*
- 115. Procedure before Commission, 47.*
- 116. Avoidance of Provisions of Title — Penalty, 47.*
- 117. Standard Forms of Leases and Contracts — Schedule of Rates and Charges for Hotels and Apartments, 47.*
- 118. Assignment of Leases — Subletting of Leased Property — Rate of Rent, 48.*
- 119. Conflicting Laws — Repeal or Suspension, 48.*
- 120. Appropriation to Carry Out Provisions of Title, 48.*
- 121. Invalidity of Part of Act — Effect as to Remainder, 49.*
- 122. Declaration of Reason for Act — Termination, 49.*

## CROSS-REFERENCES

See also *GAME ANIMALS AND BIRDS; JUDICIAL OFFICERS; JUDICIARY; LABOR; MILITIA; PUBLIC OFFICERS AND EMPLOYEES.*

TITLE II.—DISTRICT OF COLUMBIA RENTS.<sup>1</sup>

SEC. 101. [Terms defined — “rental property” — “person” — “hotel” — “apartment” — “owner” — “tenant” — “service” — “commission.”]

When used in this title, unless the context indicates otherwise —

The term “rental property” means any building or part thereof or land appurtenant thereto in the District of Columbia rented or hired and the service agreed or required by law or by determination of the commission to be furnished in connection therewith; but does not include an hotel or apartment.

The term “person” includes an individual, partnership, association, or corporation.

The term “hotel” or “apartment” means any hotel or apartment or part thereof, in the District of Columbia, rented or hired and the land and out-buildings appurtenant thereto, and the service agreed or required by law or by determination of the commission to be furnished in connection therewith.

The term “owner” includes a lessor or sublessor, or other person entitled to receive rent or charges for the use or occupancy of any rental property, hotel or apartment, or any interest therein, or his agent.

The term “tenant” includes a subtenant, lessee, sublessee or other person, not the owner, entitled to the use or occupancy of any rental property, hotel or apartment.

The term “service” includes the furnishing of light, heat, water, telephone or elevator service, furniture, furnishings, window shades, screens, awnings, storage, kitchen, bath and laundry facilities and privileges, maid service, janitor service, removal of refuse, making all repairs suited to the type of building or necessitated by ordinary wear and tear, and any other privilege or service connected with the use or occupancy of any rental property, apartment, or hotel.

The term “commission” means the Rent Commission of the District of Columbia. [41 Stat. L. 298.]

SEC. 102. [Rent Commission — creation — appointment of commissioners — term — vacancies — organization — seal.] A commission is hereby created and established, to be known as the Rent Commission of the District of Columbia, which shall be composed of three commissioners, none of whom shall be directly or indirectly engaged in, or in any manner interested in or connected with, the real estate or renting business in the District of Columbia. The commissioners shall be appointed by the President by and with the advice and consent of the Senate. The term of each commissioner shall be two years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he succeeds. The commission shall at the time of its organization and annually thereafter elect a chairman from its own membership. The commission may make such regulations as may be necessary to carry this title into effect.

All powers and duties of the commission may be exercised by a majority of its members. A vacancy in the commission shall not impair the right of the

<sup>1</sup> This is part of the Act of Oct. 22, 1919, ch. 80, entitled “The Food Control and District of Columbia Rents Act.” Title I of the Act will be found under FOOD AND FUEL.

remaining commissioners to exercise all the powers of the commission. The commission shall have an official seal, which shall be judicially noticed. [41 Stat. L. 299.]

**SEC. 103. [Salaries and expenditures — employees.]** Each commissioner shall receive a salary of \$5,000 a year, payable monthly. The commission shall appoint a secretary, who shall receive a salary of \$3,000 a year, payable in like manner; and, subject to the provisions of the civil-service laws, it may appoint and remove such officers, employees, and agents and make such expenditures for rent, printing, telegrams, telephone, law books, books of reference, periodicals, furniture, stationery, office equipment, and other supplies and expenses as may be necessary to the administration of this title. All of the expenditures of the commission shall upon the presentation of itemized vouchers therefor approved by the chairman of the commission be audited and paid in the same manner as other expenditures for the District of Columbia.

With the exception of the secretary, all employees of the commission shall be appointed from lists of eligibles supplied by the Civil Service Commission and in accordance with the civil-service law. [41 Stat. L. 299.]

**SEC. 104. [Advisory assistant to commission — data supplied commission by Government employees.]** The assessor of the District of Columbia shall serve ex officio as an advisory assistant to the commission, but he shall have none of the powers or duties of a commissioner. He shall attend the meetings and hearings of the commission. Every officer or employee of the United States or of the District of Columbia, whenever requested by the commission, shall supply to the commission any data or information pertaining to the administration of this title which may be contained in the records of his office. The assessor shall receive for the performance of the duties required by this section a salary of \$1,000 per annum, payable monthly, in addition to such other salary as may be prescribed for his office by law. [4v Stat. L. 299.]

**SEC. 105. [Access to records — attendance and testimony of witnesses — production of books, etc.]** For the purposes of this title the commission or any officer, employee, or agent duly authorized in writing by it, shall at all reasonable times have access to, for the purpose of examination, and the right to copy, any books, accounts, records, papers, or correspondence relating to any matter which the commission is authorized to consider or investigate; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such books, accounts, records, papers, and correspondence relating to any such matter. Any member of the commission may sign subpoenas, administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses and the production of such books, accounts, records, papers, and correspondence may be required from any place in the United States at any designated place of hearing. In case of disobedience to a subpoena or of the contumacy of any witness appearing before the commission, the commission may invoke the aid of the Supreme Court of the District of Columbia or of any district court of the United States. Such court may thereupon issue an order requiring the person subpoenaed to obey the subpoena, or to give evidence touching the matter in question. Any failure to obey such order of the court may be punished by such court as a contempt thereof. No

officer or employee of the commission shall, unless authorized by the commission or by a court of competent jurisdiction, make public any information obtained by the commission. [41 Stat. L. 300.]

**SEC. 106. [Rents to be reasonable—determination by commission.]** For the purposes of this title it is declared that all (a) rental property and (b) apartments and hotels are affected with a public interest, and that all rents and charges therefor, all service in connection therewith, and all other terms and conditions of the use or occupancy thereof, shall be fair and reasonable; and any unreasonable or unfair provision of a lease or other contract for the use or occupancy of such rental property, apartment, or hotel with respect to such rents, charges, service, terms, or conditions is hereby declared to be contrary to public policy. The commission upon its own initiative may, or upon complaint shall, determine whether the rent, charges, service, and other terms or conditions of a lease or other contract for the use or occupancy of any such rental property, hotel, or apartment are fair and reasonable. Such complaints may be made (a) by or on behalf of any tenant, and (b) by any owner except where the tenant is in possession under a lease or other contract, the term specified in which has not expired, and the fairness and reasonableness of which has not been determined by the commission.

In all such cases the commission shall give notice personally or by registered mail and afford an opportunity to be heard to all parties in interest. The commission shall promptly hear and determine the issues involved in all complaints submitted to it. All hearings before the commission shall be open to the public. If the commission determines that such rents, charges, service, or other terms or conditions are unfair or unreasonable, it shall determine and fix such fair and reasonable rent or charges therefor, and fair and reasonable service, terms, and conditions of use or occupancy. In any suit in any court of the United States or the District of Columbia involving any question arising out of the relation of landlord and tenant with respect to any rental property, apartment, or hotel, except on appeal from the commission's determination as provided in this title, such court shall determine the rights and duties of the parties in accordance with the determination and regulations of the commission relevant thereto. [41 Stat. L. 300.]

**SEC. 107. [Determination of commission fixing reasonable rent—when effective—adjustment of any differences in rent.]** A determination of the commission fixing a fair and reasonable rent or charge made in a proceeding begun by complaint shall be effective from the date of the filing of the complaint. The difference between the amount of rent and charges paid for the period from the filing of the complaint to the date of the commission's determination and the amount that would have been payable for such period at the fair and reasonable rate fixed by the commission may be added to or subtracted from, as the case demands, future rent payments, or after the final decision of an appeal from the commission's determination may be sued for and recovered in an action in the Municipal Court of the District of Columbia. [41 Stat. L. 300.]

**SEC. 108. [Appeal from commission's determination—additional evidence—modification of or new findings.]** Unless within ten days after the filing of the commission's determination any party to the complaint appeals therefrom to the Court of Appeals of the District of Columbia, the determination of the

commission shall be final and conclusive. If such an appeal is taken from the determination of the commission, the record before the commission or such part thereof as the court may order shall be certified by it to the court and shall constitute the record before the court, and the commission's determination shall not be modified or set aside by the court, except for error of law. If any party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may deem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which shall be conclusive, and its recommendations if any for the modification or setting aside of its original determination, with the return of such additional evidence. In the proceedings before such court on appeal from a determination of the commission, the commission shall appear by its counsel or other representative and submit oral or written arguments to support the findings and the determination of the commission. [41 Stat. L. 301.]

**SEC. 109. [Rights of tenant on expiration of term — effect of sale of leased property.]** The right of a tenant to the use or occupancy of any rental property, hotel or apartment, existing at the time this Act takes effect, or thereafter acquired, under any lease or other<sup>1</sup> contract for such use or occupancy or under any extension thereof by operation of law, shall, notwithstanding the expiration of the term fixed by such lease or contract, continue at the option of the tenant subject, however, to any determination or regulation of the commission relevant thereto; and such tenant shall not be evicted or dispossessed so long as he pays the rent and performs the other terms and conditions of the tenancy as fixed by such lease or contract, or in case such lease or contract is modified by any determination or regulation of the commission, then as fixed by such modified lease or contract. All remedies of the owner at law or equity, based on any provision of any such lease or contract to the effect that such lease or contract shall be determined or forfeited if the premises are sold, are hereby suspended so long as this title is in force. Every purchaser shall take conveyance of any rental property, hotel, or apartment subject to the rights of tenants as provided in this title. The rights of the tenant under this title shall be subject to the limitation that the bona fide owner of any rental property, apartment, or hotel shall have the right to possession thereof for actual and bona fide occupancy by himself, or his wife, children, or dependents, or for the purpose of tearing down or razing the same in order immediately to construct new rental property, hotel, or apartment if approved by the commission, upon giving thirty days' notice in writing, served in the manner provided by section 1223 of the Act entitled "An Act to establish a code of laws for the District of Columbia," approved May 3, 1901, as amended, which notice shall contain a full and correct statement of the facts and circumstances upon which the same is based; but in no case shall possession be demanded or obtained by such owner in contravention of the terms of any such lease or contract. If there is a dispute between the owner and the tenant as to the accuracy or sufficiency of

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<sup>1</sup> So in original.

the statement set forth in such notice, as to the good faith of such demand, or as the service of notice, the matters in dispute shall be determined by the commission upon complaint as provided in section 106 of this title. [41 Stat. L. 301.]

**SEC. 110. [Determination of commission as affected by pendency of appeal.]** Pending the final decision on appeal from a determination of the commission, the commission's determination shall be in full force and effect and the appeal shall not operate as a supersedeas or in any manner stay or postpone the enforcement of the determination appealed from. Immediately upon the entry of a final decision on the appeal the commission shall, if necessary, modify its determination in order to make it conform to such decision. The difference, if any, between the amount of rent and charges paid for the period from the date of the filing by the commission of the determination appealed from and the amount that would have been payable for such period under the determination as modified in accordance with the final decision on appeal may be added to or allowed on account of, as the case demands, future rent payments or may be sued for and recovered in an action in the Municipal Court in the District of Columbia. [41 Stat. L. 302.]

**SEC. 111. [Determination of commission fixing reasonable rates — effect — change in ownership or tenancy.]** The determination of the commission in a proceeding begun by complaint or upon its own initiative fixing fair and reasonable rents, charges, service, and other terms and conditions of use or occupancy of any rental property, hotel, or apartment shall constitute the commission's determination of the fairness and reasonableness of such rents, charges, service, terms, or conditions for the rental property, hotel, or apartment affected, and shall remain in full force and effect notwithstanding any change in ownership or tenancy thereof, unless and until the commission modifies or sets aside such determination upon complaint either of the owner or of the tenant. [41 Stat. L. 302.]

**SEC. 112. [Noncompliance with determination of commission — collection of excess rent — penalty.]** If the owner of any rental property, apartment, or hotel collects any rent or charge therefor in excess of the amount fixed in a determination of the commission made and in full force and effect in accordance with the provisions of this title, he shall be liable for and the commission is hereby authorized and directed to commence an action in the Municipal Court in the District of Columbia to recover double the amount of such excess, together with the costs of the proceeding which shall include an attorney's fee of \$50, to be taxed as part of the costs. Out of any sums received on account of such recovery the commission shall pay over to the tenant the amount of the excess so paid by him and the balance shall be paid into the Treasury of the United States to the credit of the District of Columbia: *Provided*, That if the commission finds that such excess was paid by the tenant voluntarily and with knowledge of the commission's determination, the whole amount of such recovery shall be paid into the Treasury of the United States to the credit of the District of Columbia. [41 Stat. L. 302.]

**SEC. 113. [Withdrawal of service from tenant — unsafe or insanitary condition of leased premises — liability of landlord.]** If in any proceeding before

the commission, begun by complaint or on the commission's own initiative, and involving any lease or other contract for the use or occupancy of any rental property, hotel, or apartment the commission finds that at any time after the passage of this Act but during the tenancy the owner has, directly or indirectly, willfully withdrawn from the tenant any service agreed or required by a determination of the commission to be furnished, or has by act, neglect, or omission contrary to such lease or contract or to the law or any ordinance or regulation made in pursuance of law, or of a determination of the commission, exposed the tenant, directly or indirectly, to any unsafe or insanitary condition or imposed upon him any burden, loss, or unusual inconvenience in connection with his use or occupancy of such rental property, hotel, or apartment, the commission shall determine the sum which in its judgment will fairly and reasonably compensate or reimburse the tenant therefor. In any such proceeding involving a lease or other contract, the term specified in which had not expired at the time the proceeding was begun, the commission shall likewise determine the amount or value of any bonus or other consideration in excess of the rental named in such lease or contract received at any time directly or indirectly by the owner in connection with such lease or contract. The tenant may recover any amount so determined by the commission in an action in the Municipal Court of the District of Columbia. [41 Stat. L. 302.]

SEC. 114. [Duty of commission to sue in behalf of tenant — costs.] Whenever under this title a tenant is entitled to bring suit to recover any sum due him under any determination of the commission, the commission shall, upon application by the tenant and without expense to him, commence and prosecute in the municipal court of the District of Columbia an action on behalf of the tenant for the recovery of the amount due, and in such case the court shall include in any judgment rendered in favor of the tenant the costs of the action, including a reasonable attorney's fee, to be fixed by the court. Such costs and attorney's fee when recovered shall be paid into the Treasury of the United States to the credit of the District of Columbia. [41 Stat. L. 302.]

SEC. 115. [Procedure before commission.] The commission shall, by general order, from time to time prescribe the procedure to be followed in all proceedings under its jurisdiction. Such procedure shall be as simple and summary as may be practicable, and the commission and parties appearing before it shall not be bound by technical rules of evidence or of pleading. [41 Stat. L. 302.]

SEC. 116. [Avoidance of provisions of title — penalty.] Any person who with intent to avoid the provisions of this title enters into any agreement or arrangement for the payment of any bonus or other consideration in connection with any lease or other contract for the use or occupancy of any rental property, hotel, or apartment, or who participates in any fictitious sale or other device or arrangement the purpose of which is to grant or obtain the use or occupancy of any rental property, hotel, or apartment without subjecting such use or occupancy to the provisions of this title or to the jurisdiction of the commission shall upon conviction be punished by a fine not exceeding \$1,000 or by imprisonment for not exceeding one year or by both. [41 Stat. L. 303.]

SEC. 117. [Standard forms of leases and contracts — schedule of rates and charges for hotels and apartments.] The commission shall prescribe standard

forms of leases and other contracts for the use or occupancy of any rental property, hotel, or apartment and shall require their use by the owner thereof. Every such lease or contract entered into after the commission has prescribed and promulgated a form for the tenancy provided by such lease or contract shall be deemed to accord with such standard form; and any such lease or contract in any proceeding before the commission or in any court of the United States or of the District of Columbia shall be interpreted, applied, and enforced in the same manner as if it were in the form and contained the stipulations of such standard form.

The owner of an hotel or apartment shall file with the commission plans and other data in such detail as the commission requires, descriptive of the rooms, accommodations and service in connection with such hotel or apartment, and a schedule of rates and charges therefor. The commission shall, after consideration of such plans, schedules, data, or other information, determine and fix a schedule of fair and reasonable rates and charges for such hotels or apartments; and the rates and charges stated in such schedule shall thereafter constitute the fair and reasonable rates and charges for such hotel or apartment. The commission's determination in such case shall be made after such notice and hearing and shall have the same force and effect and be subject to appeal in the same manner as a determination of the commission under section 106 of this title. [41 Stat. L. 303.]

SEC. 118. [Assignment of leases — subletting of leased property — rate of rent.] No tenant shall assign his lease of or sublet any rental property or apartment at a rate in excess of the rate paid by him under his lease without the consent of the commission upon application in a particular case, and in such case the commission shall determine a fair and reasonable rate of rent or charge for such assignment or sublease. [41 Stat. L. 304.]

SEC. 119. [Conflicting laws — repeal or suspension.] The public resolution entitled "Joint resolution to prevent [rent] profiteering in the District of Columbia," approved May 31, 1918, as amended, is hereby repealed, to take effect sixty days after the date of the confirmation by the Senate of the commissioners first nominated by the President under the provisions of this title; but a determination by the commission made within such period of sixty days shall be enforced in accordance with the provisions of this title, notwithstanding the provisions of such public resolution. All laws or parts of laws in conflict with any provisions of this title are hereby suspended so long as this title is in force to the extent that they are in such conflict. [41 Stat. L. 304.]

For resolution of May 31, 1918, affected by the text see 1918 Supp. Fed. Stat. Ann. 151. The resolution was amended by the District of Columbia Appropriation Act of July 11, 1919, sec. 13, which provided as follows: "That the provisions of the joint resolution entitled 'Joint resolution to prevent rent profiteering in the District of Columbia,' approved May 31, 1918, are extended and continued in full force and effect for a period of ninety days following the definite conclusion of a treaty of peace between the United States and the Imperial German Government."

SEC. 120. [Appropriation to carry out provisions of title.] The sum of \$50,000, or so much thereof as may be necessary, is hereby appropriated and made immediately available to carry out the provisions of this title, one-half thereof to be paid out of money in the Treasury of the United States not otherwise appropriated and the other one-half out of the revenues of the District of Columbia, [41 Stat. L. 304.]



SEC. 121. [Invalidity of part of act — effect as to remainder.] If any clause, sentence, paragraph, or part of this title shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof but shall be confined in its operations to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered. [41 Stat. L. 304.]

SEC. 122. [Declaration of reason for act — termination.] It is hereby declared that the provisions of this title are made necessary by emergencies growing out of the war with the Imperial German Government, resulting in rental conditions in the District of Columbia dangerous to the public health and burdensome to public officers and employees whose duties require them to reside within the District and other persons whose activities are essential to the maintenance and comfort of such officers and employees, and thereby embarrassing the Federal Government in the transaction of the public business. It is also declared that this title shall be considered temporary legislation, and that it shall terminate on the expiration of two years from the date of the passage of this Act, unless sooner repealed. [41 Stat. L. 304.]

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## DRUGS

See FOOD AND DRUGS

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## EDUCATION

*Act of Aug. 4, 1919, ch. 31, 49.*

*American Printing House for Blind — Additional Aid, 49.*

*Act of Nov. 4, 1919, ch. 93, 50.*

*Sec. 1. National Library for the Blind — Copies of Publications from American Printing House for Blind, 50.*

### CROSS-REFERENCES

See also *AGRICULTURE; PUBLIC LANDS; VOCATIONAL REHABILITATION; WAR DEPARTMENT AND MILITARY ESTABLISHMENT.*

**An Act Providing additional aid for the American Printing House for the Blind.**

[*Act of August 4, 1919, ch. 31, 41 Stat. L. 272.*]

[**American Printing House for Blind—additional aid.**] That for the purpose of enabling the American Printing House for the Blind more adequately to provide books and apparatus for the education of the blind there is hereby authorized to be appropriated annually to it in addition to the permanent appropriation of \$10,000 made in the Act entitled “An Act to promote the education of the blind,” approved March 3, 1879, as amended, the sum of \$40,000, which sum shall be expended in accordance with the requirements of said Act to promote the education of the blind. [41 Stat. L. 272.]

For Act of March 3, 1879, mentioned in the text, see 3 Fed. Stat. Ann. (2d ed.) 114; 2 Fed. Stat. Ann. (1st ed.) 857.

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[SEC. 1. ] \* \* \* [National Library for the Blind — copies of publications from American Printing House for Blind.] That two copies of each of the publications printed by the American Printing House for the Blind shall be furnished free of charge to the National Library for the Blind located at Seventeen hundred and twenty-nine H Street northwest, Washington, District of Columbia. [41 Stat. L. 332.]

This is from the "First Deficiency Appropriation Act, fiscal year 1920," of Nov. 4, 1919, ch. 93.

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## ELECTIONS

*Act of Oct. 16, 1918, ch. 187, 50.*

*Members of Congress — Corrupt Practices in Election, 50.*

**An Act To prevent corrupt practices in the election of Senators, Representatives, or Delegates in Congress.**

[*Act of Oct. 16, 1918, ch. 187, 40 Stat. L. 1013.*]

[Members of Congress — corrupt practices in election.] That whoever shall promise, offer, or give, or cause to be promised, offered, or given, any money or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value to any person, either to vote or withhold his vote or to vote for or against any candidate, or whoever solicits, accepts, or receives any money or other thing of value in consideration of his vote for or against any candidate for Senator or Representative or Delegate in Congress at any primary or general or special election, shall be fined not more than \$1,000, or imprisoned not more than one year, or both. [40 Stat. L. 1013.]

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## EMPLOYEES

See CIVIL SERVICE; LABOR; PUBLIC OFFICERS AND EMPLOYEES

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## ENEMY

See TRADING WITH THE ENEMY

## ESTIMATES, APPROPRIATIONS AND REPORTS

*Act of March 3, 1919, ch. 99, 51.*

*Sec. 5. Appropriations for Fortifications, etc.— Unexpended Balances, 51.*

*6. Estimates of Appropriations for Fortifications, etc.— Submission to Congress — Annual Basis, 51.*

**An Act Making appropriations for fortifications and other works of defense, for the armament thereof, and for the procurement of heavy ordnance for trial and service, for the fiscal year ending June 30, 1920, and for other purposes.<sup>1</sup>**

*[Act of March 3, 1919, ch. 99, 40 Stat. L. 1305.]*

**SEC. 5. [Appropriations for fortifications, etc.— unexpended balances.]** That appropriations for fortifications and other works of defense, for the armament thereof, and for the procurement of heavy ordnance for trial and service, heretofore made in fortifications or sundry civil appropriation Acts shall not be available for obligation after June 30, 1920, and all unexpended balances of such appropriations which remain upon the books of the Treasury Department on June 30, 1921, shall be covered into the Treasury and carried to the surplus fund. *[40 Stat. L. 1309.]*

**SEC. 6. [Estimates of appropriations for fortifications, etc.— submission to Congress — annual basis.]** That estimates of appropriations for fortifications and other works of defense, for the armament thereof, and for the procurement of heavy ordnance for trial and service shall be submitted to Congress in the Book of Estimates for the fiscal year 1921 and each fiscal year thereafter upon an annual basis. And section 5 of the legislative, executive, and judicial appropriation Act approved June 20, 1874, and section 7 of the sundry civil appropriation Act approved August 24, 1912, so far as they except appropriations for "fortifications" from the operations thereof, are repealed. *[40 Stat. L. 1309.]*

For Act of June 20, 1874, sec. 5, see 3 Fed. Stat. Ann. (2d ed.) 152; 2 Fed. Stat. Ann. (1st ed.) 913.

For Act of Aug. 24, 1912, sec. 7, see 3 Fed. Stat. Ann. (2d ed.) 154; 1914 Supp. Fed. Stat. Ann. 140.

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## EXECUTIVE DEPARTMENTS

*Act of March 1, 1919, ch. 86, 51.*

*Sec. 1. Employees — Detail to Office of President, 51.*

*5. Purchase of Typewriters, 52.*

**[SEC. 1.] \* \* \* [Employees — detail to office of President.]** That employees of the executive departments and other establishments of the executive branch of the Government may be detailed from time to time to the office of the President of the United States for such temporary assistance as may be necessary. *[40 Stat. L. 1222.]*

This and the following section 5 are from the Legislative, Executive and Judicial Appropriation Act of March 1, 1919, ch. 86.

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<sup>1</sup> The sections set out here are 5 and 6. The other sections are of no general or permanent value and are therefore omitted.

**SEC. 5. [Purchase of typewriters.]** That no part of any money appropriated by this or any other Act shall be used during the fiscal year 1920 for the purchase of any typewriting machine at a price in excess of the lowest price paid by the Government of the United States for the same make and substantially the same model of machine during the fiscal year 1918; such price shall include the value of any typewriting machine or machines given in exchange, but shall not apply to special prices granted on typewriting machines used in schools of the District of Columbia or of the Indian Service, the lowest of which special prices paid for typewriting machines shall not be exceeded in future purchases for such schools: *Provided*, That in construing this section the Commissioner of Patents shall advise the Comptroller of the Treasury as to whether the changes in any typewriter are of such structural character as to constitute a new machine not within the limitations of this section. [40 Stat. L. 1266.]

See the note to the preceding paragraph of the text.

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## FEDERAL RESERVE ACT

See CORPORATIONS; NATIONAL BANKS

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## FILMS

See AGRICULTURE

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## FISH AND FISHERIES

*Act of Nov. 4, 1919, ch. 93, 52.*

*Sec. 1. Bureau of Fisheries — Commutation of Rations, 52.*

[SEC. 1.] \* \* \* [Bureau of Fisheries — commutation of rations.] That commutation of rations not to exceed \$1 per day may be paid to officers and crews of vessels of the Bureau of Fisheries during the fiscal year 1920 under regulations prescribed by the Secretary of Commerce. [41 Stat. L. 339.]

This is from the "First Deficiency Appropriation Act, fiscal year 1920," of Nov. 4, 1919, ch. 93.

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## FOOD AND DRUGS

*Act of Oct. 1, 1918, ch. 178, 52.*

*Medical Officers — Detail — Administration of Food and Drugs Act, 52.*

*Act of July 24, 1919, ch. 26, 53.*

*Misbranding — "Package" Defined, 53.*

### CROSS-REFERENCES

See also *AGRICULTURE; FOOD AND FUEL; INTERNAL REVENUE*

\* \* \* [Medical officers — detail — administration of Food and Drugs Act.] Hereafter the Secretary of the Treasury may detail medical officers of the Public Health Service to the Department of Agriculture for cooperative

assistance in the administration of the food and drugs Act, approved June thirtieth, nineteen hundred and six, and amended August twenty-third, nineteen hundred and twelve, and the compensation and expenses of the officers so detailed may be paid from the applicable appropriations made herein for enforcement of said Act. [40 Stat. L. 992.]

This is from the Agricultural Appropriation Act of Oct. 1, 1918, ch. 178.

For Act of June 30, 1906, as amended, see 3 Fed. Stat. Ann. (2d ed.) 358; 1909 Supp. Fed. Stat. Ann. 136.

\* \* \* [Misbranding—"package" defined.] That the word "package" where it occurs the second and last time in the act entitled "An act to amend section 8 of an act entitled, 'An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes,' " approved March 3, 1913, shall include and shall be construed to include wrapped meats inclosed in papers or other materials as prepared by the manufacturers thereof for sale." [41 Stat. L. 271.]

This is from the Agricultural Appropriation Act of July 24, 1919, ch. 26.

For Act of March 3, 1913, mentioned in the text, see 3 Fed. Stat. Ann. (2d ed.) 380; 1914 Supp. Fed. Stat. Ann. (1st ed.) 146.

## FOOD AND FUEL

Act of Feb. 25, 1919, ch. 38, 54.

*Relief of European Populations — Furnishing of Foodstuffs and Other Urgent Supplies, 54.*

Act of March 4, 1919, ch. 125, 54.

*Sec. 1. Wheat — Price Guaranties — Authority of President to Carry Out, 54.*

*2. Authority of President How Exercised, 55.*

*3. Purchase of Wheat by President — Transportation and Storage, 55.*

*4. Unjust Market Manipulations, etc. — Regulations — Open Market 55.*

*5. Licenses to Persons in Business Affecting Wheat — Regulations — Unfair Practices — Revocation of Licenses, 56.*

*6. Imports and Exports — Regulations — Preference Given to Ports of One State over Those of Another — Additional Customs Duty, 57.*

*7. False Statements or Representations, 58.*

*8. Appropriation — Receipts and Disbursements — Revolving Fund, 58.*

*9. Report to Congress — Contents, 59.*

*10. Construction of Act, 59.*

*11. Termination of Act — Enforcement of Rights and Liabilities Arising Before Termination, 59.*

Act of Oct. 22, 1919, ch. 80, 60.

*Sec. 1. Food, Fuel, etc. — Encouraging Production, Conserving Supply and Controlling Distribution — Authority of President, 60.*

*2. Necessaries — Destroying, Restricting Supply, or Monopolizing — Penalty — Collective Bargaining, 60.*

*3. Certain Sections of Original Act Repealed, 61.*

Act of Dec. 31, 1919, ch. —, 61.

*United States Sugar Equalization Board — Continuance — Distribution of Sugar — Act of Aug. 10, 1917, Amended, 61.*

**An Act Providing for the relief of such populations in Europe, and countries contiguous thereto, outside of Germany, German-Austria, Hungary, Bulgaria, and Turkey, as may be determined upon by the President as necessary.**

*[Act of Feb. 25, 1919, ch. 38, 40 Stat. L. 1161.]*

**[Relief of European populations — furnishing of foodstuffs and other urgent supplies.]** That for the participation by the Government of the United States in the furnishing of foodstuffs and other urgent supplies, and for the transportation, distribution, and administration thereof to such populations in Europe, and countries contiguous thereto, outside of Germany, German-Austria, Hungary, Bulgaria, and Turkey: *Provided, however,* That Armenians, Syrians, Greeks, and other Christian and Jewish populations of Asia Minor, now or formerly subjects of Turkey may be included within the populations to receive relief under this Act, as may be determined upon by the President from time to time as necessary, and for each and every purpose connected therewith, in the discretion of the President, there is appropriated out of any money in the Treasury not otherwise appropriated, \$100,000,000, which may be used as a revolving fund until June thirtieth, nineteen hundred and nineteen, and which shall be audited in the same manner as other expenditures of the Government: *Provided,* That expenditures hereunder shall be reimbursed so far as possible by the Governments or subdivisions thereof or the peoples to whom relief is furnished: *Provided further,* That a report of the receipts, expenditures and an itemized statement of such receipts and expenditures made under this appropriation shall be submitted to Congress not later than the first day of the next regular session: *And provided further,* That so far as said fund shall be expended for the purchase of wheat to be donated preference shall be given to grain grown in the United States. *[40 Stat. L. 1161.]*

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**An Act To enable the President to carry out the price guaranties made to producers of wheat of the crops of nineteen hundred and eighteen and nineteen hundred and nineteen and to protect the United States against undue enhancement of its liabilities thereunder.**

*[Act of March 4, 1919, ch. 125, 40 Stat. L. 1348.]*

**[SEC. 1.] [Wheat — price guaranties — authority of President to carry out.]** That by reason of the emergency growing out of the war with Germany and in order to carry out the guaranties made to producers of wheat of the crops of nineteen hundred and eighteen and nineteen hundred and nineteen by the two proclamations of the President of the United States dated, respectively, the twenty-first day of February, nineteen hundred and eighteen, and the second day of September, nineteen hundred and eighteen, pursuant to section fourteen of "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," approved August tenth, nineteen hundred and seventeen, and to protect the United States against undue enhancement of its liabilities under said guaranties, the instrumentalities, means, methods, power, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred, and prescribed. *[40 Stat. L. 1348.]*

For Act of Aug. 10, 1917, sec. 14, see 1918 Supp. Fed. Stat. Ann. 187.

**SEC. 2. [Authority of President how exercised.]** That, in carrying out the provisions of this Act, the President is authorized to make such regulations and issue such orders as may be necessary, to enter into any voluntary arrangements or agreements, to use any existing agency or agencies, to accept the services of any person without compensation, to cooperate with any agency or person, to utilize any department or agency of the Government, including the Food Administration Grain Corporation, and to coordinate their activities so as to avoid any preventable loss or duplication of effort or funds. [40 Stat. L. 1348.]

**SEC. 3. [Purchase of wheat by President—transportation and storage.]** That whenever the President shall find it essential, in order to carry out the guaranties aforesaid or to protect the United States against undue enhancement of its liabilities thereunder, he is authorized to buy, or contract for the purchase of, wheat of said crops of nineteen hundred and eighteen and nineteen hundred and nineteen at the places designated for the delivery of the same by the President's proclamations or such other places as he may designate, for cash at the said guaranteed prices and he is authorized thereafter to buy or contract for the purchase of, for cash, or sell, consign, or contract for the sale of, for cash or on credit, wheat of the said crops of nineteen hundred and eighteen and nineteen hundred and nineteen and flour produced therefrom at the said guaranteed prices or at such other prices and on such terms or conditions as may be necessary to carry out the purposes of this Act and to enable the people of the United States to purchase wheat products at a reasonable price; to make reasonable compensation for handling, transportation, insurance, and other charges with respect to wheat and wheat flour of said crops, and for storage thereof in elevators, on farms, and elsewhere; to take such steps, to make such arrangements, and to adopt such methods as may be necessary to maintain and assure an adequate and continuous flow of wheat and wheat flour in the channels of trade, including the protection or indemnification of millers, wholesalers, jobbers, bakers, and retail merchants who purchase in carload lots against actual loss by them on account of abnormal fluctuations in the price of wheat and wheat flour of said crops due to the action of the Government; to borrow such sums of money as may be secured by the property or other assets acquired under this Act; to lease and utilize storage facilities for, and to store, such wheat and wheat flour; and to requisition storage facilities therefor. He shall ascertain and pay a just compensation for facilities so requisitioned. If the compensation so ascertained by the President be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of such amount and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation for such facilities; and jurisdiction is hereby conferred on the United States district courts to hear and determine all such controversies. [40 Stat. L. 1348.]

**SEC. 4. [Unjust market manipulations, etc.—regulations—open market.]** That whenever the President shall find that operations, practices, or transactions, at, on, in, or under the rules of any exchange, board of trade, or similar institution or place of business cause or are likely to cause unjust market manipulation, or unfair and misleading market quotations, or undue depression or fluctuation of the prices of, or injurious speculation in, wheat or wheat flour, hereafter in this section called evil practices, calculated or likely to enhance unduly the

liabilities of the United States under the said guaranties, he is authorized to prescribe such regulations governing, or may either wholly or partly prohibit, operations, practices, and transactions in wheat or wheat flour at, on, in, or under the rules of any exchange, board of trade, or similar institution or place of business as he may find essential in order to prevent, correct, or remove such evil practices. Such regulations may require all persons coming within their provisions to keep such records and statements of account, and may require such persons to make such returns, verified under oath or otherwise, as will fully and correctly disclose all transactions in wheat or wheat flour at, in, on, or under the rules of any such exchange, board of trade, or similar institution or place of business, including the making, execution, settlement, and fulfillment thereof.

He may also require all persons acting in the capacity of a clearing house, clearing association, or similar institution, for the purpose of clearing, settling, or adjusting transactions in wheat or wheat flour at, in, on, or under the rules of any such exchange, board of trade, or similar institution or place of business, to keep such records and to make such returns as will fully and correctly disclose all facts in their possession relating to such transactions, and he may appoint agents to conduct all investigations necessary to enforce the provisions of this section and all regulations made by him in pursuance thereof, and may fix and pay the compensation of such agents. Any person who intentionally and willfully violates any regulation made pursuant to this section, or who knowingly engages in any operation, practice, or transaction prohibited pursuant to this section, or who intentionally and willfully aids or abets in such violation, or any such prohibited operation, practice, or transaction, shall be deemed guilty of a misdemeanor, and upon conviction thereof, be punished by a fine not exceeding \$1,000. The President shall take seasonable steps to provide for and to permit the establishment of a free and open market for the purchase, sale, and handling of wheat and wheat products upon the expiration of this Act. [40 Stat. L. 1349.]

**SEC. 5. [Licenses to persons in business affecting wheat — regulations — unfair practices — revocation of licenses.]** That, from time to time, whenever the President shall find it essential to license any business of importation, exportation, manufacture, storage, or distribution of wheat or wheat flour in order to carry into effect any of the purposes of this Act, and shall publicly so announce: *Provided*, That as between the two articles mentioned preference shall be given to the exportation of flour, except when the public interest would, in the judgment of the President, be injuriously affected thereby, no person shall, after a date fixed in the announcement, engage in or carry on any such business specified in the announcement unless he shall secure and hold a license issued pursuant to this section. The regulations prescribed pursuant to this Act may include requirements with respect to the issuance of licenses, systems of accounts, and the auditing of accounts to be kept by licensees, submission of reports by them, with or without oath or affirmation, and the entry and inspection by the President's duly authorized agents of the places of business of licensees. It shall be unlawful for any licensee to engage in any unfairly discriminatory or deceptive practice or device, or to make any unjust or unreasonable rate, commission, or charge, or to exact an unreasonable profit or price, in handling or dealing in or with wheat, wheat flour, bran, and shorts. Whenever the President shall find that any practice, device, rate, commission, charge, profit, or price of any licensee is unfairly discriminatory, deceptive, unjust, or unreason-



able, and shall order such licensee, within a reasonable time fixed in the order, to discontinue the same, unless such order, which shall recite the facts found, is revoked or suspended, such licensee shall, within the time prescribed in the order, discontinue such unfairly discriminatory, deceptive, unjust, or unreasonable practice, device, rate, commission, charge, profit, or price. The President may, in lieu of any such unfairly discriminatory, deceptive, unjust, or unreasonable practice, device, rate, commission, charge, profit, or price, find what is a fair, just, or reasonable practice, device, rate, commission, charge, profit, or price, and in any proceeding brought in any court such order of the President shall be *prima facie* evidence. Any person who, without a license issued pursuant to this section, or whose license shall have been suspended or revoked after opportunity to be heard has been afforded him, intentionally and knowingly engages in or carries on any business for which a license is required under this section, or intentionally and willfully fails or refuses to discontinue any unfairly discriminatory, deceptive, unjust, or unreasonable practice, device, rate, commission, charge, profit, or price, in accordance with the requirement of an order issued under this section, or intentionally and willfully violates any regulation prescribed under this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof be punished by a fine not exceeding \$1,000: *Provided*, That this section shall not apply to any farmer or cooperative association of farmers or other person with respect to the products of any farm or other land owned, leased, or cultivated by him, nor to any common carrier. [40 Stat. L. 1350.]

**SEC. 6. [Imports and exports — regulations — preference given to ports of one State over those of another — additional customs duty.]** That whenever the President shall find it essential in carrying out the guaranties aforesaid, or to protect the United States against undue enhancement of its liabilities thereunder, and shall make proclamation thereof, it shall be unlawful to import into the United States from any country named in such proclamation, or to export from or ship from or take out of the United States to any country named in such proclamation, wheat, semolina, or wheat flour, except at such time or times, and under such regulations or orders, and subject to such limitations and exceptions as the President shall prescribe, until otherwise ordered by the President or by Congress: *Provided*, That no preference shall be given to the ports of one State over those of another. Any person who shall import, export, ship, or take out of the United States, or attempt to import, export, ship, or take out of the United States, any wheat, semolina, or wheat flour in violation of this section or of any regulation or order made hereunder, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be punished by a fine not exceeding \$1,000: *Provided further*, That when the President finds that the importation into the United States of any wheat, semolina, or wheat flour produced outside of the United States materially enhances or is likely materially to enhance the liabilities of the United States under guaranties of prices therefor made pursuant to law, and ascertains what rate of duty, added to the then existing rate of duty on wheat and to the value of wheat, semolina, or wheat flour at the time of importation, would be sufficient to bring the price thereof at which imported up to the price fixed or prevailing under the direction of the President under or pursuant to this Act, he shall proclaim such facts, and thereafter there shall be levied, collected, and paid upon wheat, semolina, or wheat flour when imported in addition to the then existing rate of duty the rate of duty so ascertained; but in no case shall any such rate of duty be fixed at an amount which will effect a reduction of the rate of duty upon

wheat, semolina, or wheat flour under any then existing tariff law of the United States. \* \* \* [40 Stat. L. 1350.]

This section also contained at the end thereof an amendment to the Cotton Futures Act, which amendment is set out, *infra*, p. 195.

**Presidential Proclamations.**—On June 24, 1919, the President, by virtue of the first sentence of this section, issued a proclamation that it was essential in carrying out the guaranties aforesaid and to protect the United States against undue enhancement of its liabilities thereunder, that wheat and wheat flour on and after July 1, 1919, should not be imported into the United States, or exported from, or shipped from, or taken out of the United States, except at such time or times and under such regulations or orders and subject to such limitations and exceptions as should be prescribed until otherwise ordered by the President of the United States or by Congress. But on November 21, 1919, another proclamation was issued annulling the earlier proclamation. After referring to the earlier proclamation it continued as follows: "And whereas conditions relating to the necessity of maintaining an import and export embargo on wheat and wheat flour for the purposes above stated, have changed since the promulgation of the aforesaid Proclamation of June 24, 1919. Now therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the powers conferred upon me by said Act of Congress of March 4, 1919, and of all other Acts giving me power in the premises, do hereby find and determine and by this Proclamation do announce that it is not now essential in carrying out the guaranties aforesaid, or to protect the United States against undue enhancement of its liabilities thereunder, to continue the prohibitions and limitations on the importation and exportation of wheat and wheat flour into and from the United States, as prescribed in the above mentioned Proclamation of June 24, 1919, and I order and direct that such prohibitions and limitations on the importation and exportation of wheat and wheat flour be discontinued and cancelled, effective December 15, 1919."

**SEC. 7. [False statements or representations.]** That any person who intentionally and knowingly makes any false statement or representation to any officer, agent, or employee of the United States engaged in the performance of any duty under this Act, or falsely represents to any of said persons that the wheat he offers for sale was grown as a part of the nineteen hundred and eighteen or nineteen hundred and nineteen crops for the purpose of securing any of the benefits of the aforesaid guaranties, or any person who willfully assaults, resists, impedes, or interferes with any officer, agent, or employee of the United States in the execution of any duty authorized to be performed by or pursuant to this Act, or any person who intentionally and knowingly violates any regulation issued pursuant to this Act, except as otherwise made punishable in this Act, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding \$1,000. [40 Stat. L. 1352.]

**SEC. 8. [Appropriation — receipts and disbursements — revolving fund.]** That for carrying out the aforesaid guaranties and otherwise for the purposes of this Act, there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be available during the time this Act is in effect, the sum of \$1,000,000,000, of which not to exceed \$3,000,000 may be used for such administrative expenses, including the payment of such rent, the expense, including postage, of such printing and publications, the purchase of such material and equipment, and the employment of such persons and means, in the District of Columbia and elsewhere, as the President may deem essential. Any moneys received by the United States from or in connection with the disposal by the United States of wheat or wheat flour under this Act may, in the discretion of the President, be used as a revolving fund for further carrying out the purposes of this Act. Any balance of such moneys not used as part of such revolving fund shall be covered into the Treasury as miscellaneous receipts: *Provided*, That no part of this appropriation shall be used to pay rent in the District of Columbia. [40 Stat. L. 1352.]

**SEC. 9. [Report to Congress — contents.]** That an itemized statement, covering all receipts and disbursements under this Act, shall be filed with the Secretary of the Senate and the Clerk of the House of Representatives on or before the twenty-fifth day of each month after the taking effect of this Act, covering the business of the preceding month, and such statement shall be subject to public inspection. Not later than the expiration of sixty days after this Act shall cease to be in effect the President shall cause a detailed report to be made to the Congress of all proceedings had under this Act. Such report shall, in addition to other matters, contain an account of all persons appointed or employed, the salary or compensation paid or allowed each, the aggregate amount of the different kinds of property purchased or requisitioned, the use and disposition made of such property, and a statement of all receipts and expenditures, together with a statement showing the general character and estimated value of all property then on hand, and the aggregate amount and character of all claims against the United States growing out of this Act. [40 Stat. L. 1353.]

**SEC. 10. [Construction of Act.]** That words used in this Act shall be construed to import the plural or singular, as the case demands; the word "person," wherever used in this Act, shall include individuals, partnerships, associations, and corporations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any official, agent, or other person acting for or employed by any individual, partnership, association, or corporation, within the scope of his employment or office, shall in every case also be deemed the act, omission, or failure of such individual, partnership, association, or corporation, as well as that of the person. [40 Stat. L. 1353.]

**SEC. 11. [Termination of Act — enforcement of rights and liabilities arising before termination.]** That the provisions of this Act shall cease to be in effect whenever the President shall find that the emergency growing out of the war with Germany has passed and that the further execution of the provisions of this Act is no longer necessary for its purposes, the date of which termination shall be ascertained and proclaimed by the President; but the date when this Act shall cease to be in effect shall not be later than the first day of June, nineteen hundred and twenty: *Provided*, That after June first, nineteen hundred and twenty, neither the President nor any agency acting for him shall purchase or contract for the purchase of wheat or flour. The termination of this Act shall not affect any act done, or any right or obligation accruing or accrued, or any suit or proceeding had or commenced in any civil case before the said termination pursuant to this Act; but all rights and liabilities under this Act arising before its termination shall continue and may be enforced in the same manner as if the Act had not terminated. Any offense committed and all penalties or liabilities incurred prior to such termination may be prosecuted or punished in the same manner and with the same effect as if this Act had not been terminated. [40 Stat. L. 1353.]

**An Act To amend an Act entitled “An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,” approved August 10, 1917, and to regulate rents in the District of Columbia.**

[*Act of Oct. 22, 1919, ch. 80, 41 Stat. L. 297.*]

That this Act may be cited as “The Food Control and the District of Columbia Rents Act.”<sup>1</sup>

#### TITLE I.—FOOD CONTROL ACT AMENDMENTS.

[SEC. 1.] **[Food, fuel, etc.—encouraging production, conserving supply and controlling distribution—authority of President.]** That section one of the Act entitled “An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,” approved August 10, 1917, is hereby amended to read as follows:

“That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, wearing apparel, containers primarily designed or intended for containing foods, feeds, or fertilizers; fuel, including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for the actual production of foods, feeds, and fuel, hereafter in this Act called necessities; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulation, and private controls affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessities during the war. For such purposes the instrumentalities, means, methods, powers, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred, and prescribed. The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this Act.” [41 Stat. L. 297.]

For section 1 of the Act of Aug. 10, 1917, here amended, see 1918 Supp. Fed. Stat. Ann. 181.

SEC. 2. **[Necessaries—destroying, restricting supply, or monopolizing—penalty—collective bargaining.]** That section 4 of such Act of August 10, 1917, is hereby amended to read as follows:

“That it is hereby made unlawful for any person willfully to destroy any necessities for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessities in or in connection with their production, manufacture, or distribution; to hoard, as defined in section 6 of this Act, any necessities; to monopolize or attempt to monopolize, either locally or generally, any necessities; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities; to conspire, combine, agree, or arrange with any other person, (a) to limit the facilities for transporting, producing,

<sup>1</sup> The part of this Act which relates to “District of Columbia Rents” will be found under the title DISTRICT OF COLUMBIA.

harvesting, manufacturing, supplying, storing, or dealing in any necessities; (b) to restrict the supply of any necessities; (c) to restrict distribution of any necessities; (d) to prevent, limit, or lessen the manufacture or production of any necessities in order to enhance the price thereof; or (e) to exact excessive prices for any necessities, or to aid or abet the doing of any act made unlawful by this section. Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding \$5,000 or be imprisoned for not more than two years, or both: *Provided*, That this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him: *Provided further*, That nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any cooperative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them." [41 Stat. L. 298.]

For section 4 here amended, see 1918 Supp. Fed. Stat. Ann. 183.

**SEC. 3. [Certain sections of original act repealed.]** That sections 8 and 9 of the Act entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," approved August 10, 1917, be, and the same are hereby repealed: *Provided*, That any offense committed in violation of said sections 8 and 9, prior to the passage of this Act, may be prosecuted and the penalties prescribed therein enforced in the same manner and with the same effect as if this Act had not been passed. [41 Stat. L. 298.]

For sections 8, 9, here repealed, see 1918 Supp. Fed. Stat. Ann. 185.

### **An Act To provide for the national welfare by continuing the United States Sugar Equalization Board until December 31, 1920, and for other purposes.**

[Act of Dec. 31, 1919, ch. —, 41 Stat. L. —.]

**[United States Sugar Equalization Board—continuance—distribution of sugar—Act of Aug. 10, 1917, amended.]** That the President is authorized to continue during the year ending December 31, 1920, the United States Sugar Equalization Board (Incorporated), a corporation organized under the laws of the State of Delaware, and to vote or use the stock in such corporation held by him for the benefit of the United States, or otherwise exercise his control over the corporation and its directors, in such a manner as to authorize and require them to adopt and carry out until December 31, 1920, plans and methods of securing, if found necessary for the public good, an adequate supply and an equitable distribution of sugar at a fair and reasonable price to the people of the United States. Sections 5 and 10 of the Act entitled "An Act to further provide for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," approved August 10, 1917, as far as the same relates to raw or refined sugar, syrups, or molasses, are hereby continued in full force and effect until December 31, 1920, notwithstanding the provisions of section 24 of said Act: *Provided*, That the provisions of this Act shall expire as to the domestic product June 30, 1920: *And provided further*, That the zone system of sale and distribution of sugars heretofore established by the said United States Sugar Equalization Board shall be

abolished and shall not be reestablished or maintained, and that sugars shall be permitted to be sold and to circulate freely in every portion of the United States. The termination of this Act shall not affect any act done, or any right or obligation accruing or accrued, or any suit or proceeding had or commenced in any civil case before the said termination pursuant to this Act; but all rights and liabilities under this Act arising before its termination shall continue and may be enforced in the same manner as if the Act had not terminated. Any offense committed and all penalties, forfeitures, or liabilities incurred prior to such termination may be prosecuted or punished in the same manner and with the same effect as if this Act had not been terminated. [41 Stat. L. —.]

For Act of Aug. 10, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 181.

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## FOREST RESERVES

See TIMBER LANDS AND FOREST RESERVES

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## GAME ANIMALS AND BIRDS

*Act of Dec. 18, 1919, ch. —, 62.*

*Sec. 1. District of Columbia — Sale, Purchase, etc., of Certain Wild Birds — Prohibition, 62.*

*2. License to Take or Kill Game Birds — Scientific Purposes — Penalties for Violating Provisions of Act, 62.*

*3. Sale of Certain Birds for Propagating Purposes, 63.*

*4. Conflicting Acts — Repeal, 63.*

**An Act To prohibit the purchase, sale, or possession for the purpose of sale of certain wild birds in the District of Columbia.**

[*Act of Dec. 18, 1919, ch. —, 41 Stat. L. —.*]

[**SEC. 1.**] [**District of Columbia — sale, purchase, etc., of certain wild birds — prohibition.**] That it shall be unlawful, within the District of Columbia, for any person at any time to buy, sell, or expose for sale, or to have in possession for the purpose of selling, any heath hen, sage hen, any kind of quail, bob white, grouse, partridge, ptarmigan, prairie chicken, pheasant, wild turkey, Hungarian partridge, English, ring-necked, Mongolian or Chinese pheasant, or marsh blackbird. [41 Stat. L. —.]

**SEC. 2.** [**License to take or kill game birds — scientific purposes — penalties for violating provisions of Act.**] That nothing herein contained shall prevent the right of any person to take or kill any game birds herein defined when the same shall be so taken or killed by virtue of the authority of a license duly issued by the proper authorities of said District of Columbia for scientific purposes.

That any person who shall violate any of the provisions of this Act shall be fined not more than \$100, or be imprisoned for not more than one month, or both so fined and imprisoned: *Provided*, That each bird mentioned in this

Act so had in possession, bought, sold, exposed for sale, or had in possession for the purpose of sale shall constitute a separate offense. [41 Stat. L. —.]

SEC. 3. [Sale of certain birds for propagating purposes.] That nothing in this Act shall prevent the sale at any time of Hungarian partridges, English, ring-necked, Mongolian or Chinese pheasants, when the same shall have been raised in captivity, or the sale of birds mentioned in this Act alive, for propagating purposes, under such regulations and requirements as shall be prescribed by the Commissioners of the District of Columbia. [41 Stat. L. —.]

SEC. 4. [Conflicting Acts — repeal.] That all Acts or parts of Acts in conflict herewith are hereby repealed. [41 Stat. L. —.]

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## GUANO ISLANDS

**Presidential Proclamation.**—On February 25, 1919, the President by virtue of this section issued a proclamation as follows:

"Whereas, the Congress of the United States has provided by act of August 18, 1856 (11 U. S. Statutes at Large, page 119; Secs. 5570 to 5578 U. S. Revised Statutes), that whenever any citizen of the United States, after the passage of the act, discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government and shall take peaceable possession thereof and occupy the same, the island rock or key may, at the discretion of the President of the United States, be considered as appertaining to the United States.

"And whereas, pursuant to the foregoing act of Congress, Serrana and Quita Sueño Banks in the western part of the Caribbean Sea are now under the sole and exclusive jurisdiction of the United States and out of the jurisdiction of any other government.

"Now, therefore, I, Woodrow Wilson, President of the United States, by virtue of the power in me vested, do hereby declare, proclaim, and make known that the southwest cay of Serrana Banks and the north, or other suitable portion of Quita Sueño Banks, including any small detached cays surrounding either of these banks, which the Department of Commerce may desire, be and the same are reserved for lighthouse purposes, such reservations being deemed necessary in the public interests, subject to such legislative action as the Congress of the United States may take with respect thereto."

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## HAWAII

See POSTAL SERVICE

## HEALTH AND QUARANTINE

*Res. of Oct. 1, 1918, No. 42, ch. 179, 64.*

*Sec. 1. "Spanish Influenza"—Aid in Combating, 64.*

*2. Facilities Available for Combating, 64.*

*Res. of Oct. 27, 1918, No. 45, ch. 196, 64.*

*Public Health Service — Creation of Reserve — Qualifications, Rank and Allowance of Officers, 64.*

*Act of July 19, 1919, ch. 24, 65.*

*Sec. 1. Officers of Public Health Service — Allotments From Pay, 65.*

### CROSS-REFERENCES

See also *ANIMALS; FOOD AND DRUGS; HOSPITALS AND ASYLUMS.*

### **Joint Resolution To aid in combating "Spanish influenza" and other communicable diseases.**

*[Res. of Oct. 1, 1918, No. 42, ch. 179, 40 Stat. L. 1008.]*

[SEC. 1.] [**"Spanish influenza" — aid in combating.**] That to enable the Public Health Service to combat and suppress "Spanish influenza" and other communicable diseases by aiding State and local boards of health, or otherwise, including pay and allowances of medical and sanitary personnel, medical and hospital supplies, printing, clerical services, and rent in the District of Columbia and elsewhere, transportation, freight, and such other expenses as may be necessary, there is appropriated, out of any money in the Treasury not otherwise appropriated, \$1,000,000, to be available until June thirtieth, nineteen hundred and nineteen. *[40 Stat. L. 1008.]*

SEC. 2. [**Facilities available for combating.**] That the Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury are authorized and directed, respectively, to utilize jointly the personnel and facilities of the Medical Department of the Army, the Medical Department of the Navy, and the Public Health Service, so far as possible, in aiding to combat and suppress the said diseases. *[40 Stat. L. 1008.]*

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### **Joint Resolution To establish a reserve of the Public Health Service.**

*[Res. of Oct. 27, 1918, No. 45, ch. 196, 40 Stat. L. 1017.]*

[**Public Health Service — creation of reserve — qualifications, rank and allowance of officers.**] That for the purpose of securing a reserve for duty in the Public Health Service in time of national emergency there shall be organized, under the direction of the Secretary of the Treasury, under such rules and regulations as the President shall prescribe, a reserve of the Public Health Service. The President alone shall be authorized to appoint and commission as officers in the said reserve such citizens as, upon examination prescribed by the President, shall be found physically, mentally, and morally qualified to hold such commissions, and said commissions shall be in force for a period of five years, unless sooner terminated in the discretion of the President, but commission in



said reserve shall not exempt the holder from military or naval service: *Provided*, That the officers commissioned under this Act, none of whom shall have rank above that of assistant surgeon general, shall be distributed in the several grades in the same proportion as now obtains among the commissioned medical officers of the United States Public Health Service and shall at all times be subject to call to active duty by the Surgeon General and when on such active duty shall receive the same pay and allowances as are now provided by law and regulation for the commissioned medical officers in the said regular commissioned medical corps. [40 Stat. L. 1017.]

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[SEC. 1.] \* \* \* [Officers of Public Health Service — allotments from pay.] The Secretary of the Treasury is authorized to permit officers of the Public Health Service to make allotments from their pay under such regulations as he may prescribe. [41 Stat. L. 174.]

This is from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24. It also appeared in the Sundry Civil Appropriation Act of July 1, 1918.

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## HIGHWAYS

See POSTAL SERVICE

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## HOLIDAYS

See PUBLIC OFFICERS AND EMPLOYEES

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## HOMESTEADS

See PUBLIC LANDS

## HOSPITALS AND ASYLUMS

*Act of Nov. 4, 1918, ch. 201, 66.*

*Sec. 1. Hospital Facilities for Soldiers and Sailors — Authority of President to Acquire, 66.*

*Act of Nov. 7, 1918, ch. 208, 67.*

*Sec. 1. National Home for Disabled Volunteer Soldiers — Southern Branch — Temporary Transfer to Government, 67.*

*2. Period of Control, 67.*

*3. Appropriations for What Purposes Available, 67.*

*Act of March 3, 1919, ch. 98, 67.*

*Sec. 1. Soldiers, Sailors, Marines, Nurses, etc. — Additional Hospital and Sanatorium Facilities, 67.*

*2. Properties and Equipment Transferred for Hospital or Sanatoria or Other Uses, 68.*

*3. Other Properties and Equipment Transferred for Use of Public Health Service, 68.*

*4. Battle Mountain Sanatorium — National Home for Disabled Volunteer Soldiers, 68.*

*5. Contracts with Existing Hospitals or Sanatoriums — Immediate Use, 68.*

*6. Hospital Facilities at Corpus Christi, Texas — Emergency Fund Created for Hospital Purposes, 69.*

*7. Appropriations for Specific Hospital Projects, 69.*

*8. Construction Work — Authority of Secretary of Treasury as to Contracts, 70.*

*9. Appropriations for Carrying Out Purposes of Act, 70.*

*10. Technical and Clerical Services — Employment — Traveling Expenses — Printing — Supervision of Work, 70.*

*11. Additional Appropriation Out of Unappropriated Moneys, 71.*

*Act of July 19, 1919, ch. 24, 71.*

*Sec. 1. Marine Hospitals — Admission of Persons for Study, 71.*

[SEC. 1.] \* \* \* [Hospital facilities for soldiers and sailors — authority of President to acquire.] The President is authorized, through the Secretary of War, during the existing emergency, from time to time, to requisition or otherwise take over for the United States any lands, including the buildings thereon and their equipment, or any temporary use thereof, required for hospital facilities. He shall ascertain and pay, from the proper appropriation, a just compensation therefor. If the compensation so ascertained be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined, and shall be entitled to sue the United States in the United States district court for the judicial district where the property is situated to recover such further sum as, added to the seventy-five per centum, will make up such amount as will be just compensation: *Provided*, That hospital facilities shall be so situated as to provide for the care of patients as near the place from which they entered the Army or Navy as practicable. and that the facilities shall be in every case in keeping with the number of men in the service from the different States: *Provided further*, That property shall not be taken over under the foregoing power at an aggregate cost in excess of \$15,000,000. [40 Stat. L. 1029.]

This is from the "First Deficiency Appropriation Act, 1919," of Nov. 4, 1918, ch. 201.

**An Act Transferring jurisdiction and control for the period of the war over the Southern Branch of the National Home for Disabled Volunteer Soldiers from the board of managers of the National Home for Disabled Volunteer Soldiers to the Secretary of War for use for Army hospital purposes.**

[*Act of Nov. 7, 1918, ch. 208, 40 Stat. L. 1042.*]

[SEC. 1.] **[National Home for Disabled Volunteer Soldiers — Southern Branch — temporary transfer to government.]** That jurisdiction and control over the Southern Branch of the National Home for Disabled Volunteer Soldiers, located at Hampton, Virginia, be, and the same hereby is, transferred for the period of the war from the Board of Managers of the National Home for Disabled Volunteer Soldiers to the Secretary of War for use by the Medical Department of the Army for hospital purposes. [40 Stat. L. 1042.]

SEC. 2. **[Period of control.]** That upon the close of the war or as soon thereafter as may be practicable, the Secretary of War shall cause said home to be vacated by the Medical Department of the Army, and thereupon jurisdiction and control over said home shall revert to said Board of Managers of the National Home for Disabled Volunteer Soldiers. [40 Stat. L. 1043.]

SEC. 3. **[Appropriations for what purposes available.]** That the various items of appropriations heretofore or hereafter made for the support, maintenance, and other necessary expenses of said Southern Branch of the National Home for Disabled Volunteer Soldiers, be, and they hereby are, made available for payment of the cost of the transfer of the members of said home to other branches of the national home, and for the transfer of any property found to be necessary to transfer therefrom to other branches of the national home and for the support of the branches to which said members are transferred to the extent of the allotments thereof made by the said board of managers in consideration of and in the amount of an extra expense incurred by reason of said transfers and for the retransfer from said branches to said Southern Branch of the persons and property transferred as aforesaid at such time as jurisdiction and control over said Southern Branch shall be reinvested in said board of managers in accordance with the provision of section two of this Act. [40 Stat. L. 1043.]

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**An Act To authorize the Secretary of the Treasury to provide hospital and sanatorium facilities for discharged sick and disabled soldiers, sailors, and marines.**

[*Act of March 3, 1919, ch. 98, 40 Stat. L. 1302.*]

[SEC. 1.] **[Soldiers, sailors, marines, nurses, etc.— additional hospital and sanatorium facilities.]** That the Secretary of the Treasury be, and he is hereby, authorized to provide immediate additional hospital and sanatorium facilities for the care and treatment of discharged sick and disabled soldiers, sailors, and marines, Army and Navy nurses (male and female), patients of the War Risk Insurance Bureau, and the following persons only: Merchant marine seamen, seamen on boats of the Mississippi River Commission, officers and enlisted men of the United States Coast Guard, officers and employees of the Public Health Service, certain keepers and assistant keepers of the United States Lighthouse Service, seamen of the Engineer Corps of the United States Army, officers

and enlisted men of the United States Coast and Geodetic Survey, civilian employees entitled to treatment under the United States Employees' Compensation Act, and employees on Army transports not officers or enlisted men of the Army, now entitled by law to treatment by the Public Health Service. [40 Stat. L. 1302.]

**SEC. 2. [Properties and equipment transferred for hospital or sanatoria or other uses.]** There are hereby permanently transferred to the Treasury Department for the use of the Public Health Service for hospital or sanatoria or other uses the following properties, with their present equipment, including sites and leases, or so much thereof as may be required by the Public Health Service, including mechanical equipment in connection therewith, and approaches thereto, with authority to lease or purchase sites not owned by the Government, as follows: Hospitals, with such other buildings and land as may be required, at Camp Cody (New Mexico), Camp Hancock (Georgia), Camp Joseph E. Johnston (Florida), Camp Beauregard (Louisiana), Camp Logan (Texas), Camp Fremont (California), and nitrate plant, Perryville (Maryland), and such hospitals, with other necessary buildings, hereafter vacated by the War Department, as may be required and found suitable for the needs of the Public Health Service for hospital or sanatoria purposes. And for the purpose of such remodeling of or additions to the above-named plants as may be required to adapt them to the needs and uses of the Public Health Service, the sum of \$750,000 is hereby authorized. [40 Stat. L. 1302.]

**SEC. 3. [Other properties and equipment transferred for use of Public Health Service.]** The Secretary of War is hereby authorized and directed to transfer without charge to the Secretary of the Treasury for the use of the Public Health Service such hospital furniture and equipment, including hospital and medical supplies, motor trucks, and other motor-driven vehicles, in good condition, not required by the War Department, as may be required by the Public Health Service for its hospitals, and the President is authorized to direct the transfer to the Treasury Department of the use of such lands or parts of lands, buildings, fixtures, appliances, furnishings, or furniture under the control of any other department of the Government not required for the purposes of such department and suitable for the uses of the Public Health Service. [40 Stat. L. 1303.]

**SEC. 4. [Battle Mountain Sanatorium — National Home for Disabled Volunteer Soldiers.]** So much of the Battle Mountain Sanatorium at Hot Springs, South Dakota, the National Home for Disabled Volunteer Soldiers, with its present equipment, as is not required for the purposes for which these facilities were provided, is hereby made available for the use of the Public Health Service for a period of five years from the approval of this Act, unless sooner released by the Surgeon General of the Public Health Service. [40 Stat. L. 1303.]

**SEC. 5. [Contracts with existing hospitals or sanatoriums — immediate use.]** The Secretary of the Treasury is hereby authorized to contract with any existing hospital or sanatorium, by lease or otherwise, for immediate use, in whole or in part, of their present facilities, so as to provide bed capacity and facilities for not exceeding one thousand patients, and for such purposes the sum of \$300,000 is hereby authorized. [40 Stat. L. 1303.]

**SEC. 6. [Hospital facilities at Corpus Christi, Texas—emergency fund created for hospital purposes.]** The Secretary of the Treasury is hereby authorized, if in his judgment the same will be for the best interests of the Government from the standpoint of cost, location, and of the emergency needs of the Public Health Service, to purchase the site, buildings, and hospital facilities and appurtenances, at Corpus Christi, Texas, known as General Hospital Numbered 15, and for such purpose the sum of \$150,000 is hereby authorized.

The sum of \$1,500,000 is hereby authorized to be held as an emergency fund for the purchase of land and the erection thereon of buildings or for the purchase of land and buildings, and the remodeling thereof, suitable for hospital and sanatoria purposes, which the Secretary of the Treasury is hereby authorized to select and locate for the uses of the United States Public Health Service, if in his judgment the emergency requires it. [40 Stat. L. 1303 as amended by 41 Stat. L. 45.]

The second paragraph of this section was amended to read as above by the "Third Deficiency Appropriation Act" of July 11, 1919, ch. 6.

**SEC. 7. [Appropriations for specific hospital projects.]** By the construction of new hospitals and sanatoria, to include the necessary buildings with their appropriate mechanical and other equipment and approach work, including roads leading thereto, for the accommodation of patients, officers, nurses, attendants, storage, laundries, vehicles, and live stock on sites now owned by the Government, or on new sites to be acquired by purchase or otherwise, at the places hereinafter named: *Provided*, That if the Secretary of the Treasury shall make a finding that any hospital project hereinafter specifically authorized is not to the best interest of the Government from the standpoint of cost, location, and of the emergency needs of the Public Health Service, he is hereby authorized to reject such project or projects and to locate, construct, or acquire hospitals at such other locations as would best subserve the interest of the Government and the emergency needs of the Public Health Service within the limits of cost of such authorization.

a. At Cook County, Illinois, by taking over the land and executing the contract for the construction thereon of hospital buildings specified therein of a certain proposed contract executed by the Shank Company, August thirty-first, nineteen hundred and eighteen, and in accordance with such contract and the plans and specifications, identified in connection therewith August thirty-first, nineteen hundred and eighteen, by the signature and initials of Brigadier General R. C. Marshall, junior, Construction Division, Quartermaster Department, United States Army, by Lieutenant Colonel C. C. Wright, and the Shank Company, by George H. Shank, president, at the cost stated therein, namely \$2,500,000, with such changes in said plans and specifications as may be required by the Secretary of the Treasury to adapt said specified buildings to the needs and purposes of the Public Health Service, at a total limit of cost not to exceed \$3,000,000.

b. In carrying the foregoing authorization into effect, the Secretary of the Treasury is authorized to execute the contract with The Shank Company herein before specified, with such verbal changes as are made necessary by a change in the contracting officers, and to assume all obligations in said contract contained, and to purchase materials and labor in the open market, or otherwise, and to employ laborers and mechanics for the construction of such buildings and their equipment as in his judgment shall best meet the public exigencies, within the limits of cost herein authorized.

c. At Dawson Springs, Kentucky, on land to be acquired by gift, the necessary buildings for a sanatorium having a capacity of not less than five hundred beds. The sum of \$1,500,000 is hereby authorized for the construction of such sanatorium.

d. The sum of \$900,000 is hereby authorized for the construction, including site, of a hospital plant complete at Norfolk, Virginia.

e. The sum of \$550,000 is hereby authorized for the construction, on land owned by the Government, on a site to be selected by the Secretary of the Treasury with the approval of the President, of a hospital plant complete in the District of Columbia or vicinity.

f. The sum of \$190,000 is hereby authorized for additional hospital accommodations, including such minor alteration in and remodeling of existing and authorized buildings as may be necessary to economically adapt them to the additional accommodations herein authorized for the Marine Hospital at Stapleton, Staten Island, New York, the sum appropriated for additions to the said hospital by the Act approved March twenty-eighth, nineteen hundred and eighteen, is authorized to be expended in full without the construction of psychiatric units. [40 Stat. L. 1303.]

**SEC. 8. [Construction work — authority of Secretary of Treasury as to contracts.]** In carrying the foregoing authorization into effect, all new construction work herein authorized shall, as far as feasible, be of fire resisting character, and the Secretary of the Treasury is authorized to enter into contracts for the construction, equipment, and so forth, of such buildings on Government owned lands, or lands acquired for such purpose, to purchase materials and labor in the open market, or otherwise, and to employ laborers and mechanics for the construction of such buildings and their equipment as in his judgment shall best meet the public exigencies, within the limits of cost herein authorized. [40 Stat. L. 1304.]

**SEC. 9. [Appropriations for carrying out purposes of Act.]** For the purpose of carrying the foregoing authorization into effect, there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be immediately available and remain available until expended, the sum of \$8,840,000, and for furniture and equipment not otherwise provided for, the sum of \$210,000; in all, \$9,050,000. [40 Stat. L. 1304.]

**SEC. 10. [Technical and clerical services — employment — traveling expenses — printing — supervision of work.]** And the Secretary of the Treasury is hereby authorized, in his discretion, to employ, for service within or without the District of Columbia, without regard to civil-service laws, rules, and regulations, and to pay from the sums hereby authorized and appropriated for construction purposes, at customary rates of compensation, such additional technical and clerical services as may be necessary, exclusively to aid in the preparation of the drawings and specifications for the above-named objects and supervision of the execution thereof, for traveling expenses, and printing incident thereto, at a total limit of cost for such additional technical and clerical services and traveling expenses, and so forth, of not exceeding \$210,000 of the above-named limit of cost. All of the above-mentioned work shall be under the direction and supervision of the Surgeon General of the Public Health Service, subject to the approval of the Secretary of the Treasury. [40 Stat. L. 1304.]

**SEC. 11. [Additional appropriation out of unappropriated moneys.]** There is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, for necessary personnel, including regular and reserve commissioned officers of the Public Health Service and clerical help in the District of Columbia and elsewhere, and maintenance, hospital supplies and equipment, leases, fuel, lights, and water, and freight, transportation, and travel, and reasonable burial expenses (not exceeding \$100 for any patient dying in hospital), \$785,333 for the fiscal year ending June thirtieth, nineteen hundred and nineteen. [40 Stat. L. 1305.]

[SEC. 1.] \* \* \* **[Marine Hospitals — admission of persons for study.]** That there may be admitted into said hospitals for study persons with infectious or other diseases affecting the public health, and not to exceed ten cases in any one hospital at one time. [41 Stat. L. 175.]

This is from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

This paragraph follows an appropriation for marine hospitals to which the words "said hospitals" refer. Identical paragraphs have appeared in previous Sundry Civil Appropriation Acts.

## IMMIGRATION

*Act of Oct. 16, 1918, ch. 186, 71.*

*Sec. 1. Alien Members of Anarchistic and Similar Classes — Exclusion, 71.*

*2. Deportation, 72.*

*3. Return or Attempted Return — Punishment, 73.*

*Res. of Oct. 19, 1918, No. 44, ch. 190, 73.*

*Aliens in Military or Naval Service — Readmission into United States, 73.*

*Act of Nov. 10, 1919, ch. 104, 74.*

*Sec. 1. Entry of Aliens — Regulations by President — Passports — False Statements — Forgery, etc., 74.*

*2. Penalties and Forfeitures, 74.*

*3. Definitions — "United States" — "Person," 75.*

*4. Appropriation, 75.*

*5. Act When in Effect, 75.*

### CROSS-REFERENCE

See also *NATURALIZATION*.

**An Act To exclude and expel from the United States aliens who are members of the anarchistic and similar classes.**

[Act of Oct. 16, 1918, ch. 186, 40 Stat. L. 1012.]

[SEC. 1.] **[Alien members of anarchistic and similar classes — exclusion.]** That aliens who are anarchists; aliens who believe in or advocate the overthrow by force or violence of the Government of the United States or of all forms of law; aliens who disbelieve in or are opposed to all organized government; aliens who advocate or teach the assassination of public officials; aliens who advocate or teach the unlawful destruction of property; aliens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the Government of the United States or of all forms of law, or that entertains or teaches disbelief in or opposition to all

organized government, or that advocates the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, or that advocates or teaches the unlawful destruction of property shall be excluded from admission into the United States. [40 Stat. L. 1012.]

The constitutionality of the Act was upheld in *Ex p. Pettine*, (D. C. Mass. 1919) 259 Fed. 733.

Scope of Act.—In *Ex p. Pettine*, (D. C. Mass. 1919) 259 Fed. 733, the court said:

"The act of October 16, 1918 (40 Stat. 1012, c. 186), is comprehensive and emphatic in declaring against all aliens who are anarchists; and, so far as anarchists are concerned, it would seem that no result depends upon varying degrees of anarchy. Indeed, in enumerating the offensive classes, the enactment at once declares generally against aliens who are anarchists, and then, after separating by a semicolon the sweeping declaration against all anarchists from what follows, Congress proceeds to enumerate special classes of offensive aliens, who may or may not be anarchists, such as those who advocate the overthrow of government by force or violence, or who disbelieve in or are opposed to all organized government and who teach assassination of public officials. But these special designations cannot be accepted as in any way detracting from the general enactment against all aliens who are anarchists.

"The act applies itself, not only to aliens who came with offensive theories, but to aliens who have become offensive, and it expressly confers upon the Secretary of Labor authority to take them into custody, and provides for deportation in the manner provided in the Immigration Act of February 5, 1917, and this irrespective of the time of their entry into the United States.

"The point is taken by counsel for the petitioners that they are only philosophical anarchists, who do not teach violence. But this point only goes to the degree of offensiveness, and cannot be accepted as an answer to the authority of the executive branch of the government to deport, because, as said in 194 U. S. 279, 294, 24 Sup. Ct. 719, 724 (48 L. ed. 979): 'If the word "anarchist" should be interpreted as including aliens whose anarchistic views are professed as those of political philosophers innocent of evil intent, it would follow that Congress was of opinion that the tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to our population, whether permanently or temporarily, whether many or few, and, in the light of previous decisions, the act even in this aspect would not be unconstitutional.'

"The point is also taken that, by treaty between the government of the United States and Italy, Italians stand on a level with native-born citizens, who, it is said, under the right of freedom of speech, may teach anarchistic theories with immunity; and that as a consequence the deportation of alien philosophical anarchists would be in violation of the treaty between the United States and Italy.

"Passing all discussion as to the right of freedom of speech as not germane to executive proceedings for deportation under the recent acts of Congress, this view cannot be accepted, because, as said in 149 U. S. 698, 720, 13 Sup. Ct. 1016, 1025 (37 L. Ed. 905):

"In our jurisprudence, it is well settled that the provisions of an act of Congress, passed in the exercise of its constitutional authority, on this as on any other subject, if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty."

"Congress, through the act approved October 16, 1918, having clearly declared against all aliens who are anarchists, the declaration must be accepted as meaning that Congress was of opinion that the presence of alien anarchists is offensive to our society and dangerous to the government, and it must be assumed that the enactment in this respect was based upon the idea that the government possesses the right to determine who shall be members of its community—a right which may be exercised by all nations, and a right which may be exercised both in peace and war.

"For further discussion of the acts of Congress and of executive authority, see opinion of Judge Knox of December 9, 1918, in the Southern District of New York, in the *Lopez Case*; also the recent opinion of the Circuit Court of Appeals for the Second Circuit in the same case (259 Fed. 401) in affirmance thereof."

**SEC. 2. [Deportation.]** That any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens enumerated in section one of this Act, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in the immigration Act of February



fifth, nineteen hundred and seventeen. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act irrespective of the time of their entry into the United States. [40 Stat. L. 1012.]

For Act of Feb. 5, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 211.

**SEC. 3. [Return or attempted return — punishment.]** That any alien who shall, after he has been excluded and deported or arrested and deported in pursuance of the provisions of this Act, thereafter return to or enter the United States or attempt to return to or to enter the United States shall be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment for a term of not more than five years; and shall, upon the termination of such imprisonment, be taken into custody, upon the warrant of the Secretary of Labor, and deported in the manner provided in the immigration Act of February fifth, nineteen hundred and seventeen. [40 Stat. L. 1012.]

For Act of Feb. 5, 1917, see 1918 Supp. Fed. Stat. Ann. 211.

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**Joint Resolution Authorizing the readmission to the United States of certain aliens who have been conscripted or have volunteered for service with the military forces of the United States or cobelligerent forces.**

[Res. of Oct. 19, 1918, No. 44, ch. 190, 40 Stat. L. 1014.]

**[Aliens in military or naval service — readmission into United States.]**

That, notwithstanding the provisions of section three of the immigration Act of February fifth, nineteen hundred and seventeen, excluding from the United States aliens who are likely to become a public charge, or who are physically defective, or who are contract laborers, or who have come in consequence of advertisements for labor printed, published, or distributed in a foreign country, or who are assisted by others to come, or whose ticket or passage is paid for with the money of another or by any corporation, association, society, municipality, or foreign government, or who are stowaways, or who are illiterate, aliens lawfully resident in the United States when heretofore or hereafter enlisted or conscripted for the military or naval service of the United States, or of any one of the nations cobelligerent of the United States in the present war; and aliens lawfully resident in the United States who have enlisted for service with Czecho-Slovak, Polish, or other independent forces attached to the United States Army or to the army or navy of any one of the cobelligerents of the United States in the present war, who may during or within one year after the termination of the war apply for readmission to this country, after being honorably discharged or granted furlough abroad by the proper military or naval authorities, or after being rejected on final examination in connection with their enlistment or conscription shall, within two years after the termination of the war, be readmitted; and that any alien of either of the foregoing descriptions who would otherwise be excluded under said section of the immigration Act on the ground that he is idiotic, imbecile, feeble-minded, epileptic, insane, or has had one or more attacks of insanity, or on the ground that he is afflicted with constitutional psychopathic inferiority, tuberculosis, a loathsome or dangerous contagious disease, or mental defect, shall be readmitted if it is proved that the disability was acquired while the alien was serving in the military or naval forces of the United States or of any one of the nations cobelligerent of the United States in the present war or in an independent force of the kind hereinbefore described, if such alien returns

to a port of the United States within two years after the termination of the war; and that the head tax provided in the immigration Act of February fifth, nineteen hundred and seventeen, shall not be collected from aliens readmitted into the United States under the provisions of this resolution. [40 Stat. L. 1014.]

For Act of Feb. 5, 1917, see 1918 Supp. Fed. Stat. Ann. 211.

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**An Act To regulate further the entry of aliens into the United States.**

[Act of Nov. 10, 1919, ch. 104, 41 Stat. L. 353.] <sup>1</sup>

[SEC. 1.] \* \* \* [Entry of aliens — regulations by President — passports — false statements — forgery, etc.] That if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the entry of aliens into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful —

(a) For any alien to enter or attempt to enter the United States except under such reasonable rules, regulations, and orders, and subject to such passport, visé, or other limitations and exceptions as the President shall prescribe;

(b) For any person to transport or attempt to transport into the United States another person with knowledge or reasonable cause to believe that the entry of such other person is forbidden by this Act;

(c) For any person knowingly to make any false statement in an application for a passport or other permission to enter the United States with intent to induce or secure the granting of such permission, either for himself or for another;

(d) For any person knowingly to furnish or attempt to furnish or assist in furnishing to another a viséed passport or other permit or evidence of permission to enter, not issued and designed for such other person's use;

(e) For any person knowingly to use or attempt to use any viséed passport or other permit or evidence of permission to enter not issued and designated for his use;

(f) For any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any passport, visé or other permit or evidence of permission to enter the United States;

(g) For any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered passport, permit, or evidence of permission, or any passport, permit, or evidence of permission which, though originally valid, has become or been made void or invalid. [41 Stat. L. 353.]

SEC. 2. [Penalties and forfeitures.] That any person who shall willfully violate any of the provisions of this Act, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than \$5,000, or, if a natural person, imprisoned for not more than five years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment, or both; and any vehicle or any vessel, together with its or her appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States. [41 Stat. L. 353.]

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<sup>1</sup> This act became a law without the approval of the President by lapse of time.

**SEC. 3. [Definitions — “United States” — “person.”]** That the term “United States” as used in this Act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

The word “person” as used herein shall be deemed to mean any individual, partnership, association, company, or other unincorporated body of individuals, or corporation, or body politic. [41 Stat. L. 354.]

**SEC. 4. [Appropriation.]** That in order to carry out the purposes and provisions of this Act the sum of \$600,000 is hereby appropriated. [41 Stat. L. 354.]

Act of Dec. 24, 1919, provided as follows: “That so much of the sum of \$600,000 appropriated by section 4 of Public Act Numbered 79 of the Sixty-sixth Congress, entitled ‘An Act to regulate further the entry of aliens into the United States,’ as may be necessary is hereby made immediately available for expenses of regulating entry into the United States, in accordance with the provisions of the Act approved May 22, 1918: *Provided*, That not more than \$450,000 of said sum shall be used during the remainder of the fiscal year 1920.”

**SEC. 5. [Act when in effect.]** That this Act shall take effect upon the date when the provisions of the Act of Congress approved the 22d day of May, 1918, entitled “An Act to prevent in time of war departure from and entry into the United States, contrary to the public safety,” shall cease to be operative, and shall continue in force and effect until and including the 4th day of March, 1921. [41 Stat. L. 354.]

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## IMPORTS AND EXPORTS

See CORPORATIONS; CUSTOMS DUTIES; FOOD AND DRUGS; INTERNAL REVENUE;  
TRADING WITH THE ENEMY

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## INCOME TAX

See INTERNAL REVENUE

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## INDIANS

*Act of March 3, 1919, ch. 103, 76.*

*Claims of Cherokee Indians — Jurisdiction of Court of Claims, 76.*

*Act of June 30, 1919, ch. 4, 77.*

*Sec. 1. Intoxicating Liquors — Possession — Punishment, 77.*

*Employees in Indian Service — Heat and Light, 77.*

*Expenditures for Pupils in Indian Schools — Per Capita, 77.*

*Segregation of Tribal Funds — Membership of Tribes — Rolls, 77.*

*Penalty for Removing Cattle from Indian Country — R. S. Sec. 2138 Amended, 78.*

*26. Indian Reservations — Unallotted Lands — Leases — Mining Claims, 78.*

*27. Withdrawal of Public Lands for Indian Reservation — Act of Congress, 81.*

*28. Bureau of Indian Affairs — Investigations by Congress, 81.*

## CROSS-REFERENCE

See also *NATURALIZATION; PUBLIC LANDS.*

**An Act Conferring jurisdiction upon the Court of Claims to hear, consider, and determine certain claims of the Cherokee Nation against the United States.**

[*Act of March 3, 1919, ch. 103, 40 Stat. L. 1316.*]

[**Claims of Cherokee Indians — jurisdiction of Court of Claims.**] That jurisdiction is hereby conferred upon the Court of Claims to hear, consider, and determine the claim of the Cherokee Nation against the United States for interest, in addition to all other interest heretofore allowed and paid, alleged to be owing from the United States to the Cherokee Nation on the funds arising from the judgment of the Court of Claims of May eighteenth, nineteen hundred and five (Fortieth Court of Claims Report, page two hundred and fifty-two), in favor of the Cherokee Nation. The said court is authorized, empowered, and directed to carefully examine all laws, treaties, or agreements, and especially the agreement between the United States and the Cherokee Nation of December nineteenth, eighteen hundred and ninety-one, ratified by the United States March third, eighteen hundred and ninety-three (Twenty-seventh Statutes at Large, page six hundred and forty, section ten), in any manner affecting or relating to the question of interest on said funds, as the same shall be brought to the attention of the court by the Cherokee Nation under this Act. And if it shall be found that under any of the said treaties, laws, or agreements interest on one or more of the said funds, either in whole or in part, has not been paid and is rightfully owing from the United States to the Cherokee Nation, the court shall render final judgment therefor against the United States and in favor of the Cherokee Nation, either party to have the right to appeal to the Supreme Court of the United States as in other cases. The said claim shall be presented within one year after the passage of this Act by petition in the Court of Claims by the Cherokee Nation as plaintiff against the United States as defendant, and the petition shall be verified by the attorney employed to prosecute said claim by the Cherokee Nation acting through its principal chief. A copy of the petition shall be served upon the Attorney General of the United States, and he, or some attorney from the Department of Justice to be designated by him, is hereby directed to appear and defend the interests of the United States in said cause. The law and practice and rules of procedure in said courts shall be the practice and law in this case.

The attorney for the Cherokee Nation shall be paid such fee as the Court of Claims may find reasonable, the same to be approved by the Secretary of the Interior: *Provided*, That in no case shall the fee decreed by said Court of Claims be in excess of the amount stipulated in his contract of employment, nor amount to more than ten per centum of the sum, if any, to which the Cherokee Nation shall be found entitled. The amount recovered, if any, for the Cherokee Nation shall be disbursed under the supervision of the Secretary of the Interior to the parties entitled thereto in the manner prescribed by the Court of Claims. [40 Stat. L. 1316.]

**An Act Making appropriations for the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June 30, 1920.**

[*Act of June 30, 1919, ch. 4, 41 Stat. L. 4.*]

[SEC. 1.] \* \* \* [Intoxicating liquors — possession — punishment.] That on and after July 1, 1919, possession by a person of intoxicating liquors in the Indian country or where the introduction is or was prohibited by treaty or Federal statute shall be an offense and punished in accordance with the provisions of the Acts of July 23, 1892 (Twenty-seventh Statutes at Large, page 260), and January 30, 1897 (Twenty-ninth Statutes at Large, page 506). [*41 Stat. L. 4.*]

For the acts mentioned in the text see 3 Fed. Stat. Ann. (2d ed.) 913; 3 Fed. Stat. Ann. 383 note, 384.

\* \* \* [Employees in Indian Service—heat and light.] That the Secretary of the Interior is authorized to allow employees in the Indian Service, who are furnished quarters, necessary heat and light for such quarters without charge, such heat and light to be paid for out of the fund chargeable with the cost of heating and lighting other buildings at the same place: *And provided further*, That the amount so expended for agency purposes shall not be included in the maximum amounts for compensation of employees prescribed by section 1, Act of August 24, 1912. [*41 Stat. L. 5.*]

For Act of Aug. 24, 1912, mentioned in the text, see 3 Fed. Stat. Ann. (2d ed.) 763; 1914 Supp. Fed. Stat. Ann. 170.

[Expenditures for pupils in Indian schools — per capita.] That hereafter, except for pay of superintendents and for transportation of goods and supplies and transportation of pupils, not more than \$225 shall be expended from appropriations made in this Act, or any other Act, for the annual support and education of any one pupil in any Indian school, unless the attendance in any school shall be less than two hundred pupils, in which case the Secretary of the Interior may authorize a per capita expenditure of not to exceed \$250: *Provided*, That the total amount appropriated for the support of such school shall not be exceeded: *Provided further*, That the number of pupils in any school entitled to the per capita allowance hereby provided for shall be based upon average attendance, determined by dividing the total daily attendance by the number of days the school is in session: *Provided further*, That all moneys appropriated for school purposes among the Indians for the fiscal year ending June 30, 1919, may be expended, without restriction as to per capita expenditure, for the annual support and education of any one pupil in any school. [*41 Stat. L. 6.*]

\* \* \* [Segregation of tribal funds — membership of tribes — rolls.] That the Secretary of the Interior is hereby authorized, wherever in his discretion such action would be for the best interest of the Indians, to cause a final roll to be made of the membership of any Indian tribe; such rolls shall contain the ages and quantum of Indian blood, when approved by the said Secretary are hereby declared to constitute the legal membership of the respective tribes for the purpose of segregating the tribal funds as provided in section 28 of the

Indian Appropriation Act approved May 25, 1918 (Fortieth Statutes at Large, pages 591 and 592), and shall be conclusive both as to ages and quantum of Indian blood: *Provided*, That the foregoing shall not apply to the Five Civilized Tribes or to the Osage Tribe of Indians, or to the Chippewa Indians of Minnesota, or the Menominee Indians of Wisconsin. [41 Stat. L. 9.]

For Act of May 25, 1918, sec. 28, mentioned in the text, see 1918 Supp. Fed. Stat. Annot. 266.

\* \* \* **[Penalty for removing cattle from Indian country — R. S. sec. 2138 amended.]** That section 2138 of the Revised Statutes of the United States is hereby amended so as to read as follows: "That where restricted Indians are in possession or control of live stock purchased for or issued to them by the Government, or the increase therefrom, such stock shall not be sold, transferred, mortgaged, or otherwise disposed of, except with the consent in writing of the superintendent or other officer in charge of the tribe to which the owner or possessor of the live stock belongs, and all transactions in violation of this provision shall be void. All such live stock so purchased or issued and the increase therefrom belonging to restricted Indians and grazed in the Indian country shall be branded with the I D or reservation brand of the jurisdiction to which the owners of such stock belong, and shall not be removed from the Indian country except with the consent in writing of the superintendent or other officer in charge of the tribe to which the owner or possessor of such live stock belongs, or by order of the Secretary of War, in connection with the movement of troops. Every person who violates the provisions of this section by selling or otherwise disposing of such stock, purchasing, or otherwise acquiring an interest therein, or by removing such stock from the Indian country, shall be fined in any sum not more than \$1,000, or imprisoned for not more than six months, or both such fine and imprisonment." [41 Stat. L. 9.]

For R. S. sec. 2138, amended by the text, see 3 Fed. Stat. Ann. (2d ed.) 809; 3 Fed. Stat. Ann. 382.

**SEC. 26. [Indian reservations — unallotted lands — leases — mining claims.]** That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him and under such terms and conditions as he may prescribe, not inconsistent with the terms of this section, to lease to citizens of the United States or to any association of such persons or to any corporation organized under the laws of the United States or of any State or Territory thereof, any part of the unallotted lands within any Indian reservation within the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming, heretofore withdrawn from entry under the mining laws for the purpose of mining for deposits of gold, silver, copper, and other valuable metalliferous minerals, which leases shall be irrevocable, except as herein provided, but which may be declared null and void upon breach of any of their terms.

That after the passage and approval of this section, unallotted lands, or such portion thereof as the Secretary of the Interior shall determine, within Indian reservations heretofore withheld from disposition under the mining laws may be declared by the Secretary of the Interior to be subject to exploration for the discovery of deposits of gold, silver, copper, and other valuable metalliferous minerals by citizens of the United States, and after such declaration mining claims may be located by such citizens in the same manner as mining claims are

located under the mining laws of the United States: *Provided*, That the locators of all such mining claims, or their heirs, successors, or assigns, shall have a preference right to apply to the Secretary of the Interior for a lease, under the terms and conditions of this section, within one year after the date of the location of any mining claim, and any such locator who shall fail to apply for a lease within one year from the date of location shall forfeit all rights to such mining claim: *Provided further*, That duplicate copies of the location notice shall be filed within sixty days with the superintendent in charge of the reservation on which the mining claim is located, and that application for a lease under this section may be filed with such superintendent for transmission through official channels to the Secretary of the Interior: *And provided further*, That lands containing springs, water holes, or other bodies of water needed or used by the Indians for watering live stock, irrigation, or water-power purposes shall not be designated by the Secretary of the Interior as subject to entry under this section.

That leases under this section shall be for a period of twenty years, with the preferential right in the lessee to renew the same for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the time of the expiration of such periods: *Provided*, That the lessee, may in the discretion of the Secretary of the Interior, be permitted at any time to make written relinquishment of all rights under such a lease and upon acceptance thereof be thereby relieved of all future obligations under said lease.

That in addition to areas of mineral land to be included in leases under this section the Secretary of the Interior, in his discretion, may grant to the lessee the right to use, during the life of the lease, subject to the payment of an annual rental of not less than \$1 per acre, a tract of unoccupied land, not exceeding forty acres in area, for camp sites, milling, smelting, and refining works, and for other purposes connected with and necessary to the proper development and use of the deposits covered by the lease.

That the Secretary of the Interior, in his discretion, in making any lease under this section, may reserve to the United States the right to lease for a term not exceeding that of the mineral lease, the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein: *Provided*, That the said Secretary, during the life of the lease, is hereby authorized to issue such permits for easements herein provided to be reserved.

That any successor in interest or assignee of any lease granted under this section, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the lease under which such rights are held and also subject to all the provisions and conditions of this section to the same extent as though such successor or assign were the original lessee hereunder.

That any lease granted under this section may be forfeited and canceled by appropriate proceedings in the United States district court for the district in which said property or some part thereof is situated whenever the lessee, after reasonable notice in writing, as prescribed in the lease, shall fail to comply with the terms of this section or with such conditions not inconsistent herewith as may be specifically recited in the lease.

That for the privilege of mining or extracting the mineral deposits in the

ground covered by the lease the lessee shall pay to the United States, for the benefit of the Indians, a royalty which shall not be less than 5 per centum of the net value of the output of the minerals at the mine, due and payable at the end of each month succeeding that of the extraction of the minerals from the mine, and an annual rental, payable at the date of such lease and annually thereafter on the area covered by such lease, at the rate of not less than 25 cents per acre for the first calendar year thereafter; not less than 50 cents per acre for the second, third, fourth, and fifth years, respectively; and not less than \$1 per acre for each and every year thereafter during the continuance of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year.

That in addition to the payment of the royalties and rentals as herein provided the lessee shall expend annually not less than \$100 in development work for each mining claim located or leased in the same manner as an annual expenditure for labor or improvements is required to be made under the mining laws of the United States: *Provided*, That the lessee shall also agree to pay all damages occasioned by reason of his mining operations to the land or allotment of any Indian or to the crops or improvements thereon: *And provided further*, That no timber shall be cut upon the reservation by the lessee except for mining purposes and then only after first obtaining a permit from the superintendent of the reservation and upon payment of the fair value thereof.

That the Secretary of the Interior is hereby authorized to examine the books and accounts of lessees, and to acquire them to submit statements, representations, or reports, including information as to cost of mining, all of which statements, representations, or reports so required shall be upon oath, unless otherwise specified, and in such form and upon such blanks as the Secretary of the Interior may require; and any person making any false statement, representation, or report under oath shall be subject to punishment as for perjury.

That all moneys received from royalties and rentals under the provisions of this section shall be deposited in the Treasury of the United States to the credit of the Indians belonging and having tribal rights on the reservation where the leased land is located, which moneys shall be at all times subject to appropriation by Congress for their benefit, unless otherwise provided by treaty or agreement ratified by Congress: *Provided*, That such moneys shall be subject to the laws authorizing the pro rata distribution of Indian tribal funds.

That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations not inconsistent with this section as may be necessary and proper for the protection of the interests of the Indians and for the purpose of carrying the provisions of this section into full force and effect: *Provided*, That nothing in this section shall be construed or held to affect the right of the States or other local authority to exercise any rights which they may have to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee.

That mining locations, under the terms of this section, may be made on unallotted lands within Indian reservations by Indians who have heretofore or may hereafter be declared by the Secretary of the Interior to be competent to manage their own affairs; and the said Secretary is hereby authorized and empowered to lease such lands to such Indians in accordance with the provisions of this section: *Provided*, That the Secretary of the Interior be, and he is hereby, authorized to permit other Indians to make locations and obtain leases under



the provisions of this section, under such rules and regulations as he may prescribe in regard to the working, developing, disposition, and selling of the products, and the disposition of the proceeds thereof of any such mine by such Indians. [41 Stat. L. 31.]

**SEC. 27. [Withdrawal of public lands for Indian reservation — act of Congress.]** That hereafter no public lands of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for or as an Indian reservation except by act of Congress. [41 Stat. L. 34.]

**SEC. 28. [Bureau of Indian affairs — investigations by Congress.]** That during this Congress those members of the Committee on Indian Affairs of the House of Representatives, not less than five in number, who are members of the Sixty-sixth Congress, are authorized to conduct hearings and investigate the conduct of the Indian Service, at Washington, District of Columbia, and elsewhere, and the sum of \$15,000, or so much thereof as may be necessary, to be immediately available, is hereby appropriated for expenses incident thereto. The said committee is hereby authorized and empowered to examine into the conduct and management of the Bureau of Indian Affairs and all its branches and agencies, their organization and administration, to examine all books, documents, and papers in the said Bureau of Indian Affairs, its branches or agencies, relating to the administration of the business of said bureau, and shall have and is hereby granted authority to subpoena witnesses, compel their attendance, administer oaths, and to demand any and all books, documents, and papers of whatever nature relating to the affairs of Indians as conducted by said bureau, its branches, and agencies. Said committee is hereby authorized to employ such clerical and other assistance, including stenographers, as said committee may deem necessary in the proper prosecution of its work: *Provided*, That stenographers so employed shall not receive for their services exceeding \$1 per printed page. [41 Stat. L. 34.]

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## INSURANCE

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

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## INTERIOR DEPARTMENT

*Act of March 1, 1919, ch. 86, 81.*

*Sec. 1. Surveyor Generals — Detail of Clerks, 81.*

[SEC. 1.] \* \* \* **[Surveyor generals — detail of clerks.]** The Secretary of the Interior is authorized to detail temporarily clerks from the office of one surveyor general to another as the necessities of the service may require and to pay their actual necessary traveling expenses in going to and returning from such office out of the appropriation for surveying the public lands. A detailed statement of traveling expenses incurred hereunder shall be made to Congress at the beginning of each regular session thereof. [40 Stat. L. 1251.]

This is from the Legislative, Executive and Judicial Appropriation Act of March 1, 1919, ch. 86.

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#### CROSS-REFERENCE

See also *PUBLIC DEBT*.

\* \* \* **[Packing and marking oleomargarine — penalty.]** That section six of the Act entitled “An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine,” approved August second, eighteen hundred and eighty-six, be amended so as to read as follows:

“SEC. 6. That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden or paper packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by the manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages.

“Retail dealers in oleomargarine must sell only from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe.

“Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any packages or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than \$1,000, and be imprisoned not more than two years.” [40 Stat. L. 1008.]

This is from the Agricultural Appropriation Act of Oct. 1, 1918, ch. 178.

For Act of Aug. 2, 1886, sec. 6, see 4 Fed. Stat. Ann. (2d ed.) 189; 3 Fed. Stat. Ann. 122.

**An Act To provide revenue, and for other purposes.**

[*Act of Feb. 24, 1919, ch. 18, 40 Stat. L. 1057.*]

**TITLE I.—GENERAL DEFINITIONS.**

**SECTION 1. [Terms used in act defined.]** That when used in this Act —

The term "person" includes partnerships and corporations, as well as individuals;

The term "corporation" includes associations, joint-stock companies, and insurance companies;

The term "domestic" when applied to a corporation or partnership means created or organized in the United States;

The term "foreign" when applied to a corporation or partnership means created or organized outside the United States;

The term "United States" when used in a geographical sense includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia;

The term "Secretary" means the Secretary of the Treasury;

The term "Commissioner" means the Commissioner of Internal Revenue;

The term "collector" means collector of internal revenue;

The term "Revenue Act of 1916" means the Act entitled "An Act to increase the revenue, and for other purposes," approved September 8, 1916;

The term "Revenue Act of 1917" means the Act entitled "An Act to provide revenue to defray war expenses, and for other purposes," approved October 3, 1917;

The term "taxpayer" includes any person, trust or estate subject to a tax imposed by this Act;

The term "Government contract" means (a) a contract made with the United States, or with any department, bureau, officer, commission, board, or agency, under the United States and acting in its behalf, or with any agency controlled by any of the above if the contract is for the benefit of the United States, or (b) a subcontract made with a contractor performing such a contract if the products or services to be furnished under the subcontract are for the benefit of the United States. The term "Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive" when applied to a contract of the kind referred to in clause (a) of this paragraph, includes all such contracts which, although entered into during such period, were originally not enforceable, but which have been or may become enforceable by reason of subsequent validation in pursuance of law;

The term "military or naval forces of the United States" includes the Marine Corps, the Coast Guard, the Army Nurse Corps, Female, and the Navy Nurse Corps, Female, but this shall not be deemed to exclude other units otherwise included within such term;

The term "present war" means the war in which the United States is now engaged against the German Government.

For the purposes of this Act the date of the termination of the present war shall be fixed by proclamation of the President. [40 Stat. L. 1057.]

For Revenue Acts of 1916 and 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 270 et seq.

## TITLE II.—INCOME TAX.

*Part I.—General Provisions.*

**SEC. 200. Definitions.** That when used in this title —

The term “taxable year” means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section 212 or section 232. The term “fiscal year” means an accounting period of twelve months ending on the last day of any month other than December. The first taxable year, to be called the taxable year 1918, shall be the calendar year 1918 or any fiscal year ending during the calendar year 1918;

The term “fiduciary” means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person, trust or estate;

The term “withholding agent” means any person required to deduct and withhold any tax under the provisions of section 221 or section 237;

The term “personal service corporation” means a corporation whose income is to be ascribed primarily to the activities of the principal owners or stockholders who are themselves regularly engaged in the active conduct of the affairs of the corporation and in which capital (whether invested or borrowed) is not a material income-producing factor; but does not include any foreign corporation, nor any corporation 50 per centum or more of whose gross income consists either (1) of gains, profits or income derived from trading as a principal, or (2) of gains, profits, commissions, or other income, derived from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive;

The term “paid,” for the purposes of the deductions and credits under this title, means “paid or accrued” or “paid or incurred,” and the terms “paid or incurred” and “paid or accrued” shall be construed according to the method of accounting upon the basis of which the net income is computed under section 212. [40 Stat. L. 1058.]

**SEC. 201. Dividends.** (a) That the term “dividend” when used in this title (except in paragraph (10) of subdivision (a) of section 234) means (1) any distribution made by a corporation, other than a personal service corporation, to its shareholders or members, whether in cash or in other property or in stock of the corporation, out of its earnings or profits accumulated since February 28, 1913, or (2) any such distribution made by a personal service corporation out of its earnings or profits accumulated since February 28, 1913, and prior to January 1, 1918.

(b) Any distribution shall be deemed to have been made from earnings or profits unless all earnings and profits have first been distributed. Any distribution made in the year 1918 or any year thereafter shall be deemed to have been made from earnings or profits accumulated since February 28, 1913, or, in the case of a personal service corporation, from the most recently accumulated earnings or profits; but any earnings or profits accumulated prior to March 1, 1913, may be distributed in stock dividends or otherwise, exempt from the tax, after the earnings and profits accumulated since February 28, 1913, have been distributed.

(c) A dividend paid in stock of the corporation shall be considered income to the amount of the earnings or profits distributed. Amounts distributed in

the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits.

(d) If any stock dividend (1) is received by a taxpayer between January 1 and November 1, 1918, both dates inclusive, or (2) is during such period bona fide authorized or declared, and entered on the books of the corporation, and is received by a taxpayer after November 1, 1918, and before the expiration of thirty days after the passage of this Act, then such dividend shall, in the manner provided in section 206, be taxed to the recipient at the rates prescribed by law for the years in which the corporation accumulated the earnings or profits from which such dividend was paid, but the dividend shall be deemed to have been paid from the most recently accumulated earnings or profits.

(e) Any distribution made during the first sixty days of any taxable year shall be deemed to have been made from earnings or profits accumulated during preceding taxable years; but any distribution made during the remainder of the taxable year shall be deemed to have been made from earnings or profits accumulated between the close of the preceding taxable year and the date of distribution, to the extent of such earnings or profits, and if the books of the corporation do not show the amount of such earnings or profits, the earnings or profits for the accounting period within which the distribution was made shall be deemed to have been accumulated ratably during such period. [40 Stat. L. 1059.]

**SEC. 202. Basis for determining gain or loss.** (a) That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be —

(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and

(2) In the case of property acquired on or after that date, the cost thereof; or the inventory value, if the inventory is made in accordance with section 203.

(b) When property is exchanged for other property, the property received in exchange shall for the purpose of determining gain or loss be treated as the equivalent of cash to the amount of its fair market value, if any; but when in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock or securities owned by him new stock or securities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange, and the new stock or securities received shall be treated as taking the place of the stock, securities, or property exchanged.

When in the case of any such reorganization, merger or consolidation the aggregate par or face value of the new stock or securities received is in excess of the aggregate par or face value of the stock or securities exchanged, a like amount in par or face value of the new stock or securities received shall be treated as taking the place of the stock or securities exchanged, and the amount of the excess in par or face value shall be treated as a gain to the extent that the fair market value of the new stock or securities is greater than the cost (or if acquired prior to March 1, 1913, the fair market value as of that date) of the stock or securities exchanged. [40 Stat. L. 1060.]

**SEC. 203. Inventories.** That whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of

any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income. [40 Stat. L. 1060.]

**SEC. 204. Net losses.** (a) That as used in this section the term "net loss" refers only to net losses resulting from either (1) the operation of any business regularly carried on by the taxpayer, or (2) the bona fide sale by the taxpayer of plant, buildings, machinery, equipment or other facilities, constructed, installed or acquired by the taxpayer on or after April 6, 1917, for the production of articles contributing to the prosecution of the present war; and when so resulting means the excess of the deductions allowed by law (excluding in the case of corporations amounts allowed as a deduction under paragraph (6) of subdivision (a) of section 234) over the sum of the gross income plus any interest received free from taxation both under this title and under Title III.

(b) If for any taxable year beginning after October 31, 1918, and ending prior to January 1, 1920, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount of such net loss shall under regulations prescribed by the Commissioner with the approval of the Secretary be deducted from the net income of the taxpayer for the preceding taxable year; and the taxes imposed by this title and by Title III for such preceding taxable year shall be redetermined accordingly. Any amount found to be due to the taxpayer upon the basis of such redetermination shall be credited or refunded to the taxpayer in accordance with the provisions of section 252. If such net loss is in excess of the net income for such preceding taxable year, the amount of such excess shall under regulations prescribed by the Commissioner with the approval of the Secretary be allowed as a deduction in computing the net income for the succeeding taxable year.

(c) The benefit of this section shall be allowed to the members of a partnership and the beneficiaries of an estate or trust under regulations prescribed by the Commissioner with the approval of the Secretary. [40 Stat. L. 1060.]

**SEC. 205. Fiscal year with different rates.** (a) That if a taxpayer makes return for a fiscal year beginning in 1917 and ending in 1918, his tax under this title for the first taxable year shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917 and under Title I of the Revenue Act of 1917, which the portion of such period falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1918 which the portion of such period falling within the calendar year 1918 is of the entire period: *Provided*, That in the case of a personal service corporation the amount to be paid shall be only that specified in clause (1).

Any amount heretofore or hereafter paid on account of the tax imposed for such fiscal year by Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917, and by Title I of the Revenue Act of 1917, shall be credited towards the payment of the tax imposed for such fiscal year by this act, and if the amount so paid exceeds the amount of such tax imposed by this act, or, in the case of a personal service corporation, the amount specified in clause (1), the excess shall be credited or refunded in accordance with the provisions of section 252.

(b) If a taxpayer makes a return for a fiscal year beginning in 1918 and ending in 1919, the tax under this title for such fiscal year shall be the sum of: (1) the

same proportion of a tax for the entire period computed under this title at the rates specified for the calendar year 1918 which the portion of such period falling within the calendar year 1918 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates specified for the calendar year 1919 which the portion of such period falling within the calendar year 1919 is of the entire period.

(c) If a fiscal year of a partnership begins in 1917 and ends in 1918 or begins in 1918 and ends in 1919, then notwithstanding the provisions of subdivision (b) of section 218, (1) the rates for the calendar year during which such fiscal year begins shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year, and (2) the rates for the calendar year during which such fiscal year ends shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year: *Provided*, That in the case of a personal service corporation with respect to a fiscal year beginning in 1917 and ending in 1918, the amount specified in clause (1) shall not be subject to normal tax. [40 Stat. L. 1061.]

For Revenue Acts of 1916 and 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 273.

**SEC. 206. Parts of income subject to rates for different years.** That whenever parts of a taxpayer's income are subject to rates for different calendar years, the part subject to the rates for the most recent calendar year shall be placed in the lower brackets of the rate schedule provided in this title, the part subject to the rates for the next preceding calendar year shall be placed in the next higher brackets of the rate schedule applicable to that year, and so on until the entire net income has been accounted for. In determining the income, any deductions, exemptions or credits of a kind not plainly and properly chargeable against the income taxable at rates for a preceding year shall first be applied against the income subject to rates for the most recent calendar year; but any balance thereof shall be applied against the income subject to the rates of the next preceding year or years until fully allowed. [40 Stat. L. 1062.]

#### *Part II.—Individuals.*

**SEC. 210. Normal tax.** That, in lieu of the taxes imposed by subdivision (a) of section 1 of the Revenue Act of 1916 and by section 1 of the Revenue Act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax at the following rates:

(a) For the calendar year 1918, 12 per centum of the amount of the net income in excess of the credits provided in section 216: *Provided*, That in the case of a citizen or resident of the United States the rate upon the first \$4,000 of such excess amount shall be 6 per centum;

(b) For each calendar year thereafter, 8 per centum of the amount of the net income in excess of the credits provided in section 216: *Provided*, That in the case of a citizen or resident of the United States the rate upon the first \$4,000 of such excess amount shall be 4 per centum. [40 Stat. L. 1062.]

For Revenue Acts of 1916 and 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 273.

**Sec. 211. Surtax.** (a) That, in lieu of the taxes imposed by subdivision (b) of section 1 of the Revenue Act of 1916 and by section 2 of the Revenue Act of 1917, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual, a surtax equal to the sum of the following:

1 per centum of the amount by which the net income exceeds \$5,000 and does not exceed \$6,000;

2 per centum of the amount by which the net income exceeds \$6,000 and does not exceed \$8,000;

3 per centum of the amount by which the net income exceeds \$8,000 and does not exceed \$10,000;

4 per centum of the amount by which the net income exceeds \$10,000 and does not exceed \$12,000;

5 per centum of the amount by which the net income exceeds \$12,000 and does not exceed \$14,000;

6 per centum of the amount by which the net income exceeds \$14,000 and does not exceed \$16,000;

7 per centum of the amount by which the net income exceeds \$16,000 and does not exceed \$18,000;

8 per centum of the amount by which the net income exceeds \$18,000 and does not exceed \$20,000;

9 per centum of the amount by which the net income exceeds \$20,000 and does not exceed \$22,000;

10 per centum of the amount by which the net income exceeds \$22,000 and does not exceed \$24,000;

11 per centum of the amount by which the net income exceeds \$24,000 and does not exceed \$26,000;

12 per centum of the amount by which the net income exceeds \$26,000 and does not exceed \$28,000;

13 per centum of the amount by which the net income exceeds \$28,000 and does not exceed \$30,000;

14 per centum of the amount by which the net income exceeds \$30,000 and does not exceed \$32,000;

15 per centum of the amount by which the net income exceeds \$32,000 and does not exceed \$34,000;

16 per centum of the amount by which the net income exceeds \$34,000 and does not exceed \$36,000;

17 per centum of the amount by which the net income exceeds \$36,000 and does not exceed \$38,000;

18 per centum of the amount by which the net income exceeds \$38,000 and does not exceed \$40,000;

19 per centum of the amount by which the net income exceeds \$40,000 and does not exceed \$42,000;

20 per centum of the amount by which the net income exceeds \$42,000 and does not exceed \$44,000;

21 per centum of the amount by which the net income exceeds \$44,000 and does not exceed \$46,000;

22 per centum of the amount by which the net income exceeds \$46,000 and does not exceed \$48,000;

23 per centum of the amount by which the net income exceeds \$48,000 and does not exceed \$50,000;

24 per centum of the amount by which the net income exceeds \$50,000 and does not exceed \$52,000;

25 per centum of the amount by which the net income exceeds \$52,000 and does not exceed \$54,000;

26 per centum of the amount by which the net income exceeds \$54,000 and does not exceed \$56,000;

27 per centum of the amount by which the net income exceeds \$56,000 and does not exceed \$58,000;

28 per centum of the amount by which the net income exceeds \$58,000 and does not exceed \$60,000;

29 per centum of the amount by which the net income exceeds \$60,000 and does not exceed \$62,000;

30 per centum of the amount by which the net income exceeds \$62,000 and does not exceed \$64,000;

31 per centum of the amount by which the net income exceeds \$64,000 and does not exceed \$66,000;

32 per centum of the amount by which the net income exceeds \$66,000 and does not exceed \$68,000;

33 per centum of the amount by which the net income exceeds \$68,000 and does not exceed \$70,000;

34 per centum of the amount by which the net income exceeds \$70,000 and does not exceed \$72,000;

35 per centum of the amount by which the net income exceeds \$72,000 and does not exceed \$74,000;

36 per centum of the amount by which the net income exceeds \$74,000 and does not exceed \$76,000;

37 per centum of the amount by which the net income exceeds \$76,000 and does not exceed \$78,000;

38 per centum of the amount by which the net income exceeds \$78,000 and does not exceed \$80,000;

39 per centum of the amount by which the net income exceeds \$80,000 and does not exceed \$82,000;

40 per centum of the amount by which the net income exceeds \$82,000 and does not exceed \$84,000;

41 per centum of the amount by which the net income exceeds \$84,000 and does not exceed \$86,000;

42 per centum of the amount by which the net income exceeds \$86,000 and does not exceed \$88,000;

43 per centum of the amount by which the net income exceeds \$88,000 and does not exceed \$90,000;

44 per centum of the amount by which the net income exceeds \$90,000 and does not exceed \$92,000;

45 per centum of the amount by which the net income exceeds \$92,000 and does not exceed \$94,000;

46 per centum of the amount by which the net income exceeds \$94,000 and does not exceed \$96,000;

47 per centum of the amount by which the net income exceeds \$96,000 and does not exceed \$98,000;



48 per centum of the amount by which the net income exceeds \$98,000 and does not exceed \$100,000;

52 per centum of the amount by which the net income exceeds \$100,000 and does not exceed \$150,000.

56 per centum of the amount by which the net income exceeds \$150,000 and does not exceed \$200,000;

60 per centum of the amount by which the net income exceeds \$200,000 and does not exceed \$300,000;

63 per centum of the amount by which the net income exceeds \$300,000 and does not exceed \$500,000;

64 per centum of the amount by which the net income exceeds \$500,000 and does not exceed \$1,000,000;

65 per centum of the amount by which the net income exceeds \$1,000,000.

(b) In the case of a bona fide sale of mines, oil or gas wells, or any interest therein, where the principal value of the property has been demonstrated by prospecting or exploration and discovery work done by the taxpayer, the portion of the tax imposed by this section attributable to such sale shall not exceed 20 per centum of the selling price of such property or interest. [40 Stat. L. 1062.]

For Revenue Acts of 1916 and 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 273.

**SEC. 212. Net income defined.** (a) That in the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by section 214.

(b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 200 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the Commissioner, be computed on the basis of such new accounting period, subject to the provisions of section 226. [40 Stat. L. 1064.]

**SEC. 213. Gross income defined.** That for the purposes of this title (except as otherwise provided in section 233) the term "gross income" —

(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, divi-

dends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; but

(b) Does not include the following items, which shall be exempt from taxation under this title:

(1) The proceeds of life insurance policies paid upon the death of the insured to individual beneficiaries or to the estate of the insured;

(2) The amount received by the insured as a return of premium or premiums paid by him under life insurance, endowment, or annuity contracts, either during the term or at the maturity of the term mentioned in the contract or upon surrender of the contract;

(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income);

(4) Interest upon (a) the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia; or (b) securities issued under the provisions of the Federal Farm Loan Act of July 17, 1916; or (c) the obligations of the United States or its possessions; or (d) bonds issued by the War Finance Corporation: *Provided*, That every person owning any of the obligations, securities or bonds enumerated in clauses (a), (b), (c) and (d) shall, in the return required by this title, submit a statement showing the number and amount of such obligations, securities and bonds owned by him and the income received therefrom, in such form and with such information as the Commissioner may require. In the case of obligations of the United States issued after September 1, 1917, and in the case of bonds issued by the War Finance Corporation, the interest shall be exempt only if and to the extent provided in the respective Acts authorizing the issue thereof as amended and supplemented, and shall be excluded from gross income only if and to the extent it is wholly exempt from taxation to the taxpayer both under this title and under Title III;

(5) The income of foreign governments received from investments in the United States in stocks, bonds, or other domestic securities, owned by such foreign governments, or from interest on deposits in banks in the United States of moneys belonging to such foreign governments, or from any other source within the United States;

(6) Amounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness;

(7) Income derived from any public utility or the exercise of any essential governmental function and accruing to any State, Territory, or the District of Columbia, or any political subdivision of a State or Territory, or income accruing to the government of any possession of the United States, or any political subdivision thereof.

Whenever any State, Territory, or the District of Columbia, or any political subdivision of a State or Territory, prior to September 8, 1916, entered in good faith into a contract with any person, the object and purpose of which is to acquire, construct, operate, or maintain a public utility, no tax shall be levied under the provisions of this title upon the income derived from the operation of

such public utility, so far as the payment thereof will impose a loss or burden upon such State, Territory, District of Columbia, or political subdivision; but this provision is not intended to confer upon such person any financial gain or exemption or to relieve such person from the payment of a tax as provided for in this title upon the part or portion of such income to which such person is entitled under such contract;

(8) So much of the amount received during the present war by a person in the military or naval forces of the United States as salary or compensation in any form from the United States for active services in such forces, as does not exceed \$3,500.

(c) In the case of nonresident alien individuals, gross income includes only the gross income from sources within the United States, including interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, dividends from resident corporations, and including all amounts received (although paid under a contract for the sale of goods or otherwise) representing profits on the manufacture and disposition of goods within the United States. [40 Stat. L. 1065.]

For Federal Farm Loan Act of July 17, 1916, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 14.

**SEC. 214. Deductions allowed.** (a) That in computing net income there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity;

(2) All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917), the interest upon which is wholly exempt from taxation under this title as income to the taxpayer, or, in the case of a nonresident alien individual, the proportion of such interest which the amount of his gross income from sources within the United States bears to the amount of his gross income from all sources within and without the United States;

(3) Taxes paid or accrued within the taxable year imposed (a) by the authority of the United States, except income, war-profits and excess-profits taxes; or (b) by the authority of any of its possessions, except the amount of income, war-profits and excess-profits taxes allowed as a credit under section 222; or (c) by the authority of any State or Territory, or any county, school district, municipality, or other taxing subdivision of any State or Territory, not including those assessed against local benefits of a kind tending to increase the value of the property assessed; or (d) in the case of a citizen or resident of the United States, by the authority of any foreign country, except the amount of income, war-profits and excess-profits taxes allowed as a credit under section 222; or (e) in the case of a nonresident alien individual, by the authority of any foreign country (except income, war-profits and excess-profits taxes, and taxes assessed

against local benefits of a kind tending to increase the value of the property assessed), upon property or business;

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business;

(5) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business; but in the case of a nonresident alien individual only as to such transactions within the United States;

(6) Losses sustained during the taxable year of property not connected with the trade or business (but in the case of a nonresident alien individual only property within the United States) if arising from fires, storms, shipwreck, or other casualty, or from theft, and if not compensated for by insurance or otherwise;

(7) Debts ascertained to be worthless and charged off within the taxable year;

(8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence;

(9) In the case of buildings, machinery, equipment, or other facilities, constructed, erected, installed, or acquired, on or after April 6, 1917, for the production of articles contributing to the prosecution of the present war, and in the case of vessels constructed or acquired on or after such date for the transportation of articles or men contributing to the prosecution of the present war, there shall be allowed a reasonable deduction for the amortization of such part of the cost of such facilities or vessels as has been borne by the taxpayer, but not again including any amount otherwise allowed under this title or previous Acts of Congress as a deduction in computing net income. At any time within three years after the termination of the present war, the Commissioner may, and at the request of the taxpayer shall, reexamine the return, and if he then finds as a result of an appraisal or from other evidence that the deduction originally allowed was incorrect, the taxes imposed by this title and by Title III for the year or years affected shall be redetermined; and the amount of tax due upon such redetermination, if any, shall be paid upon notice and demand by the collector, or the amount of tax overpaid, if any, shall be credited or refunded to the taxpayer in accordance with the provisions of section 252;

(10) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted: *Provided*, That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date: *Provided further*, That in the case of mines, oil and gas wells, discovered by the taxpayer, on or after March 1, 1913, and not acquired as the result of purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery, or within thirty days thereafter; such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee;

(11) Contributions or gifts made within the taxable year to corporations organized and operated exclusively for religious, charitable, scientific, or educa-

tional purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to the special fund for vocational rehabilitation, authorized by section 7 of the Vocational Rehabilitation Act, to an amount not in excess of 15 per centum of the taxpayer's net income as computed without the benefit of this paragraph. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary. In the case of a nonresident alien individual this deduction shall be allowed only as to contributions or gifts made to domestic corporations, or to such vocational rehabilitation fund;

For the Vocational Rehabilitation Act, sec. 7, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 878.

(12) (a) At the time of filing return for the taxable year 1918 a taxpayer may file a claim in abatement based on the fact that he has sustained a substantial loss (whether or not actually realized by sale or other disposition) resulting from any material reduction (not due to temporary fluctuation) of the value of the inventory for such taxable year, or from the actual payment after the close of such taxable year of rebates in pursuance of contracts entered into during such year upon sales made during such year. In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the Commissioner, conditioned for the payment of any part of such tax found to be due, with interest. If any part of such claim is disallowed then the remainder of the tax due shall on notice and demand by the collector be paid by the taxpayer with interest at the rate of 1 per centum per month from the time the tax would have been due had no such claim been filed. If it is shown to the satisfaction of the Commissioner that such substantial loss has been sustained, then in computing the tax imposed by this title the amount of such loss shall be deducted from the net income. (b) If no such claim is filed, but it is shown to the satisfaction of the Commissioner that during the taxable year 1919 the taxpayer has sustained a substantial loss of the character above described then the amount of such loss shall be deducted from the net income for the taxable year 1918 and the tax imposed by this title for such year shall be redetermined accordingly. Any amount found to be due to the taxpayer upon the basis of such redetermination shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.

(b) In the case of a nonresident alien individual the deductions allowed in paragraphs (1), (4), (7), (8), (9), (10), and (12), and clause (e) of paragraph (3), of subdivision (a) shall be allowed only if and to the extent that they are connected with income arising from a source within the United States; and the proper apportionment and allocation of the deductions with respect to sources of income within and without the United States shall be determined under rules and regulations prescribed by the Commissioner with the approval of the Secretary. [40 Stat. L. 1066.]

**SEC. 215. Items not deductible.** That in computing net income no deduction shall in any case be allowed in respect of —

(a) Personal, living, or family expenses;

(b) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate;

(c) Any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made; or

(d) Premiums paid on any life insurance policy covering the life of any officer or employee, or of any person financially interested in any trade or business carried on by the taxpayer, when the taxpayer is directly or indirectly a beneficiary under such policy. [40 Stat. L. 1069.]

**SEC. 216. Credits allowed.** That for the purpose of the normal tax only there shall be allowed the following credits:

(a) The amount received as dividends from a corporation which is taxable under this title upon its net income, and amounts received as dividends from a personal service corporation out of earnings or profits upon which income tax has been imposed by Act of Congress;

(b) The amount received as interest upon obligations of the United States and bonds issued by the War Finance Corporation, which is included in gross income under section 213;

(c) In the case of a single person, a personal exemption of \$1,000, or in the case of the head of a family or a married person living with husband or wife, a personal exemption of \$2,000. A husband and wife living together shall receive but one personal exemption of \$2,000 against their aggregate net income; and in case they make separate returns, the personal exemption of \$2,000 may be taken by either or divided between them;

(d) \$200 for each person (other than husband or wife) dependent upon and receiving his chief support from the taxpayer, if such dependent person is under eighteen years of age or is incapable of self-support because mentally or physically defective.

(e) In the case of a nonresident alien individual who is a citizen or subject of a country which imposes an income tax, the credits allowed in subdivisions (c) and (d) shall be allowed only if such country allows a similar credit to citizens of the United States not residing in such country. [40 Stat. L. 1069.]

**SEC. 217. Nonresident aliens—Allowance of deductions and credits.** That a nonresident alien individual shall receive the benefit of the deductions and credits allowed in this title only by filing or causing to be filed with the collector a true and accurate return of his total income received from all sources corporate or otherwise in the United States, in the manner prescribed by this title, including therein all the information which the Commissioner may deem necessary for the calculation of such deductions and credits: *Provided*, That the benefit of the credits allowed in subdivisions (c) and (d) of section 216 may, in the discretion of the Commissioner, and except as otherwise provided in subdivision (e) of that section, be received by filing a claim therefor with the withholding agent. In case of failure to file a return, the collector shall collect the tax on such income, and all property belonging to such nonresident alien individual shall be liable to distraint for the tax. [40 Stat. L. 1069.]

**SEC. 218. Partnerships and personal service corporations.** (a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net

income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the fiscal or calendar year upon the basis of which the partner's net income is computed.

The partner shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the partnership.

(b) If a fiscal year of a partnership ends during a calendar year for which the rates of tax differ from those for the preceding calendar year, then (1) the rates for such preceding calendar year shall apply to an amount of each partner's share of such partnership net income equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year, and (2) the rates for the calendar year during which such fiscal year ends shall apply to the remainder.

(c) In the case of an individual member of a partnership which makes return for a fiscal year beginning in 1917 and ending in 1918, his proportionate share of any excess-profits tax imposed upon the partnership under the Revenue Act of 1917 with respect to that part of such fiscal year falling in 1917, shall, for the purpose of determining the tax imposed by this title, be credited against that portion of the net income embraced in his personal return for the taxable year 1918 to which the rates for 1917 apply.

(d) The net income of the partnership shall be computed in the same manner and on the same basis as provided in section 212 except that the deduction provided in paragraph (11) of subdivision (a) of section 214 shall not be allowed.

(e) Personal service corporations shall not be subject to taxation under this title, but the individual stockholders thereof shall be taxed in the same manner as the members of partnerships. All the provisions of this title relating to partnerships and the members thereof shall so far as practicable apply to personal service corporations and the stockholders thereof: *Provided*, That for the purpose of this subdivision amounts distributed by a personal service corporation during its taxable year shall be accounted for by the distributees; and any portion of the net income remaining undistributed at the close of its taxable year shall be accounted for by the stockholders of such corporation at the close of its taxable year in proportion to their respective shares. [40 Stat. L. 1070.]

For Revenue Act of 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 273.

**SEC. 219. Estates and trusts.** (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including —

(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

(2) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;

(3) Income held for future distribution under the terms of the will or trust; and

(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

(b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that there shall also be allowed as a deduction (in lieu of the deduction authorized by paragraph (11) of subdivision (a) of section 214) any part of the gross income which, pursuant to the terms of the will or deed creating the trust, is during the taxable year paid to or permanently set aside for the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, or any corporation organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; and in cases under paragraph (4) of subdivision (a) of this section the fiduciary shall include in the return a statement of each beneficiary's distributive share of such net income, whether or not distributed before the close of the taxable year for which the return is made.

(c) In cases under paragraph (1), (2), or (3) of subdivision (a) the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share, whether distributed or not, of the net income of the estate or trust for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the estate or trust is computed, then his distributive share of the net income of the estate or trust for any accounting period of such estate or trust ending within the fiscal or calendar year upon the basis of which such beneficiary's net income is computed. In such cases the beneficiary shall, for the purpose of the normal tax, be allowed as credits in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the estate or trust. [40 Stat. L. 1071.]

**SEC. 220. Profits of corporations taxable to stockholders.** That if any corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of the surtax upon its stockholders or members through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, such corporation shall not be subject to the tax imposed by section 230, but the stockholders or members thereof shall be subject to taxation under this title in the same manner as provided in sub-



division (e) of section 218 in the case of stockholders of a personal service corporation, except that the tax imposed by Title III shall be deducted from the net income of the corporation before the computation of the proportionate share of each stockholder or member. The fact that any corporation is a mere holding company, or that the gains and profits are permitted to accumulate beyond the reasonable needs of the business, shall be *prima facie* evidence of a purpose to escape the surtax; but the fact that the gains and profits are in any case permitted to accumulate and become surplus shall not be construed as evidence of a purpose to escape the tax in such case unless the Commissioner certifies that in his opinion such accumulation is unreasonable for the purposes of the business. When requested by the Commissioner, or any collector, every corporation shall forward to him a correct statement of such gains and profits and the names and addresses of the individuals or shareholders who would be entitled to the same if divided or distributed, and of the amounts that would be payable to each. [40 Stat. L. 1072.]

**SEC. 221. Payment of tax at source.** (a) That all individuals, corporations and partnerships, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States, having the control, receipt, custody, disposal, or payment, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, of any nonresident alien individual (other than income received as dividends from a corporation which is taxable under this title upon its net income) shall (except in the cases provided for in subdivision (b) and except as otherwise provided in regulations prescribed by the Commissioner under section 217) deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 8 per centum thereof: *Provided*, That the Commissioner may authorize such tax to be deducted and withheld from the interest upon any securities the owners of which are not known to the withholding agent.

(b) In any case where bonds, mortgages, or deeds of trust, or other similar obligations of a corporation contain a contract or provision by which the obligor agrees to pay any portion of the tax imposed by this title upon the obligee, or to reimburse the obligee for any portion of the tax, or to pay the interest without deduction for any tax which the obligor may be required or permitted to pay thereon or to retain therefrom under any law of the United States, the obligor shall deduct and withhold a tax equal to 2 per centum of the interest upon such bonds, mortgages, deeds of trust, or other obligations, whether such interest is payable annually or at shorter or longer periods and whether payable to a nonresident alien individual or to an individual citizen or resident of the United States or to a partnership: *Provided*, That the Commissioner may authorize such tax to be deducted and withheld in the case of interest upon any such bonds, mortgages, deeds of trust or other obligations, the owners of which are not known to the withholding agent. Such deduction and withholding shall not be required in the case of a citizen or resident entitled to receive such interest, if he files with the withholding agent on or before February 1, a signed notice in writing claiming the benefit of the credits provided in subdivisions (c) and (d) of section 216; nor in the case of a nonresident alien individual if so provided for in regulations prescribed by the Commissioner under section 217.

(c) Every individual, corporation, or partnership required to deduct and withhold any tax under this section shall make return thereof on or before March first of each year and shall on or before June fifteenth pay the tax to the official of the United States Government authorized to receive it. Every such individual, corporation, or partnership is hereby made liable for such tax and is hereby indemnified against the claims and demands of any individual, corporation, or partnership for the amount of any payments made in accordance with the provisions of this section.

(d) Income upon which any tax is required to be withheld at the source under this section shall be included in the return of the recipient of such income, but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return.

(e) If any tax required under this section to be deducted and withheld is paid by the recipient of the income, it shall not be re-collected from the withholding agent; nor in cases in which the tax is so paid shall any penalty be imposed upon or collected from the recipient of the income or the withholding agent for failure to return or pay the same, unless such failure was fraudulent and for the purpose of evading payment. [40 Stat. L. 1072.]

**SEC. 222. Credit for taxes.** (a) That the tax computed under Part II of this title shall be credited with:

(1) In the case of a citizen of the United States, the amount of any income, war-profits and excess-profits taxes paid during the taxable year to any foreign country, upon income derived from sources therein, or to any possession of the United States; and

(2) In the case of a resident of the United States, the amount of any such taxes paid during the taxable year to any possession of the United States; and

(3) In the case of an alien resident of the United States who is a citizen or subject of a foreign country, the amount of any such taxes paid during the taxable year to such country, upon income derived from sources therein, if such country, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country; and

(4) In the case of any such individual who is a member of a partnership or a beneficiary of an estate or trust, his proportionate share of such taxes of the partnership or the estate or trust paid during the taxable year to a foreign country or to any possession of the United States, as the case may be.

(b) If accrued taxes when paid differ from the amounts claimed as credits by the taxpayer, or if any tax paid is refunded in whole or in part, the taxpayer shall notify the Commissioner who shall redetermine the amount of the tax due under Part II of this title for the year or years affected, and the amount of tax due upon such redetermination, if any, shall be paid by the taxpayer upon notice and demand by the collector, or the amount of tax overpaid, if any, shall be credited or refunded to the taxpayer in accordance with the provisions of section 252. In the case of such a tax accrued but not paid, the Commissioner as a condition precedent to the allowance of this credit may require the taxpayer to give a bond with sureties satisfactory to and to be approved by the Commissioner in such penal sum as the Commissioner may require, conditioned for the payment by the taxpayer of any amount of tax found due upon any such redetermination; and the bond herein prescribed shall contain such further conditions as the Commissioner may require.

(c) These credits shall be allowed only if the taxpayer furnishes evidence satisfactory to the Commissioner showing the amount of income derived from sources within such foreign country or such possession of the United States, and all other information necessary for the computation of such credits. [40 Stat. L. 1073.]

**SEC. 223. Individual returns.** That every individual having a net income for the taxable year of \$1,000 or over if single or if married and not living with husband or wife, or of \$2,000 or over if married and living with husband or wife, shall make under oath a return stating specifically the items of his gross income and the deductions and credits allowed by this title. If a husband and wife living together have an aggregate net income of \$2,000 or over, each shall make such a return unless the income of each is included in a single joint return.

If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer. [40 Stat. L. 1074.]

**SEC. 224. Partnership returns.** That every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this title, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners. [40 Stat. L. 1074.]

**SEC. 225. Fiduciary returns.** That every fiduciary (except receivers appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for the individual, estate or trust for which he acts (1) if the net income of such individual is \$1,000 or over if single or if married and not living with husband or wife, or \$2,000 or over if married and living with husband or wife, or (2) if the net income of such estate or trust is \$1,000 or over or if any beneficiary of such estate or trust is a non-resident alien, stating specifically the items of the gross income and the deductions and credits allowed by this title. Under such regulations as the Commissioner with the approval of the Secretary may prescribe, a return made by one of two or more joint fiduciaries and filed in the office of the collector of the district where such fiduciary resides shall be a sufficient compliance with the above requirement. The fiduciary shall make oath that he has sufficient knowledge of the affairs of such individual, estate or trust to enable him to make the return, and that the same is, to the best of his knowledge and belief, true and correct.

Fiduciaries required to make returns under this Act shall be subject to all the provisions of this Act which apply to individuals. [40 Stat. L. 1074.]

**SEC. 226. Returns when accounting period changed.** That if a taxpayer, with the approval of the Commissioner, changes the basis of computing net income from fiscal year to calendar year a separate return shall be made for the period between the close of the last fiscal year for which return was made and the following December thirty-first. If the change is from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the

close of the fiscal year. If the change is from one fiscal year to another fiscal year a separate return shall be made for the period between the close of the former fiscal year and the date designated as the close of the new fiscal year. If a taxpayer making his first return for income tax keeps his accounts on the basis of a fiscal year he shall make a separate return for the period between the beginning of the calendar year in which such fiscal year ends and the end of such fiscal year.

In all of the above cases the net income shall be computed on the basis of such period for which separate return is made, and the tax shall be paid thereon at the rate for the calendar year in which such period is included; and the credits provided in subdivisions (c) and (d) of section 216 shall be reduced respectively to amounts which bear the same ratio to the full credits provided in such subdivisions as the number of months in such period bears to twelve months. [40 Stat. L. 1075.]

**SEC. 227. Time and place for filing returns.** (a) That returns shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the fifteenth day of March. The Commissioner may grant a reasonable extension of time for filing returns whenever in his judgment good cause exists and shall keep a record of every such extension and the reason therefor. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months.

(b) Returns shall be made to the collector for the district in which is located the legal residence or principal place of business of the person making the return, or, if he has no legal residence or principal place of business in the United States, then to the collector at Baltimore, Maryland. [40 Stat. L. 1075.]

**SEC. 228. Understatement in returns.** That if the collector or deputy collector has reason to believe that the amount of any income returned is understated, he shall give due notice to the taxpayer making the return to show cause why the amount of the return should not be increased, and upon proof of the amount understated, may increase the same accordingly. Such taxpayer may furnish sworn testimony to prove any relevant facts and if dissatisfied with the decision of the collector may appeal to the Commissioner for his decision, under such rules of procedure as may be prescribed by the Commissioner with the approval of the Secretary. [40 Stat. L. 1075.]

### *Part III.—Corporations.*

**SEC. 230. Tax on corporations.** (a) That, in lieu of the taxes imposed by section 10 of the Revenue Act of 1916, as amended by the Revenue Act of 1917, and by section 4 of the Revenue Act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:

(1) For the calendar year 1918, 12 per centum of the amount of the net income in excess of the credits provided in section 236; and

(2) For each calendar year thereafter, 10 per centum of such excess amount.

(b) For the purposes of the Act approved March 21, 1918, entitled "An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,"

five-sixths of the tax imposed by paragraph (1) of subdivision (a) and four-fifths of the tax imposed by paragraph (2) of subdivision (a) shall be treated as levied by an Act in amendment of Title I of the Revenue Act of 1917. [40 Stat. L. 1075.]

For Revenue Acts of 1916 and 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 273. For Act of March 21, 1918, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 757.

**SEC. 231. Conditional and other exemptions.** That the following organizations shall be exempt from taxation under this title —

- (1) Labor, agricultural, or horticultural organizations;
- (2) Mutual savings banks not having a capital stock represented by shares;
- (3) Fraternal beneficiary societies, orders, or associations, (a) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and (b) providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents;
- (4) Domestic building and loan associations and cooperative banks without capital stock organized and operated for mutual purposes and without profit;
- (5) Cemetery companies owned and operated exclusively for the benefit of their members;
- (6) Corporations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual;
- (7) Business leagues, chambers of commerce, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private stockholder or individual;
- (8) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare;
- (9) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or member;
- (10) Farmers' or other mutual hail, cyclone, or fire insurance companies, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations of a purely local character, the income of which consists solely of assessments, dues, and fees collected from members for the sole purpose of meeting expenses;
- (11) Farmers', fruit growers', or like associations, organized and operated as sales agents for the purpose of marketing the products of members and turning back to them the proceeds of sales, less the necessary selling expenses, on the basis of the quantity of produce furnished by them;
- (12) Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom; and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this title;
- (13) Federal land banks and national farm-loan associations as provided in section 26 of the Act approved July 17, 1916, entitled "An Act to provide capital for agricultural development, to create standard forms of investment based upon farm mortgage, to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create Government depositaries and financial agents for the United States, and for other purposes";

(14) Personal service corporations. [40 Stat. L. 1076.]

For Act of July 17, 1916, § 26, *see* 1918 Supp. Fed. Stat. Ann. 36.

**SEC. 232. Net income defined.** That in the case of a corporation subject to the tax imposed by section 230 the term "net income" means the gross income as defined in section 233 less the deductions allowed by section 234, and the net income shall be computed on the same basis as is provided in subdivision (b) of section 212 or in section 226. [40 Stat. L. 1077.]

**SEC. 233. Gross income defined.** (a) That in the case of a corporation subject to the tax imposed by section 230 the term "gross income" means the gross income as defined in section 213, except that:

(1) In the case of life insurance companies there shall not be included in gross income such portion of any actual premium received from any individual policyholder as is paid back or credited to or treated as an abatement of premium of such policyholder within the taxable year.

(2) Mutual marine insurance companies shall include in gross income the gross premiums collected and received by them less amounts paid for reinsurance.

(b) In the case of a foreign corporation gross income includes only the gross income from sources within the United States, including the interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, dividends from resident corporations, and including all amounts received (although paid under a contract for the sale of goods or otherwise) representing profits on the manufacture and disposition of goods within the United States. [40 Stat. L. 1077.]

**SEC. 234. Deductions allowed.** (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity;

(2) All interest paid or accrued within the taxable year on its indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917) the interest upon which is wholly exempt from taxation under this title as income to the taxpayer, or, in the case of a foreign corporation, the proportion of such interest which the amount of its gross income from sources within the United States bears to the amount of its gross income from all sources within and without the United States;

(3) Taxes paid or accrued within the taxable year imposed (a) by the authority of the United States, except income, war-profits and excess-profits taxes; or (b) by the authority of any of its possessions, except the amount of income, war-profits and excess-profits taxes allowed as a credit under section 238; or (c) by the authority of any State or Territory, or any county, school district, municipality, or other taxing subdivision of any State or Territory, not including those assessed against local benefits of a kind tending to increase the value of the prop-

erty assessed; or (d) in the case of a domestic corporation, by the authority of any foreign country, except the amount of income, war-profits and excess-profits taxes allowed as a credit under section 238; or (e) in the case of a foreign corporation, by the authority of any foreign country (except income, war-profits and excess-profits taxes, and taxes assessed against local benefits of a kind tending to increase the value of the property assessed), upon the property or business: *Provided*, That in the case of obligors specified in subdivision (b) of section 221 no deduction for the payment of the tax imposed by this title or any other tax paid pursuant to the contract or provision referred to in that subdivision, shall be allowed;

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise;

(5) Debts ascertained to be worthless and charged off within the taxable year;

(6) Amounts received as dividends from a corporation which is taxable under this title upon its net income, and amounts received as dividends from a personal service corporation out of earnings or profits upon which income tax has been imposed by Act of Congress;

(7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence;

(8) In the case of buildings, machinery, equipment, or other facilities, constructed, erected, installed, or acquired, on or after April 6, 1917, for the production of articles contributing to the prosecution of the present war, and in the case of vessels constructed or acquired on or after such date for the transportation of articles or men contributing to the prosecution of the present war, there shall be allowed a reasonable deduction for the amortization of such part of the cost of such facilities or vessels as has been borne by the taxpayer, but not again including any amount otherwise allowed under this title or previous Acts of Congress as a deduction in computing net income. At any time within three years after the termination of the present war the Commissioner may, and at the request of the taxpayer shall, reexamine the return, and if he then finds as a result of an appraisal or from other evidence that the deduction originally allowed was incorrect, the taxes imposed by this title and by Title III for the year or years affected shall be redetermined and the amount of tax due upon such redetermination, if any, shall be paid upon notice and demand by the collector, or the amount of tax overpaid, if any, shall be credited or refunded to the taxpayer in accordance with the provisions of section 252;

(9) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted: *Provided*, That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date: *Provided further*, That in the case of mines, oil and gas wells, discovered by the taxpayer, on or after March 1, 1913, and not acquired as the result of purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery, or within thirty days thereafter; such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner

with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee;

(10) In the case of insurance companies, in addition to the above: (a) The net addition required by law to be made within the taxable year to reserve funds (including in the case of assessment insurance companies the actual deposit of sums with State or Territorial officers pursuant to law as additions to guarantee or reserve funds); and (b) the sums other than dividends paid within the taxable year on policy and annuity contracts;

(11) In the case of corporations issuing policies covering life, health, and accident insurance combined in one policy issued on the weekly premium payment plan continuing for life and not subject to cancellation, in addition to the above, such portion of the net addition (not required by law) made within the taxable year to reserve funds as the Commissioner finds to be required for the protection of the holders of such policies only;

(12) In the case of mutual marine insurance companies, there shall be allowed, in addition to the deductions allowed in paragraphs (1) to (10), inclusive, amounts repaid to policyholders on account of premiums previously paid by them, and interest paid upon such amounts between the ascertainment and the payment thereof;

(13) In the case of mutual insurance companies (other than mutual life or mutual marine insurance companies) requiring their members to make premium deposits to provide for losses and expenses, there shall be allowed, in addition to the deductions allowed in paragraphs (1) to (10), inclusive, (unless otherwise allowed under such paragraphs) the amount of premium deposits returned to their policyholders and the amount of premium deposits retained for the payment of losses, expenses, and reinsurance reserves;

(14) (a) At the time of filing return for the taxable year 1918 a taxpayer may file a claim in abatement based on the fact that he has sustained a substantial loss (whether or not actually realized by sale or other disposition) resulting from any material reduction (not due to temporary fluctuation) of the value of the inventory for such taxable year, or from the actual payment after the close of such taxable year of rebates in pursuance of contracts entered into during such year upon sales made during such year. In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the Commissioner, conditioned for the payment of any part of such tax found to be due, with interest. If any part of such claim is disallowed then the remainder of the tax due shall on notice and demand by the collector be paid by the taxpayer with interest at the rate of 1 per centum per month from the time the tax would have been due had no such claim been filed. If it is shown to the satisfaction of the Commissioner that such substantial loss has been sustained, then in computing the taxes imposed by this title and by Title III the amount of such loss shall be deducted from the net income. (b) If no such claim is filed, but it is shown to the satisfaction of the Commissioner that during the taxable year 1919 the taxpayer has sustained a substantial loss of the character above described then the amount of such loss shall be deducted from the net income for the taxable year 1918 and the taxes imposed by this title and by Title III for such year shall be redetermined accordingly. Any amount found to be due to the taxpayer upon the basis of such redetermination shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.



(b) In the case of a foreign corporation the deductions allowed in subdivision (a), except those allowed in paragraph (2) and in clauses (a), (b), and (c) of paragraph (3), shall be allowed only if and to the extent that they are connected with income arising from a source within the United States; and the proper apportionment and allocation of the deductions with respect to sources of income within and without the United States shall be determined under rules and regulations prescribed by the Commissioner with the approval of the Secretary. [40 Stat. L. 1077.]

**SEC. 235. Items not deductible.** That in computing net income no deduction shall in any case be allowed in respect of any of the items specified in section 215. [40 Stat. L. 1080.]

**SEC. 236. Credits allowed.** That for the purpose only of the tax imposed by section 230 there shall be allowed the following credits:

(a) The amount received as interest upon obligations of the United States and bonds issued by the War Finance Corporation, which is included in gross income under section 233;

(b) The amount of any taxes imposed by Title III for the same taxable year: *Provided*, That in the case of a corporation which makes return for a fiscal year beginning in 1917 and ending in 1918, in computing the tax as provided in subdivision (a) of section 205, the tax computed for the entire period under Title II of the Revenue Act of 1917 shall be credited against the net income computed for the entire period under Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917 and under Title I of the Revenue Act of 1917, and the tax computed for the entire period under Title III of this Act at the rates prescribed for the calendar year 1918 shall be credited against the net income computed for the entire period under this title; and

(c) In the case of a domestic corporation, \$2,000. [40 Stat. L. 1080.]

For Revenue Acts of 1916 and 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 273.

**SEC. 237. Payment of tax at source.** That in the case of foreign corporations subject to taxation under this title not engaged in trade or business within the United States and not having any office or place of business therein, there shall be deducted and withheld at the source in the same manner and upon the same items of income as is provided in section 221 a tax equal to 10 per centum thereof, and such tax shall be returned and paid in the same manner and subject to the same conditions as provided in that section: *Provided*, That in the case of interest described in subdivision (b) of that section the deduction and withholding shall be at the rate of 2 per centum. [40 Stat. L. 1080.]

**SEC. 238. Credit for taxes.** (a) That in the case of a domestic corporation the total taxes imposed for the taxable year by this title and by Title III shall be credited with the amount of any income, war-profits and excess-profits taxes paid during the taxable year to any foreign country, upon income derived from sources therein, or to any possession of the United States.

If accrued taxes when paid differ from the amounts claimed as credits by the corporation, or if any tax paid is refunded in whole or in part, the corporation shall at once notify the Commissioner who shall redetermine the amount of the taxes due under this title and under Title III for the year or years affected, and

the amount of taxes due upon such redetermination, if any, shall be paid by the corporation upon notice and demand by the collector, or the amount of taxes overpaid, if any, shall be credited or refunded to the corporation in accordance with the provisions of section 252. In the case of such a tax accrued but not paid, the Commissioner as a condition precedent to the allowance of this credit may require the corporation to give a bond with sureties satisfactory to and to be approved by him in such penal sum as he may require, conditioned for the payment by the taxpayer of any amount of taxes found due upon any such redetermination; and the bond herein prescribed shall contain such further conditions as the Commissioner may require.

(b) This credit shall be allowed only if the taxpayer furnishes evidence satisfactory to the Commissioner showing the amount of income derived from sources within such foreign country or such possession of the United States, as the case may be, and all other information necessary for the computation of such credit.

(c) If a domestic corporation makes a return for a fiscal year beginning in 1917 and ending in 1918, only that proportion of this credit shall be allowed which the part of such period within the calendar year 1918 bears to the entire period. [40 Stat. L. 1080.]

**SEC. 239. Corporation returns.** That every corporation subject to taxation under this title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer. If any foreign corporation has no office or place of business in the United States but has an agent in the United States, the return shall be made by the agent. In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.

Returns made under this section shall be subject to the provisions of sections 226 and 228. When return is made under section 226 the credit provided in subdivision (c) of section 236 shall be reduced to an amount which bears the same ratio to the full credit therein provided as the number of months in the period for which such return is made bears to twelve months. [40 Stat. L. 1081.]

**SEC. 240. Consolidated returns.** (a) That corporations which are affiliated within the meaning of this section shall, under regulations to be prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income and invested capital for the purposes of this title and Title III, and the taxes thereunder shall be computed and determined upon the basis of such return: *Provided*, That there shall be taken out of such consolidated net income and invested capital, the net income and invested capital of any such affiliated corporation organized after August 1, 1914, and not successor to a then existing business, 50 per centum or more of whose gross income consists of gains, profits, commissions, or other income, derived from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive. In such case the corporation so taken out shall be separately assessed on

the basis of its own invested capital and net income and the remainder of such affiliated group shall be assessed on the basis of the remaining consolidated invested capital and net income.

In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each. There shall be allowed in computing the income tax only one specific credit of \$2,000 (as provided in section 236); in computing the war-profits credit (as provided in section 311) only one specific exemption of \$3,000; and in computing the excess-profits credit (as provided in section 312) only one specific exemption of \$3,000.

(b) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests.

(c) For the purposes of section 238 a domestic corporation which owns a majority of the voting stock of a foreign corporation shall be deemed to have paid the same proportion of any income, war-profits and excess-profits taxes paid (but not including taxes accrued) by such foreign corporation during the taxable year to any foreign country or to any possession of the United States upon income derived from sources without the United States, which the amount of any dividends (not deductible under section 234) received by such domestic corporation from such foreign corporation during the taxable year bears to the total taxable income of such foreign corporation upon or with respect to which such taxes were paid: *Provided*, That in no such case shall the amount of the credit for such taxes exceed the amount of such dividends (not deductible under section 234) received by such domestic corporation during the taxable year. [40 Stat. L. 1081.]

**SEC. 241. Time and place for filing returns.** (a) That returns of corporations shall be made at the same time as is provided in subdivision (a) of section 227.

(b) Returns shall be made to the collector of the district in which is located the principal place of business or principal office or agency of the corporation, or, if it has no principal place of business or principal office or agency in the United States, then to the collector at Baltimore, Maryland. [40 Stat. L. 1082.]

#### *Part IV.—Administrative Provisions.*

**SEC. 250. Payment of taxes.** (a) That except as otherwise provided in this section and sections 221 and 237 the tax shall be paid in four installments, each consisting of one-fourth of the total amount of the tax. The first installment shall be paid at the time fixed by law for filing the return, and the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth month, after the time fixed by law for filing the return. Where an extension of time for filing a return is granted the time for payment of the first installment shall be postponed until the date of the expiration of the period

of the extension, but the time for payment of the other installments shall not be postponed unless the Commissioner so provides in granting the extension. In any case in which the time for the payment of any installment is at the request of the taxpayer thus postponed, there shall be added as part of such installment interest thereon at the rate of  $\frac{1}{2}$  of 1 per centum per month from the time it would have been due if no extension had been granted, until paid. If any installment is not paid when due, the whole amount of the tax unpaid shall become due and payable upon notice and demand by the collector.

The tax may at the option of the taxpayer be paid in a single payment instead of in installments, in which case the total amount shall be paid on or before the time fixed by law for filing the return, or, where an extension of time for filing the return has been granted, on or before the expiration of the period of such extension.

(b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.

If the amount already paid is less than that which should have been paid, the difference shall, to the extent not covered by any credits then due to the taxpayer under section 252, be paid upon notice and demand by the collector. In such case if the return is made in good faith and the understatement of the amount in the return is not due to any fault of the taxpayer, there shall be no penalty because of such understatement. If the understatement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added as part of the tax 5 per centum of the total amount of the deficiency, plus interest at the rate of 1 per centum per month on the amount of the deficiency of each installment from the time the installment was due.

If the understatement is false or fraudulent with intent to evade the tax, then, in lieu of the penalty provided by section 3176 of the Revised Statutes, as amended, for false or fraudulent returns willfully made, but in addition to other penalties provided by law for false or fraudulent returns, there shall be added as part of the tax 50 per centum of the amount of the deficiency.

(c) If the return is made pursuant to section 3176 of the Revised Statutes as amended, the amount of tax determined to be due under such return shall be paid upon notice and demand by the collector.

(d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

(e) If any tax remains unpaid after the date when it is due, and for ten days after notice and demand by the collector, then, except in the case of estates of insane, deceased, or insolvent persons, there shall be added as part of the tax

the sum of 5 per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount from the time it became due: *Provided*, That as to any such amount which is the subject of a bona fide claim for abatement such sum of 5 per centum shall not be added and the interest from the time the amount was due until the claim is decided shall be at the rate of  $\frac{1}{2}$  of 1 per centum per month.

In the case of the first installment provided for in subdivision (a) the instructions printed on the return shall be deemed sufficient notice of the date when the tax is due and sufficient demand, and the taxpayer's computation of the tax on the return shall be deemed sufficient notice of the amount due.

(f) In any case in which in order to enforce payment of a tax it is necessary for a collector to cause a warrant of distraint to be served, there shall also be added as part of the tax the sum of \$5.

(g) If the Commissioner finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the tax for the taxable year then last past or the taxable year then current unless such proceedings be brought without delay, the Commissioner shall declare the taxable period for such taxpayer terminated at the end of the calendar month then last past and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of said tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any action or suit brought to enforce payment of taxes made due and payable by virtue of the provisions of this subdivision the finding of the Commissioner, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of the taxpayer's design. A taxpayer who is not in default in making any return or paying income, war-profits, or excess-profits tax under any Act of Congress may furnish to the United States, under regulations to be prescribed by the Commissioner with the approval of the Secretary, security approved by the Commissioner that he will duly make the return next thereafter required to be filed and pay the tax next thereafter required to be paid. The Commissioner may approve and accept in like manner security for return and payment of taxes made due and payable by virtue of the provisions of this subdivision, provided the taxpayer has paid in full all other income, war-profits, or excess-profits taxes due from him under any Act of Congress. If security is approved and accepted pursuant to the provisions of this subdivision and such further or other security with respect to the tax or taxes covered thereby is given as the Commissioner shall from time to time find necessary and require, payment of such taxes shall not be enforced by any proceedings under the provisions of this subdivision prior to the expiration of the time otherwise allowed for paying such respective taxes. [40 Stat. L. 1082.]

For R. S. sec. 3176 as amended, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 282.

**SEC. 251. Receipts for taxes.** That every collector to whom any payment of any tax is made under the provisions of this title shall upon request give to the person making such payment a full written or printed receipt, stating the

amount paid and the particular account for which such payment was made; and whenever any debtor pays taxes on account of payments made or to be made by him to separate creditors the collector shall, if requested by such debtor, give a separate receipt for the tax paid on account of each creditor in such form that the debtor can conveniently produce such receipts separately to his several creditors in satisfaction of their respective demands up to the amounts stated in the receipts; and such receipt shall be sufficient evidence in favor of such debtor to justify him in withholding from his next payment to his creditor the amount therein stated; but the creditor may, upon giving to his debtor a full written receipt acknowledging the payment to him of any sum actually paid and accepting the amount of tax paid as aforesaid (specifying the same) as a further satisfaction of the debt to that amount, require the surrender to him of such collector's receipt. [40 Stat. L. 1084.]

**SEC. 252. Refunds.** That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, or the Revenue Act of 1917, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due; unless before the expiration of such five years a claim therefor is filed by the taxpayer. [40 Stat. L. 1085.]

For Act of Aug. 5, 1909, see 1909 Supp. Fed. Stat. Ann. 726.

For Act of Oct. 3, 1913, see 2 Fed. Stat. Ann. (2d ed.) 724; 1914 Supp. Fed. Stat. Ann. 59.

For Revenue Acts of 1916 and 1917, see 1918 Supp. Fed. Stat. Ann. 273.

For R. S. sec. 3228, see 3 Fed. Stat. Ann. (1st ed.) 603; 3 Fed. Stat. Ann. (2d ed.) 1037.

**SEC. 253. Penalties.** That any individual, corporation, or partnership required under this title to pay or collect any tax, to make a return or to supply information, who fails to pay or collect such tax, to make such return, or to supply such information at the time or times required under this title, shall be liable to a penalty of not more than \$1,000. Any individual, corporation, or partnership, or any officer or employee of any corporation or member or employee of a partnership, who willfully refuses to pay or collect such tax, to make such return, or to supply such information at the time or times required under this title, or who willfully attempts in any manner to defeat or evade the tax imposed by this title, shall be guilty of a misdemeanor and shall be fined not more than \$10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution. [40 Stat. L. 1085.]

**SEC. 254. Returns of payments of dividends.** That every corporation subject to the tax imposed by this title and every personal service corporation shall, when required by the Commissioner, render a correct return duly verified under oath, of its payments of dividends, stating the name and address of each stock-

holder, the number of shares owned by him, and the amount of dividends paid to him. [40 Stat. L. 1085.]

**SEC. 255. Returns of brokers.** That every individual, corporation, or partnership doing business as a broker shall, when required by the Commissioner, render a correct return duly verified under oath, under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe, showing the names of customers for whom such individual, corporation, or partnership has transacted any business, with such details as to the profits, losses, or other information which the Commissioner may require, as to each of such customers, as will enable the Commissioner to determine whether all income tax due on profits or gains of such customers has been paid. [40 Stat. L. 1085.]

**SEC. 256. Information at source.** That all individuals, corporations, and partnerships, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, and employers, making payment to another individual, corporation, or partnership, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income (other than payments described in sections 254 and 255), of \$1,000 or more in any taxable year, or, in the case of such payments made by the United States, the officers or employees of the United States having information as to such payments and required to make returns in regard thereto by the regulations hereinafter provided for, shall render a true and accurate return to the Commissioner, under such regulations and in such form and manner and to such extent as may be prescribed by him with the approval of the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.

Such returns may be required, regardless of amounts, (1) in the case of payments of interest upon bonds, mortgages, deeds of trust, or other similar obligations of corporations, and (2) in the case of collections of items (not payable in the United States) of interest upon the bonds of foreign countries and interest upon the bonds of and dividends from foreign corporations by individuals, corporations, or partnerships, undertaking as a matter of business or for profit the collection of foreign payments of such interest or dividends by means of coupons, checks, or bills of exchange.

When necessary to make effective the provisions of this section the name and address of the recipient of income shall be furnished upon demand of the individual, corporation, or partnership paying the income.

The provisions of this section shall apply to the calendar year 1918 and each calendar year thereafter, but shall not apply to the payment of interest on obligations of the United States. [40 Stat. L. 1086.]

**SEC. 257. Returns to be public records.** That returns upon which the tax has been determined by the Commissioner shall constitute public records; but they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President: *Provided*, That the proper officers of any State imposing an income tax may, upon the request of the governor thereof, have access to the returns of any corporation, or to an abstract thereof showing the name and income of the corporation, at such times and in such manner as the Secretary may prescribe: *Provided*

*further*, That all bona fide stockholders of record owning 1 per centum or more of the outstanding stock of any corporation shall, upon making request of the Commissioner, be allowed to examine the annual income returns of such corporation and of its subsidiaries. Any stockholder who pursuant to the provisions of this section is allowed to examine the return of any corporation, and who makes known in any manner whatever not provided by law the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any such return, shall be guilty of a misdemeanor and be punished by a fine not exceeding \$1,000, or by imprisonment not exceeding one year, or both.

The Commissioner shall as soon as practicable in each year cause to be prepared and made available to public inspection in such manner as he may determine, in the office of the collector in each internal-revenue district and in such other places as he may determine, lists containing the names and the post-office addresses of all individuals making income-tax returns in such district. [40 Stat. L. 1086.]

**SEC. 258. Publication of statistics.** That the Commissioner, with the approval of the Secretary, shall prepare and publish annually statistics reasonably available with respect to the operation of the income, war-profits and excess-profits-tax laws, including classifications of taxpayers and of income, the amounts allowed as deductions, exemptions, and credits, and any other facts deemed pertinent and valuable. [40 Stat. L. 1087.]

**SEC. 259. Collection of foreign items.** That all individuals, corporations, or partnerships undertaking as a matter of business or for profit the collection of foreign payments of interest or dividends by means of coupons, checks, or bills of exchange shall obtain a license from the Commissioner and shall be subject to such regulations enabling the Government to obtain the information required under this title as the Commissioner, with the approval of the Secretary, shall prescribe; and whoever knowingly undertakes to collect such payments without having obtained a license therefor, or without complying with such regulations, shall be guilty of a misdemeanor and shall be fined not more than \$5,000, or imprisoned for not more than one year, or both. [40 Stat. L. 1087.]

**SEC. 260. Citizens of United States possessions.** That any individual who is a citizen of any possession of the United States (but not otherwise a citizen of the United States) and who is not a resident of the United States, shall be subject to taxation under this title only as to income derived from sources within the United States, and in such case the tax shall be computed and paid in the same manner and subject to the same conditions as in the case of other persons who are taxable only as to income derived from such sources. [40 Stat. L. 1087.]

**SEC. 261. Porto Rico and Philippine Islands.** That in Porto Rico and the Philippine Islands the income tax shall be levied, assessed, collected, and paid in accordance with the provisions of the Revenue Act of 1916 as amended.

Returns shall be made and taxes shall be paid under Title I of such Act in Porto Rico or the Philippine Islands, as the case may be, by (1) every individual who is a citizen or resident of Porto Rico or the Philippine Islands or derives



income from sources therein, and (2) every corporation created or organized in Porto Rico or the Philippine Islands or deriving income from sources therein. An individual who is neither a citizen nor a resident of Porto Rico or the Philippine Islands but derives income from sources therein, shall be taxed in Porto Rico or the Philippine Islands as a nonresident alien individual, and a corporation created or organized outside Porto Rico or the Philippine Islands and deriving income from sources therein shall be taxed in Porto Rico or the Philippine Islands as a foreign corporation. For the purposes of section 216 and of paragraph (6) of subdivision (a) of section 234 a tax imposed in Porto Rico or the Philippine Islands upon the net income of a corporation shall not be deemed to be a tax under this title.

The Porto Rican or Philippine Legislature shall have power by due enactment to amend, alter, modify, or repeal the income tax laws in force in Porto Rico or the Philippine Islands, respectively. [40 Stat. L. 1087.]

For Revenue Act of 1916, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 273.

### TITLE III — WAR-PROFITS AND EXCESS-PROFITS TAX

#### *Part I.—General Definitions.*

SEC. 300. [Terms used in title defined.] That when used in this title the terms "taxable year," "fiscal year," "personal service corporation," "paid or accrued," and "dividends" shall have the same meaning as provided for the purposes of income tax in sections 200 and 201. The first taxable year for the purposes of this title shall be the same as the first taxable year for the purposes of the income tax under Title II. [40 Stat. L. 1088.]

#### *Part II.—Imposition of Tax.*

SEC. 301. [Rate of tax.] (a) That in lieu of the tax imposed by Title II of the Revenue Act of 1917, but in addition to the other taxes imposed by this Act, there shall be levied, collected, and paid for the taxable year 1918 upon the net income of every corporation a tax equal to the sum of the following:

##### FIRST BRACKET.

30 per centum of the amount of the net income in excess of the excess-profits credit (determined under section 312) and not in excess of 20 per centum of the invested capital;

##### SECOND BRACKET.

65 per centum of the amount of the net income in excess of 20 per centum of the invested capital;

##### THIRD BRACKET.

The sum, if any, by which 80 per centum of the amount of the net income in excess of the war-profits credit (determined under section 311) exceeds the amount of the tax computed under the first and second brackets.

(b) For the taxable year 1919 and each taxable year thereafter there shall be levied, collected, and paid upon the net income of every corporation (except corporations taxable under subdivision (c) of this section) a tax equal to the sum of the following:

**FIRST BRACKET.**

20 per centum of the amount of the net income in excess of the excess-profits credit (determined under section 312) and not in excess of 20 per centum of the invested capital;

**SECOND BRACKET.**

40 per centum of the amount of the net income in excess of 20 per centum of the invested capital.

(c) For the taxable year 1919 and each taxable year thereafter there shall be levied, collected, and paid upon the net income of every corporation which derives in such year a net income of more than \$10,000 from any Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive, a tax equal to the sum of the following:

(1) Such a portion of a tax computed at the rates specified in subdivision (a) as the part of the net income attributable to such Government contract or contracts bears to the entire net income. In computing such tax the excess-profits credit and the war-profits credit applicable to the taxable year shall be used;

(2) Such a portion of a tax computed at the rates specified in subdivision (b) as the part of the net income not attributable to such Government contract or contracts bears to the entire net income.

For the purpose of determining the part of the net income attributable to such Government contract or contracts, the proper apportionment and allocation of the deductions with respect to gross income derived from such Government contract or contracts and from other sources, respectively, shall be determined under rules and regulations prescribed by the Commissioner with the approval of the Secretary.

(d) In any case where the full amount of the excess-profit credit is not allowed under the first bracket of subdivision (a) or (b); by reason of the fact that such credit is in excess of 20 per centum of the invested capital, the part not so allowed shall be deducted from the amount in the second bracket.

(e) For the purposes of the Act approved March 21, 1918, entitled "An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes," the tax imposed by this title shall be treated as levied by an Act in amendment of Title II of the Revenue Act of 1917. [40 Stat. L. 1088.]

For Revenue Act of 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 274.

For Act of March 21, 1918, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 757.

**SEC. 302. [Tax limitations.]** That the tax imposed by subdivision (a) of section 301 shall in no case be more than 30 per centum of the amount of the net income in excess of \$3,000 and not in excess of \$20,000, plus 80 per centum of the amount of the net income in excess of \$20,000; the tax imposed by subdivision (b) of section 301 shall in no case be more than 20 per centum of the amount of the net income in excess of \$3,000 and not in excess of \$20,000, plus 40 per centum of the amount of the net income in excess of \$20,000; and the above limitations shall apply to the taxes computed under subdivisions (a) and (b) of section 301, respectively, when used in subdivision (c) of that section. Nothing in this section shall be construed in such manner as to increase the tax imposed by section 301. [40 Stat. L. 1089.]

**SEC. 303. [Net income derived from different sources — computation.]** That if part of the net income of a corporation is derived (1) from a trade or

business (or a branch of a trade or business) in which the employment of capital is necessary, and (2) a part (constituting not less than 30 per centum of its total net income) is derived from a separate trade or business (or a distinctly separate branch of the trade or business) which if constituting the sole trade or business would bring it within the class of "personal service corporations," then (under regulations prescribed by the Commissioner with the approval of the Secretary) the tax upon the first part of such net income shall be separately computed (allowing in such computation only the same proportionate part of the credits authorized in sections 311 and 312), and the tax upon the second part shall be the same percentage thereof as the tax so computed upon the first part is of such first part: *Provided*, That the tax upon such second part shall in no case be less than 20 per centum thereof, unless the tax upon the entire net income, if computed without benefit of this section, would constitute less than 20 per centum of such entire net income, in which event the tax shall be determined upon the entire net income, without reference to this section, as other taxes are determined under this title. The total tax computed under this section shall be subject to the limitations provided in section 302. [40 Stat. L. 1089.]

**SEC. 304. [Corporations when exempt from taxation.]** (a) That the corporations enumerated in section 231 shall, to the extent that they are exempt from income tax under Title II, be exempt from taxation under this title.

(b) Any corporation whose net income for the taxable year is less than \$3,000 shall be exempt from taxation under this title.

(c) In the case of any corporation engaged in the mining of gold, the portion of the net income derived from the mining of gold shall be exempt from the tax imposed by this title, and the tax on the remaining portion of the net income shall be the proportion of a tax computed without the benefit of this subdivision which such remaining portion of the net income bears to the entire net income. [40 Stat. L. 1090.]

**SEC. 305. [Period of computation as affecting amount of exemption.]** That if a tax is computed under this title for a period of less than twelve months, the specific exemption of \$3,000, wherever referred to in this title, shall be reduced to an amount which is the same proportion of \$3,000 as the number of months in the period is of twelve months. [40 Stat. L. 1090.]

### *Part III.—Credits.*

**SEC. 310. ["Prewar period" defined.]** That as used in this title the term "prewar period" means the calendar years 1911, 1912, and 1913, or, if a corporation was not in existence during the whole of such period, then as many of such years during the whole of which the corporation was in existence. [40 Stat. L. 1090.]

**SEC. 311. [War-profits credit—computation.]** (a) That the war-profits credit shall consist of the sum of:

(1) A specific exemption of \$3,000; and

(2) An amount equal to the average net income of the corporation for the prewar period, plus or minus, as the case may be, 10 per centum of the difference between the average invested capital for the prewar period and the invested

capital for the taxable year. If the tax is computed for a period of less than twelve months such amount shall be reduced to the same proportion thereof as the number of months in the period is of twelve months.

(b) If the corporation had no net income for the prewar period, or if the amount computed under paragraph (2) of subdivision (a) is less than 10 per centum of its invested capital for the taxable year, then the war-profits credit shall be the sum of:

- (1) A specific exemption of \$3,000; and
- (2) An amount equal to 10 per centum of the invested capital for the taxable year.

(c) If the corporation was not in existence during the whole of at least one calendar year during the prewar period, then, except as provided in subdivision (d), the war-profits credit shall be the sum of:

- (1) A specific exemption of \$3,000; and
- (2) An amount equal to the same percentage of the invested capital of the taxpayer for the taxable year as the average percentage of net income to invested capital, for the prewar period, of corporations engaged in a trade or business of the same general class as that conducted by the taxpayer; but such amount shall in no case be less than 10 per centum of the invested capital of the taxpayer for the taxable year. Such average percentage shall be determined by the Commissioner on the basis of data contained in returns made under Title II of the Revenue Act of 1917, and the average known as the median shall be used. If such average percentage has not been determined and published at least 30 days prior to the time when the return of the taxpayer is due, then for purposes of such return 10 per centum shall be used in lieu thereof; but such average percentage when determined shall be used for the purposes of section 250 in determining the correct amount of the tax.

(d) The war-profits credit shall be determined in the manner provided in subdivision (b) instead of in the manner provided in subdivision (c), in the case of any corporation which was not in existence during the whole of at least one calendar year during the prewar period, if (1) a majority of its stock at any time during the taxable year is owned or controlled, directly or indirectly, by a corporation which was in existence during the whole of at least one calendar year during the prewar period, or if (2) 50 per centum or more of its gross income (as computed under section 233 for income tax purposes) consists of gains, profits, commissions, or other income, derived from a government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

(e) A foreign corporation shall not be entitled to a specific exemption of \$3,000. [40 Stat. L. 1090.]

For Revenue Act of 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 274.

SEC. 312. [**Excess-profits credit.**] That the excess-profits credit shall consist of a specific exemption of \$3,000 plus an amount equal to 8 per centum of the invested capital for the taxable year.

A foreign corporation shall not be entitled to the specific exemption of \$3,000. [40 Stat. L. 1091.]

#### *Part IV.—Net Income.*

SEC. 320. [**Basis of ascertainment.**] (a) That for the purpose of this title the net income of a corporation shall be ascertained and returned —

(1) For the calendar years 1911 and 1912 upon the same basis and in the same manner as provided in section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, except that taxes imposed by such section and paid by the corporation within the year shall be included;

(2) For the calendar year 1913 upon the same basis and in the same manner as provided in Section II of the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, except that taxes imposed by section 38 of such Act of August 5, 1909, and paid by the corporation within the year shall be included, and except that the amounts received by it as dividends upon the stock or from the net earnings of other corporations subject to the tax imposed by Section II of such Act of October 3, 1913, shall be deducted; and

(3) For the taxable year upon the same basis and in the same manner as provided for income tax purposes in Title II of this Act.

(b) The average net income for the prewar period shall be determined by dividing the number of years within that period during the whole of which the corporation was in existence into the sum of the net income for such years, even though there may have been no net income for one or more of such years. [40 Stat. L. 1091.]

For Act of Aug. 5, 1909, § 38, see 4 Fed. Stat. Ann. (2d ed.) 255; 1909 Supp. Fed. Stat. Ann. 829.

For Act of Oct. 3, 1913, § II, see 4 Fed. Stat. Ann. (2d ed.) 236; 1914 Supp. Fed. Stat. Ann. 185.

#### *Part V.—Invested Capital.*

**SEC. 325. [Certain terms defined.]** (a) That as used in this title —

The term "intangible property" means patents, copyrights, secret processes and formulæ, good will, trade-marks, trade-brands, franchises, and other like property;

The term "tangible property" means stocks, bonds, notes, and other evidences of indebtedness, bills and accounts receivable, leaseholds, and other property other than intangible property;

The term "borrowed capital" means money or other property borrowed, whether represented by bonds, notes, open accounts, or otherwise;

The term "inadmissible assets" means stocks, bonds, and other obligations (other than obligations of the United States), the dividends or interest from which is not included in computing net income, but where the income derived from such assets consists in part of gain or profit derived from the sale or other disposition thereof, or where all or part of the interest derived from such assets is in effect included in the net income because of the limitation on the deduction of interest under paragraph (2) of subdivision (a) of section 234, a corresponding part of the capital invested in such assets shall not be deemed to be inadmissible assets;

The term "admissible assets" means all assets other than inadmissible assets, valued in accordance with the provisions of subdivision (a) of section 326, section 330, and section 331.

(b) For the purposes of this title, the par value of stock or shares shall, in the case of stock or shares issued at a nominal value or having no par value, be deemed to be the fair market value as of the date or dates of issue of such stock or shares. [40 Stat. L. 1091.]

SEC. 326. [“Invested capital”—Meaning and scope of term.] (a) That as used in this title the term “invested capital” for any year means (except as provided in subdivisions (b) and (c) of this section):

(1) Actual cash bona fide paid in for stock or shares;

(2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus: *Provided*, That the Commissioner shall keep a record of all cases in which tangible property is included in invested capital at a value in excess of the stock or shares issued therefor, containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, the value of the tangible property at the time paid in, the par value of the stock or shares specifically issued therefor, and the amount included under this paragraph as paid-in surplus. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257;

(3) Paid-in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year;

(4) Intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest;

(5) Intangible property bona fide paid in for stock or shares on or after March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year, whichever is lowest: *Provided*, That in no case shall the total amount included under paragraphs (4) and (5) exceed in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year; but

(b) As used in this title the term “invested capital” does not include borrowed capital.

(c) There shall be deducted from invested capital as above defined a percentage thereof equal to the percentage which the amount of inadmissible assets is of the amount of admissible and inadmissible assets held during the taxable year.

(d) The invested capital for any period shall be the average invested capital for such period, but in the case of a corporation making a return for a fractional part of a year, it shall (except for the purpose of paragraph (2) of subdivision (a) of section 311) be the same fractional part of such average invested capital.

The average invested capital for the prewar period shall be determined by dividing the number of years within that period during the whole of which the corporation was in existence into the sum of the average invested capital for such years. [40 Stat. L. 1092.]

**SEC. 327. [Enumeration of cases specially considered for purposes of taxation.]** That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive. [40 Stat. L. 1093.]

**SEC. 328. [Determination of tax of specially considered cases.]** (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of \$3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of \$3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of \$3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the

actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid together with interest at the rate of  $\frac{1}{2}$  of 1 per centum per month on such excess from the time the installment was due.

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257. [40 Stat. L. 1093.]

#### *Part VI.—Reorganizations.*

**SEC. 330. [Reorganizations, consolidations and changes of ownership — net income and invested capital.]** That in the case of the reorganization, consolidation, or change of ownership after January 1, 1911, of a trade or business now carried on by a corporation, the corporation shall for the purposes of this title be deemed to have been in existence prior to that date, and the net income and invested capital of such predecessor trade or business for all or any part of the prewar period prior to the organization of the corporation now carrying on such trade or business shall be deemed to have been the net income and invested capital of such corporation.

If such predecessor trade or business was carried on by a partnership or individual the net income for the prewar period shall, under regulations prescribed by the Commissioner with the approval of the Secretary, be ascertained and returned as nearly as may be upon the same basis and in the same manner as provided for corporations in Title II, including a reasonable deduction for salary or compensation to each partner or the individual for personal services actually rendered.

In the case of the organization as a corporation before July 1, 1919, of any trade or business in which capital is a material income-producing factor and which was previously owned by a partnership or individual, the net income of such trade or business from January 1, 1918, to the date of such reorganization may at the option of the individual or partnership be taxed as the net income of a corporation is taxed under Titles II and III; in which event the net income and invested capital of such trade or business shall be computed as if such corporation had been in existence on and after January 1, 1918, and the undistributed profits or earnings of such trade or business shall not be subject to the surtax imposed in section 211, but amounts distributed on or after January 1, 1918, from the earnings of such trade or business shall be taxed to the recipients as dividends, and all the provisions of Titles II and III relating to corporations shall so far as practicable apply to such trade or business: *Provided*, That this paragraph shall not apply to any trade or business the net income of which for the taxable year 1918 was less than 20 per centum of its invested capital for such year: *Provided further*, That any taxpayer who takes advantage of this paragraph shall pay the tax imposed by section 1000 of this Act and by the first subdivision of section 407 of the Revenue Act of 1916, as if such taxpayer had



been a corporation on and after January 1, 1918, with a capital stock having no par value.

If any asset of the trade or business in existence both during the taxable year and any prewar year is included in the invested capital for the taxable year but is not included in the invested capital for such prewar year, or is valued on a different basis in computing the invested capital for the taxable year and such prewar year, respectively, then under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary such readjustments shall be made as are necessary to place the computation of the invested capital for such prewar year on the basis employed in determining the invested capital for the taxable year. [40 Stat. L. 1094.]

For Revenue Act of 1916, § 407, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 282.

**SEC. 331. [Reorganizations, etc., subsequent to March 3, 1917.]** In the case of the reorganization, consolidation, or change of ownership of a trade or business, or change of ownership of property, after March 3, 1917, if an interest or control in such trade or business or property of 50 per centum or more remains in the same persons, or any of them, then no asset transferred or received from the previous owner shall, for the purpose of determining invested capital, be allowed a greater value than would have been allowed under this title in computing the invested capital of such previous owner if such asset had not been so transferred or received: *Provided*, That if such previous owner was not a corporation, then the value of any asset so transferred or received shall be taken at its cost of acquisition (at the date when acquired by such previous owner) with proper allowance for depreciation, impairment, betterment or development, but no addition to the original cost shall be made for any charge or expenditure deducted as expense or otherwise on or after March 1, 1913, in computing the net income of such previous owner for purposes of taxation. [40 Stat. L. 1095.]

#### *Part VII.—Miscellaneous.*

**SEC. 335. [Period covered by return of corporation as affecting amount of tax—refund of tax of partnership or personal service corporation.]** (a) That if a corporation (other than a personal service corporation) makes return for a fiscal year beginning in 1917 and ending in 1918, the tax for the first taxable year under this title shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title II of the Revenue Act of 1917 which the portion of such period falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates specified in subdivision (a) of section 301 which the portion of such period falling within the calendar year 1918 is of the entire period. Any amount heretofore or hereafter paid on account of the tax imposed for such fiscal year by Title II of the Revenue Act of 1917 shall be credited toward the payment of the tax imposed for such fiscal year by this title, and if the amount so paid exceeds the amount of the tax imposed by this title, the excess shall be credited or refunded to the corporation in accordance with the provisions of section 252.

(b) If a corporation makes return for a fiscal year beginning in 1918 and ending in 1919, the tax for such fiscal year under this title shall be the sum of: (1) the same proportion of a tax for the entire period computed under sub-

division (a) of section 301 which the portion of such period falling within the calendar year 1918 is of the entire period, and (2) the same proportion of a tax for the entire period computed under subdivision (b) or (c) of section 301 which the portion of such period falling within the calendar year 1919 is of the entire period.

(c) If a partnership or a personal service corporation makes return for a fiscal year beginning in 1917 and ending in 1918, it shall pay the same proportion of a tax for the entire period computed under Title II of the Revenue Act of 1917 which the portion of such period falling within the calendar year 1917 is of the entire period.

Any tax paid by a partnership or personal service corporation for any period beginning on or after January 1, 1918, shall be immediately refunded to the partnership or corporation as a tax erroneously or illegally collected. [40 *Stat. L.* 1095.]

For Revenue Act of 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 274.

**SEC. 336. [Corporations required to make returns under title — laws affecting returns and payment of taxes.]** That every corporation, not exempt under section 304, shall make a return for the purposes of this title. Such returns shall be made, and the taxes imposed by this title shall be paid, at the same times and places, in the same manner, and subject to the same conditions, as is provided in the case of returns and payment of income tax by corporations for the purposes of Title II, and all the provisions of that title not inapplicable, including penalties, are hereby made applicable to the taxes imposed by this title. [40 *Stat. L.* 1096.]

**SEC. 337. [Sales of mines, oil or gas wells — amount of tax.]** That in the case of a bona fide sale of mines, oil or gas wells, or any interest therein, where the principal value of the property has been demonstrated by prospecting or exploration and discovery work done by the taxpayer, the portion of the tax imposed by this title attributable to such sale shall not exceed 20 per centum of the selling price of such property or interest. [40 *Stat. L.* 1096.]

#### TITLE IV.— ESTATE TAX.

**SEC. 400. [Definitions — “executor” — “collector.”]** That when used in this title —

The term “executor” means the executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession of any property of the decedent; and

The term “collector” means the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death, or, if there was no such domicile in the United States, then the collector of the district in which is situated the part of the gross estate of the decedent in the United States, or, if such part of the gross estate is situated in more than one district, then the collector of internal revenue of such district as may be designated by the Commissioner. [40 *Stat. L.* 1096.]

**SEC. 401. [Imposition of tax — amount — persons dying in military or naval service.]** That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the

net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

- 1 per centum of the amount of the net estate not in excess of \$50,000;
- 2 per centum of the amount by which the net estate exceeds \$50,000 and does not exceed \$150,000;
- 3 per centum of the amount by which the net estate exceeds \$150,000 and does not exceed \$250,000;
- 4 per centum of the amount by which the net estate exceeds \$250,000 and does not exceed \$450,000;
- 6 per centum of the amount by which the net estate exceeds \$450,000 and does not exceed \$750,000;
- 8 per centum of the amount by which the net estate exceeds \$750,000 and does not exceed \$1,000,000;
- 10 per centum of the amount by which the net estate exceeds \$1,000,000 and does not exceed \$1,500,000;
- 12 per centum of the amount by which the net estate exceeds \$1,500,000 and does not exceed \$2,000,000;
- 14 per centum of the amount by which the net estate exceeds \$2,000,000 and does not exceed \$3,000,000;
- 16 per centum of the amount by which the net estate exceeds \$3,000,000 and does not exceed \$4,000,000;
- 18 per centum of the amount by which the net estate exceeds \$4,000,000 and does not exceed \$5,000,000;
- 20 per centum of the amount by which the net estate exceeds \$5,000,000 and does not exceed \$8,000,000;
- 22 per centum of the amount by which the net estate exceeds \$8,000,000 and does not exceed \$10,000,000; and
- 25 per centum of the amount by which the net estate exceeds \$10,000,000.

The taxes imposed by this title or by Title II of the Revenue Act of 1916 (as amended by the Act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the extensions of fortifications, and for other purposes," approved March 3, 1917) or by Title IX of the Revenue Act of 1917, shall not apply to the transfer of the net estate of any decedent who has died or may die while serving in the military or naval forces of the United States in the present war or from injuries received or disease contracted while in such service, and any such tax collected upon such transfer shall be refunded to the executor. [40 Stat. L. 1096.]

For Revenue Acts of 1916 and 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 270 et seq.

**SEC. 402. [Value of gross estate—determination.]** That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, existing at

the time of the decedent's death as dower, courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent;

(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over \$40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life. [40 Stat. L. 1097.]

**SEC. 403. [Value of net estate — determination.]** That for the purpose of the tax the value of the net estate shall be determined —

(a) In the case of a resident, by deducting from the value of the gross estate —

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise, and such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy, or inheritance taxes;

(2) An amount equal to the value at the time of the decedent's death of any property, real, personal, or mixed, which can be identified as having been received by the decedent as a share in the estate of any person who died within five years prior to the death of the decedent, or which can be identified as having been acquired by the decedent in exchange for property so received, if an estate tax under the Revenue Act of 1917 or under this Act was collected from such estate, and if such property is included in the decedent's gross estate;

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof,

or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; and

(4) An exemption of \$50,000;

(b) In the case of a nonresident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States—

(1) That proportion of the deductions specified in paragraph (1) of subdivision (a) of this section which the value of such part bears to the value of his entire gross estate, wherever situated, but in no case shall the amount so deducted exceed 10 per centum of the value of that part of his gross estate which at the time of his death is situated in the United States;

(2) An amount equal to the value at the time of the decedent's death of any property, real, personal, or mixed, which can be identified as having been received by the decedent as a share in the estate of any person who died within five years prior to the death of the decedent, or which can be identified as having been acquired by the decedent in exchange for property so received, if an estate tax under the Revenue Act of 1917 or under this Act was collected from such estate, and if such property is included in that part of the decedent's gross estate which at the time of his death is situated in the United States; and

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any domestic corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes within the United States. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; and

No deduction shall be allowed in the case of a nonresident unless the executor includes in the return required to be filed under section 404 the value at the time of his death of that part of the gross estate of the nonresident not situated in the United States.

For the purpose of this title stock in a domestic corporation owned and held by a nonresident decedent, and the amount receivable as insurance upon the life of a nonresident decedent where the insurer is a domestic corporation, shall be deemed property within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (c) of section 402, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.

In the case of any estate in respect to which the tax under existing law has been paid, if necessary to allow the benefit of the deduction under paragraph

(3) of subdivision (a) or (b) the tax shall be redetermined and any excess of tax paid shall be refunded to the executor. [40 Stat. L. 1098.]

For Revenue Acts of 1916 and 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 270.

**SEC. 404. [Duty of executor — notice — return — assessment of tax.]** That the executor, within sixty days after qualifying as such, or after coming into possession of any property of the decedent, whichever event first occurs, shall give written notice thereof to the collector. The executor shall also, at such times and in such manner as may be required by regulations made pursuant to law, file with the collector a return under oath in duplicate, setting forth (a) the value of the gross estate of the decedent at the time of his death, or, in case of a nonresident, of that part of his gross estate situated in the United States; (b) the deductions allowed under section 403; (c) the value of the net estate of the decedent as defined in section 403; and (d) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

Return shall be made in all cases where the gross estate at the death of the decedent exceeds \$50,000, and in the case of the estate of every nonresident any part of whose gross estate is situated in the United States. If the executor is unable to make a complete return as to any part of the gross estate of the decedent, he shall include in his return a description of such part and the name of every person holding a legal or beneficial interest therein, and upon notice from the collector such person shall in like manner make a return as to such part of the gross estate. The Commissioner shall make all assessments of the tax under the authority of existing administrative special and general provisions of law relating to the assessment and collection of taxes. [40 Stat. L. 1099.]

**SEC. 405. [Return when required to be made by collector.]** That if no administration is granted upon the estate of a decedent, or if no return is filed as provided in section 404, or if a return contains a false or incorrect statement of a material fact, the collector or deputy collector shall make a return and the Commissioner shall assess the tax thereon. [40 Stat. L. 1099.]

**SEC. 406. [Payment of tax — time — interest.]** That the tax shall be due one year after the decedent's death; but in any case where the Commissioner finds that payment of the tax within one year after the decedent's death would impose undue hardship upon the estate, he may grant an extension of time for the payment of the tax for a period not to exceed three years from the due date. If the tax is not paid within one year and 180 days after the decedent's death, interest at the rate of 6 per centum per annum from the expiration of one year after the decedent's death shall be added as part of the tax. [40 Stat. L. 1099.]

**SEC. 407. [Payment of tax — to whom made — amount undetermined — receipts.]** That the executor shall pay the tax to the collector or deputy collector. If the amount of the tax can not be determined, the payment of a sum of money sufficient, in the opinion of the collector, to discharge the tax shall be deemed payment in full of the tax, except as in this section otherwise provided. If the amount so paid exceeds the amount of the tax as finally determined, the Commissioner shall refund such excess to the executor. If the amount of the tax as finally determined exceeds the amount so paid, the collector shall notify

the executor of the amount of such excess and demand payment thereof. If such excess part of the tax is not paid within thirty days after such notification, interest shall be added thereto at the rate of 10 per centum per annum from the expiration of such thirty days' period until paid, and the amount of such excess shall be a lien upon the entire gross estate, except such part thereof as may have been sold to a bona fide purchaser for a fair consideration in money or money's worth.

The collector shall grant to the person paying the tax duplicate receipts, either of which shall be sufficient evidence of such payment, and shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts. [40 Stat. L. 1100.]

**SEC. 408. [Unpaid taxes — collection — satisfaction of tax out of distributed portion of estate — proceeds of insurance policies.]** That if the tax herein imposed is not paid within 180 days after it is due, the collector shall, unless there is reasonable cause for further delay, proceed to collect the tax under the provisions of general law, or commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto.

If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution. If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of \$40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio. [40 Stat. L. 1100.]

**SEC. 409. [Unpaid tax as lien — transfers of property in anticipation of death — innocent purchasers for value.]** That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate releasing any or all property of such estate from the lien herein imposed.

If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth. [40 Stat. L. 1100.]

**SEC. 410. [Violations of act — penalties.]** That whoever knowingly makes any false statement in any notice or return required to be filed under this title shall be liable to a penalty of not exceeding \$5,000, or imprisonment not exceeding one year, or both.

Whoever fails to comply with any duty imposed upon him by section 404, or, having in his possession or control any record, file, or paper, containing or supposed to contain any information concerning the estate of the decedent, or, having in his possession or control any property comprised in the gross estate of the decedent, fails to exhibit the same upon request to the Commissioner or any collector or law officer of the United States, or his duly authorized deputy or agent, who desires to examine the same in the performance of his duties under this title, shall be liable to a penalty of not exceeding \$500, to be recovered, with costs of suit, in a civil action in the name of the United States. [40 Stat. L. 1101.]

#### **TITLE V.—TAX ON TRANSPORTATION AND OTHER FACILITIES, AND ON INSURANCE.**

**SEC. 500. [Amount of tax—transportation of persons and property—messages and telephone conversations.]** That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the Revenue Act of 1917—

(a) A tax equivalent to 3 per centum of the amount paid for the transportation on or after such date, by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water, of property by freight transported from one point in the United States to another; and a like tax on the amount paid for such transportation within the United States of property transported from a point without the United States to a point within the United States;

(b) A tax of 1 cent for each 20 cents or fraction thereof of the amount paid to any person for the transportation on or after such date, by rail or water or by any form of mechanical motor power when in competition with express by rail or water, of any package, parcel, or shipment, by express, transported from one point in the United States to another; and a like tax on the amount paid for such transportation within the United States of property transported from a point without the United States to a point within the United States;



(c) A tax equivalent to 8 per centum of the amount paid for the transportation on or after such date of persons by rail or water, or by any form of mechanical motor power on a regular established line when in competition with carriers by rail or water, from one point in the United States to another or to any point in Canada or Mexico, where the ticket or order therefor is sold or issued in the United States, not including the amount paid for commutation or season tickets for trips less than thirty miles, or for transportation the fare for which does not exceed 42 cents; *Provided*, That where such water transportation lines are in competition between American ports with foreign water transportation lines from adjacent foreign ports, the tax imposed under this subdivision on amounts paid for water transportation between American ports shall not exceed the amount of the transportation tax to which such foreign water transportation lines are subjected by their government corresponding to this tax;

(d) A tax equivalent to 8 per centum of the amount paid for seats, berths, and staterooms in parlor cars, sleeping cars, or on vessels, used on or after such date in connection with transportation upon which tax is imposed by subdivision (c);

(e) A tax equivalent to 8 per centum of the amount paid for the transportation on or after such date of oil by pipe line;

(f) In the case of each telegraph, telephone, cable, or radio, dispatch, message, or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents: *Provided*, That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation; and

(g) A tax equivalent to 10 per centum of the amount paid after such date to any telegraph or telephone company for any leased wire or talking circuit special service furnished after such date. This subdivision shall not apply to the amount paid for so much of such service as is utilized (1) in the collection and dissemination of news through the public press, or (2) in the conduct, by a common carrier or telegraph or telephone company, of its business as such;

(h) No tax shall be imposed under this section upon any payment received for services rendered to the United States or to any State or Territory or the District of Columbia. The right to exemption under this subdivision shall be evidenced in such manner as the Commissioner, with the approval of the Secretary, may by regulation prescribe. [40 Stat. L. 1101.]

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SEC. 501. (a) [Tax by whom paid.] That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered. [40 Stat. L. 1102.]

[SEC. 501 continued] (b) [Mileage book — collection of tax.] If a mileage book used for transportation or accommodation was purchased before November 1, 1917, or if cash fare is paid, the tax imposed by section 500 shall be collected from the person presenting the mileage book, or paying the cash fare, by the conductor or other agent, when presented for such transportation or accommodation, and the amount so collected shall be paid to the United States in

If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth. [40 Stat. L. 1100.]

**SEC. 410. [Violations of act — penalties.]** That whoever knowingly makes any false statement in any notice or return required to be filed under this title shall be liable to a penalty of not exceeding \$5,000, or imprisonment not exceeding one year, or both.

Whoever fails to comply with any duty imposed upon him by section 404, or, having in his possession or control any record, file, or paper, containing or supposed to contain any information concerning the estate of the decedent, or, having in his possession or control any property comprised in the gross estate of the decedent, fails to exhibit the same upon request to the Commissioner or any collector or law officer of the United States, or his duly authorized deputy or agent, who desires to examine the same in the performance of his duties under this title, shall be liable to a penalty of not exceeding \$500, to be recovered, with costs of suit, in a civil action in the name of the United States. [40 Stat. L. 1101.]

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(c) A tax equivalent to 8 per centum of the amount paid for the transportation on or after such date of persons by rail or water, or by any form of mechanical motor power on a regular established line when in competition with carriers by rail or water, from one point in the United States to another or to any point in Canada or Mexico, where the ticket or order therefor is sold or issued in the United States, not including the amount paid for commutation or season tickets for trips less than thirty miles, or for transportation the fare for which does not exceed 42 cents; *Provided*, That where such water transportation lines are in competition between American ports with foreign water transportation lines from adjacent foreign ports, the tax imposed under this subdivision on amounts paid for water transportation between American ports shall not exceed the amount of the transportation tax to which such foreign water transportation lines are subjected by their government corresponding to this tax;

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(f) In the case of each telegraph, telephone, cable, or radio, dispatch, message, or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents: *Provided*, That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation; and

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For Revenue Act of 1917, sec. 500, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 355.

SEC. 501. (a) [Tax by whom paid.] That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered. [40 Stat. L. 1102.]

[SEC. 501 continued] (b) [Mileage book—collection of tax.] If a mileage book used for transportation or accommodation was purchased before November 1, 1917, or if cash fare is paid, the tax imposed by section 500 shall be collected from the person presenting the mileage book, or paying the cash fare, by the conductor or other agent, when presented for such transportation or accommodation, and the amount so collected shall be paid to the United States in

If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth. [40 Stat. L. 1100.]

**SEC. 410. [Violations of act — penalties.]** That whoever knowingly makes any false statement in any notice or return required to be filed under this title shall be liable to a penalty of not exceeding \$5,000, or imprisonment not exceeding one year, or both.

Whoever fails to comply with any duty imposed upon him by section 404, or, having in his possession or control any record, file, or paper, containing or supposed to contain any information concerning the estate of the decedent, or, having in his possession or control any property comprised in the gross estate of the decedent, fails to exhibit the same upon request to the Commissioner or any collector or law officer of the United States, or his duly authorized deputy or agent, who desires to examine the same in the performance of his duties under this title, shall be liable to a penalty of not exceeding \$500, to be recovered, with costs of suit, in a civil action in the name of the United States. [40 Stat. L. 1101.]

#### **TITLE V.—TAX ON TRANSPORTATION AND OTHER FACILITIES, AND ON INSURANCE.**

**SEC. 500. [Amount of tax—transportation of persons and property—messages and telephone conversations.]** That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the Revenue Act of 1917—

(a) A tax equivalent to 3 per centum of the amount paid for the transportation on or after such date, by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water, of property by freight transported from one point in the United States to another; and a like tax on the amount paid for such transportation within the United States of property transported from a point without the United States to a point within the United States;

(b) A tax of 1 cent for each 20 cents or fraction thereof of the amount paid to any person for the transportation on or after such date, by rail or water or by any form of mechanical motor power when in competition with express by rail or water, of any package, parcel, or shipment, by express, transported from one point in the United States to another; and a like tax on the amount paid for such transportation within the United States of property transported from a point without the United States to a point within the United States;



(c) A tax equivalent to 8 per centum of the amount paid for the transportation on or after such date of persons by rail or water, or by any form of mechanical motor power on a regular established line when in competition with carriers by rail or water, from one point in the United States to another or to any point in Canada or Mexico, where the ticket or order therefor is sold or issued in the United States, not including the amount paid for commutation or season tickets for trips less than thirty miles, or for transportation the fare for which does not exceed 42 cents; *Provided*, That where such water transportation lines are in competition between American ports with foreign water transportation lines from adjacent foreign ports, the tax imposed under this subdivision on amounts paid for water transportation between American ports shall not exceed the amount of the transportation tax to which such foreign water transportation lines are subjected by their government corresponding to this tax;

(d) A tax equivalent to 8 per centum of the amount paid for seats, berths, and staterooms in parlor cars, sleeping cars, or on vessels, used on or after such date in connection with transportation upon which tax is imposed by subdivision (c);

(e) A tax equivalent to 8 per centum of the amount paid for the transportation on or after such date of oil by pipe line;

(f) In the case of each telegraph, telephone, cable, or radio, dispatch, message, or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents: *Provided*, That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation; and

(g) A tax equivalent to 10 per centum of the amount paid after such date to any telegraph or telephone company for any leased wire or talking circuit special service furnished after such date. This subdivision shall not apply to the amount paid for so much of such service as is utilized (1) in the collection and dissemination of news through the public press, or (2) in the conduct, by a common carrier or telegraph or telephone company, of its business as such;

(h) No tax shall be imposed under this section upon any payment received for services rendered to the United States or to any State or Territory or the District of Columbia. The right to exemption under this subdivision shall be evidenced in such manner as the Commissioner, with the approval of the Secretary, may by regulation prescribe. [40 Stat. L. 1101.]

For Revenue Act of 1917, sec. 500, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 355.

SEC. 501. (a) [Tax by whom paid.] That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered. [40 Stat. L. 1102.]

[SEC. 501 continued] (b) [Mileage book—collection of tax.] If a mileage book used for transportation or accommodation was purchased before November 1, 1917, or if cash fare is paid, the tax imposed by section 500 shall be collected from the person presenting the mileage book, or paying the cash fare, by the conductor or other agent, when presented for such transportation or accommodation, and the amount so collected shall be paid to the United States in

such manner and at such times as the Commissioner, with the approval of the Secretary, may prescribe; if a ticket (other than a mileage book) was bought and partially used before November 1, 1917, it shall not be taxed, but if bought but not so used before section 500 takes effect, it shall not be valid for passage until the tax has been paid and such payment evidenced on the ticket in such manner as the Commissioner, with the approval of the Secretary, may by regulation prescribe. [40 Stat. L. 1102.]

[SEC. 501 *continued*] (c) **[Tax as applicable to all services or facilities for hire — transportation of property owned by carrier.]** The taxes imposed by section 500 shall apply to all services or facilities specified in such section when rendered for hire, whether or not the agency rendering them is a common carrier. In case a carrier (other than a pipe line) principally engaged in rendering transportation services or facilities for hire does not, because of its ownership of the goods transported, or for any other reason, receive the amount which as a carrier it would otherwise charge, such carrier shall pay a tax equivalent to the tax which would be imposed upon the transportation of such goods if the carrier received payment for such transportation, such tax, if it can not be computed from actual rates or tariffs of the carrier, to be computed on the basis of the rates or tariffs of other carriers for like services as determined by the Commissioner. In the case of any carrier (other than a pipe line) the principal business of which is to transport goods belonging to it on its own account and which only incidentally renders services for hire, the tax shall apply to such services or facilities only as are actually rendered by it for hire. Nothing in this or the preceding section shall be construed as imposing a tax (1) upon the transportation of any commodity which is necessary for the use of the carrier in the conduct of its business as such and is intended to be so used or has been so used; or (2) upon the transportation of company material transported by one carrier, which constitutes a part of a railroad system, for another carrier which is also a part of the same system. [40 Stat. L. 1102.]

[SEC. 501 *continued*.] (d) **[Transportation of oil by pipe line.]** The tax imposed by subdivision (c) of section 500 shall apply to all transportation of oil by pipe line. In case no charge for transportation is made, by reason of ownership of the commodity transported, or for any other reason, the person transporting by pipe line shall pay a tax equivalent to the tax which would be imposed if such person received payment for such transportation, and if the tax can not be computed from actual bona fide rates or tariffs, it shall be computed (1) on the basis of the rates or tariffs of other pipe lines for like services, as determined by the Commissioner, or (2) if no such rates or tariffs exist, on the basis of a reasonable charge for such transportation, as determined by the Commissioner. [40 Stat. L. 1103.]

SEC. 502. **[Collection of tax — by whom made — returns — duty of carrier — refund of payment — time for payment — penalty for non-payment.]** That each person receiving any payments referred to in section 500 shall collect the amount of the tax, if any, imposed by such section from the person making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected and the taxes imposed upon it under subdivision (c) or

(d) of section 501 to the collector of the district in which the principal office or place of business is located.

No carrier collecting the taxes imposed by subdivision (a) or (b) of section 500 shall be required to list the amount of such tax separately in any bill of lading, freight or express receipt, or other similar document, if the total amount of the transportation charge and the tax is stated therein.

Any person making a refund of any payment upon which tax is collected under this section may repay therewith the amount of the tax collected on such payment; and the amount so repaid may be credited against amounts included in any subsequent monthly return.

The returns required under this section shall contain such information, and be made at such times and in such manner, as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due. [40 Stat. L. 1103.]

#### INSURANCE.

SEC. 503. [Insurance policies — tax on issuance — exemptions.] That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 504 of the Revenue Act of 1917, the following taxes on the issuance of insurance policies, including, in the case of policies issued outside the United States (except those taxable under subdivision 15 of Schedule A of Title XI), their delivery within the United States by any agent or broker, whether acting for the insurer or the insured; such taxes to be paid by the insurer, or by such agent or broker:

(a) Life insurance: A tax equivalent to 8 cents on each \$100 or fractional part thereof of the amount for which any life is insured under any policy of insurance, or other instrument, by whatever name the same is called: *Provided*, That on all policies for life insurance only by which a life is insured not in excess of \$500, issued on the industrial or weekly or monthly payment plan of insurance, the tax shall be 40 per centum of the amount of the first weekly premium or 20 per centum of the amount of the first monthly premium, as the case may be: *Provided further*, That on policies of group life insurance, covering groups of not less than 25 lives in the employ of the same person, for the benefit of persons other than the employer, the tax shall be equivalent to 4 cents on each \$100 of the aggregate amount for which the group policy is issued and of any net increase in the amount of the insurance under such policy: *And provided further*, That on all policies covering life, health, and accident insurance combined in one policy by which a life is insured not in excess of \$500, issued on the industrial, or weekly or monthly payment plan of insurance, the tax shall be 40 per centum of the amount of the first weekly premium or 20 per centum of the amount of the first monthly premium, as the case may be;

(b) Marine, inland, and fire insurance: A tax equivalent to 1 cent on each dollar or fractional part thereof of the premium charged under each policy of insurance or other instrument by whatever name the same is called whereby insurance is made or renewed upon property of any description (including rents or profits), whether against peril by sea or inland waters, or by fire or lightning, or other peril;

(c) **Casualty insurance:** A tax equivalent to 1 cent on each dollar or fractional part thereof of the premium charged under each policy of insurance or obligation of the nature of indemnity for loss, damage, or liability (except bonds and policies taxable under subdivision 2 of schedule A of Title XI) issued or executed or renewed by any person transacting the business of employer's liability, workmen's compensation, accident, health, tornado, plate glass, steam boiler, elevator, burglary, automatic sprinkler, automobile, or other branch of insurance (except life insurance, and insurance described and taxed in the preceding subdivision): *Provided*, That in case of policies of insurance issued on the industrial or weekly or monthly payment plan the tax shall be 40 per centum of the amount of the first weekly premium or 20 per centum of the amount of the first monthly premium, as the case may be;

(d) Policies issued by any corporation enumerated in section 231, and policies of reinsurance, shall be exempt from the taxes imposed by this section. [40 Stat. L. 1104.]

For Revenue Act of 1917, sec. 504, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 357.

**SEC. 504. [Returns by insurance companies — payment of tax — penalty for non-payment.]** That every person issuing policies of insurance upon the issuance of which a tax is imposed by section 503 shall make monthly returns under oath, in duplicate, and pay such tax to the collector of the district in which the principal office or place of business of such person is located. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due. [40 Stat. L. 1104.]

#### TITLE VI.—TAX ON BEVERAGES

**SEC. 600. (a) [Distilled spirits — amount of tax — when due.]** That there shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, except such distilled spirits as are subject to the tax provided in section 604, in lieu of the internal-revenue taxes now imposed thereon by law, a tax of \$2.20 (or, if withdrawn for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, a tax of \$6.40) on each proof gallon, or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law. [40 Stat. L. 1105.]

[SEC. 600 *continued.*] (b) **[Spirits in storage — payment of tax as affected by prohibition ban — withdrawal of spirits — leakage, etc.—imported spirits, wines or other liquor.]** That the tax imposed by subdivision (a) on distilled spirits intended for beverage purposes shall not be due or payable on such spirits while stored in any distillery, bonded warehouse, or special or general bonded warehouse, and which, pursuant to any Act of Congress or proclamation of the

President of the United States, can not be lawfully sold or removed from any such warehouse during the period of prohibition fixed by such Act or proclamation; and all warehousing bonds or transportation and warehousing bonds conditioned for the payment of tax on any such spirits so stored on the date such prohibition takes effect shall as to all such spirits actually so stored be canceled and discharged, provided the distiller of such spirits shall in lieu of such bonds and prior to their cancellation execute a bond in a penal sum of not less than \$10,000, with sureties satisfactory to the collector of the district, conditioned that the principal shall, during the period of such prohibition, safely keep or cause to be kept in good condition all such spirits and the warehouse in which the same are stored, and shall not remove or suffer to be removed from warehouse, contrary to law, any such spirits during the period of such prohibition; and the bond herein prescribed shall be in such further sum and shall contain such further conditions as the Commissioner, with the approval of the Secretary, may by regulations require. The distiller may, subject to the provisions of this section, be permitted to retain in any such bonded warehouse distilled spirits on which, under the terms of any existing bond, the tax imposed thereon becomes due and payable prior to the date such prohibition takes effect: *Provided*, That on the removal of such prohibition the distiller shall, as to all spirits as to which the bonded period fixed by law has not expired and which remain stored in warehouse, execute new and satisfactory bond in the form required by existing law, conditioned for the payment of the tax on all such spirits; and all provisions of existing law relating to such bonded warehouses, or the storage of spirits therein, or to the execution of new or additional bonds, so far as applicable, shall continue in force as to all distilled spirits rebonded under the provisions of this section.

Upon the withdrawal of distilled spirits from bonded warehouse, after the period of prohibition has ended, and under the conditions imposed by section 50 of an Act entitled "An Act to reduce taxation, to provide revenue for the support of the Government, and for other purposes," approved August 28 [27], 1894, an allowance for loss by leakage or other unavoidable cause, not exceeding one proof gallon as to packages of a capacity of not less than 40 wine gallons, may be made in addition to that provided in said section 50, as amended; and a like additional allowance of one proof gallon as to each package withdrawn may be made for each period of four months, or fraction thereof, for such spirits as shall have remained in warehouse during the period of prohibition and after the expiration of the maximum leakage period fixed by that section.

Under regulations prescribed by the Secretary, any imported distilled spirits, wines or other liquors which may be in any customs bonded warehouse under the customs laws on the date such prohibition takes effect shall be permitted to remain therein without payment of any taxes or duties thereon, beyond the three-year period provided in section 2971 of the Revised Statutes, during such period of prohibition; and may be exported at any time during such extended period. Any imported spirits, wines or other liquors as to which the three-year bonded period may expire after the passage of this Act and prior to the date such prohibition takes effect may at the option of the owner remain in bond during such period of prohibition. [40 Stat. L. 1105.]

For Act of Aug. 27, 1894, sec. 50, mentioned in the text, see 3 Fed. Stat. Ann. 669; 4 Fed. Stat. Ann. (2d ed.) 106.

For R. S. sec. 2971, mentioned in the text, see 2 Fed. Stat. Ann. 699; 2 Fed. Stat. Ann. (2d ed.) 1100.

[SEC. 600 *continued.*] (c) **[Perfumes — amount of tax — collection.]** In lieu of the internal-revenue tax now imposed thereon by law there shall be levied and collected upon all perfumes hereafter imported into the United States containing distilled spirits, a tax of \$1.10 per wine gallon, and a proportionate tax at a like rate on all fractional parts of such wine gallon. Such tax shall be collected by the collector of customs and deposited as internal-revenue collections, under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe. [40 Stat. L. 1106.]

SEC. 601. **[Importation of distilled spirits.]** That no distilled spirits produced after October 3, 1917, shall be imported into the United States from any foreign country, or from the Virgin Islands (unless produced from products the growth of such islands, and not then into any State or Territory or District of the United States in which the manufacture or sale of intoxicating liquor is prohibited), or from Porto Rico, or the Philippine Islands. Under such rules, regulations, and bonds as the Secretary may prescribe, the provisions of this section shall not apply to distilled spirits imported for other than (1) beverage purposes or (2) use in the manufacture or production of any article used or intended for use as a beverage. [40 Stat. L. 1106.]

SEC. 602. **[Alcohol and other high proof spirits — bonded and distillery warehouses — withdrawals — application of Revised Statutes sections to ethyl and denatured alcohol.]** That at registered distilleries producing alcohol, or other high-proof spirits, packages may be filled with such spirits reduced to not less than one hundred proof from the receiving cisterns and tax paid without being entered into bonded warehouse. Such spirits may be also transferred from the receiving cisterns at such distilleries, by means of pipe lines, direct to storage tanks in the bonded warehouse and may be warehoused in such storage tanks. Such spirits may be also transferred in tanks or tank cars to general bonded warehouses for storage therein, either in storage tanks in such warehouses or in the tanks in which they were transferred. Such spirits may also be transferred from receiving cisterns or warehouse storage tanks to barrels, drums, tanks, tank cars, or other approved containers, and may be transported in such containers for exportation or other lawful purposes. The Commissioner, with the approval of the Secretary, is hereby empowered to prescribe all necessary regulations relating to the drawing off, transferring, gauging, storing, and transporting of such spirits; the records to be kept and returns to be made; the size and kind of packages and tanks to be used; the marking, branding, numbering, and stamping of such packages and tanks; the kinds of stamps, if any, to be used; and the time and manner of paying the tax; the kind of bond and the penal sum of same. The tax prescribed by law must be paid before such spirits are removed from the distillery premises, or from general bonded warehouse in the case of spirits transferred thereto, except as otherwise provided by law.

Under such regulations as the Commissioner, with the approval of the Secretary, may prescribe, distilled spirits may hereafter be drawn from receiving cisterns and deposited in distillery warehouses without having affixed to the packages containing the same, distillery warehouse stamps, and such packages, when so deposited in warehouse, may be withdrawn therefrom on the original gauge where the same have remained in such warehouse for a period not exceeding thirty days from the date of deposit.

Under such regulations as the Commissioner, with the approval of the Secretary, may prescribe, the manufacture, warehousing, withdrawal, and shipment, under the provisions of existing law, of ethyl alcohol for other than (1) beverage purposes or (2) use in the manufacture or production of any article used or intended for use as a beverage, and denatured alcohol, may be exempted from the provisions of section 3283 of the Revised Statutes.

The Commissioner, with the approval of the Secretary, may by regulations exempt distillers of ethyl alcohol, for use in the production of munitions of war, or for other nonbeverage purposes, from so much of the provisions of sections 3264, 3285, or 3309 of the Revised Statutes, and Acts amendatory thereof, respecting the survey of distilleries, the period of fermentation, the filling and emptying of fermenting tubs, and assessments, as, in his judgment, may be expedient: *Provided*, That the bond prescribed in section 3260 of the Revised Statutes shall, in the cases herein provided, be in such sum and contain such further conditions as the Commissioner may require. [40 Stat. L. 1106.]

For R. S. sec. 3283, mentioned in the text, see 4 Fed. Stat. Ann. (2d ed.) 45; 3 Fed. Stat. Ann. (1st ed.) 655.

For R. S. secs. 3264, 3285, 3309, see 4 Fed. Stat. Ann. (2d ed.) 31, 46, 64; 3 Fed. Stat. Ann. (1st ed.) 642, 656, 678.

For R. S. sec. 3260, see 4 Fed. Stat. Ann. (2d ed.) 26; 3 Fed. Stat. Ann. (1st ed.) 638.

**SEC. 603. [Ethyl alcohol — denaturation — shipments for war purposes — exemption from taxation — leakage and loss.]** That under such regulations as the Commissioner, with the approval of the Secretary, may prescribe, ethyl alcohol of not less than 180 degrees proof, produced at any central distilling and denaturing plant established under the provisions of subsection 2, paragraph N, of section IV of the Act entitled “An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,” approved October 3, 1913, may be removed from such plant to any central denaturing bonded warehouse for denaturation, or may, before or after denaturation, be removed from such plant or from such denaturing bonded warehouse, free of tax, for use of the United States or for shipment to any nation while engaged against the German Government in the present war, and the removal herein authorized may be made in such tank vessels, tank cars, drums, casks, or other containers as may be approved by the Commissioner. It shall be lawful, under regulations prescribed by the Commissioner, with the approval of the Secretary, for an allowance to be made for leakage or loss by unavoidable accident and without fault or negligence of the distiller, owner, carrier, or his agents or employees, which may occur during the transportation of such spirits or while the same are lawfully stored on either of the premises herein described. [40 Stat. L. 1107.]

For Act of Oct. 3, 1913, sec. IV, N, 2, mentioned in the text, see 4 Fed. Stat. Ann. (2d ed.) 121; 1914 Supp. Fed. Stat. Ann. 200.

**SEC. 604. [Distilled spirits on which tax has been paid — additional tax.]** That upon all distilled spirits produced in or imported into the United States upon which the internal-revenue tax now imposed by law has been paid, and which, on the day after the passage of this Act, are held by any person and intended for sale or for use in the manufacture or production of any article intended for sale, there shall be levied, assessed, collected, and paid a floor tax of \$3.20 (if intended for sale for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage) on

each proof gallon, and a proportionate tax at a like rate on all fractional parts of such proof gallon. [40 Stat. L. 1107.]

**SEC. 605. [Distilled spirits and wines hereafter rectified — additional tax — cordials and liqueurs — blends — rectifiers — penalty for violation of section.]** That in addition to the tax imposed by this Act on distilled spirits and wines, there shall be levied, assessed, collected, and paid, in lieu of the tax imposed by section 304 of the Revenue Act of 1917, a tax of 30 cents on each proof gallon and a proportionate tax at a like rate on all fractional parts of such proof gallon on all distilled spirits or wines hereafter rectified, purified, or refined in such manner, and on all mixtures hereafter produced in such manner, that the person so rectifying, purifying, refining, or mixing the same is a rectifier within the meaning of section 3244 of the Revised Statutes, as amended: *Provided*, That this tax shall not apply to gin produced by the redistillation of a pure spirit over juniper berries and other aromatics.

Upon all such articles heretofore produced, and which on the day after the passage of this Act are held by any person and intended for sale, there shall be levied, assessed, collected, and paid a floor tax of 15 cents on each proof gallon, and a proportionate tax at a like rate on all fractional parts of each proof gallon; and all such distilled spirits so held and not contained in the distillers' original stamped packages, or in bottles or other containers bearing the distillers' original labels, shall for the purpose of this section be regarded as rectified spirits.

When the process of rectification is completed and the taxes prescribed by this section have been paid, it shall be unlawful for the rectifier or other dealer to reduce in proof or increase in volume such spirits or wine by the addition of water or other substance; nothing herein contained shall, however, prevent a rectifier from using again in the process of rectification spirits already rectified and upon which the taxes have theretofore been paid.

The taxes imposed by this section shall not attach to cordials or liqueurs on which a tax is imposed and paid under section 611 or 613, nor to the mixing and blending of wines, where such blending is for the sole purpose of perfecting such wines according to commercial standards, nor to blends made exclusively of two or more pure straight whiskies aged in wood for a period not less than four years and without the addition of coloring or flavoring matter or any other substance than pure water and if not reduced below ninety proof: *Provided*, That such blended whiskies shall be exempt from tax under this section only when compounded under the immediate supervision of a revenue officer, in such tanks and under such conditions and supervision as the Commissioner, with the approval of the Secretary, may prescribe.

All distilled spirits or wines taxable under this section shall be subject to uniform regulations concerning the use thereof in the manufacture, blending, compounding, mixing, marking, branding, and sale of whisky and rectified spirits, and no discrimination whatsoever shall be made by reason of a difference in the character of the material from which same may have been produced.

The business of a rectifier of spirits shall be carried on, and the tax on rectified spirits shall be paid, under such rules, regulations, and bonds as may be prescribed by the Commissioner, with the approval of the Secretary.

Whoever violates any of the provisions of this section shall be deemed to be guilty of a misdemeanor and, upon conviction, shall be fined not more than \$1,000 or imprisoned not more than two years, and shall, in addition, be liable



to double the tax evaded, together with the tax, to be collected by assessment or on any bond given. [40 Stat. L. 1108.]

For Act of Oct. 3, 1917, sec. 304, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 298.  
For R. S. sec. 3244, mentioned in the text, see 3 Fed. Stat. Ann. (2d ed.) 1045; 3 Fed. Stat. Ann. (1st ed.) 613.

**SEC. 606. [Stamps—exchange—discontinuing issuance.]** That hereafter collectors shall not furnish wholesale liquor dealer's stamps in lieu of and in exchange for stamps for rectified spirits unless the package covered by stamp for rectified spirits is to be broken into smaller packages.

The Commissioner, with the approval of the Secretary, is authorized to discontinue the use of the following stamps whenever in his judgment the interests of the Government will be subserved thereby:

Distillery warehouse, special bonded warehouse, special bonded rewarehouse, general bonded warehouse, general bonded retransfer, transfer brandy, export tobacco, export cigars, export oleomargarine, and export fermented-liquor stamps. [40 Stat. L. 1108.]

**SEC. 607. [Distilleries, breweries and rectifying houses—installation of meters, etc., to protect revenue.]** That the Commissioner, with the approval of the Secretary, is hereby authorized to require at distilleries, breweries, rectifying houses, and wherever else in his judgment such action may be deemed advisable, the installation of meters, tanks, pipes, or any other apparatus for the purpose of protecting the revenue, and such meters, tanks, and pipes and all necessary labor incident thereto shall be at the expense of the person on whose premises the installation is required. Any such person refusing or neglecting to install such apparatus when so required by the Commissioner shall not be permitted to conduct business on such premises. [40 Stat. L. 1109.]

**SEC. 608. [Beer, ale, porter and other fermented liquor—amount of tax.]** That there shall be levied and collected on all beer, lager beer, ale, porter, and other similar fermented liquor, containing one-half of one per centum, or more, of alcohol, brewed or manufactured and hereafter sold, or removed for consumption or sale, within the United States, by whatever name such liquors may be called, in lieu of the internal-revenue taxes now imposed thereon by law, a tax of \$6.00 for every barrel containing not more than thirty-one gallons, and at a like rate for any other quantity or for the fractional parts of a barrel authorized and defined by law, to be collected under the provisions of existing law. [40 Stat. L. 1109.]

**SEC. 609. [Fermented liquors—conveyances to industrial distilleries—exemption from payment of tax.]** That from and after the passage of this Act taxable fermented liquors may be conveyed without payment of tax from the brewery premises where produced to a contiguous industrial distillery of either class established under the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, to be used as distilling material, and the residue from such distillation, containing less than one-half of 1 per centum of alcohol by volume, which is to be used in making beverages, may be manipulated by cooling, flavoring, carbonating, settling, and filtering on the distillery premises or elsewhere.

The removal of the taxable fermented liquor from the brewery to the distillery and the operation of the distillery and removal of the residue therefrom shall be under the supervision of such officer or officers as the Commissioner shall deem proper, and the Commissioner, with the approval of the Secretary, is hereby authorized to make such regulations from time to time as may be necessary to give force and effect to this section and to safeguard the revenue. [40 Stat. L. 1109.]

For Act of Oct. 3, 1913, mentioned in the text, see 2 Fed. Stat. Ann. (2d ed.) 724; 1914 Supp. Fed. Stat. Ann. 59.

SEC. 610. [Wine—meaning as used in Act.] That natural wine within the meaning of this Act shall be deemed to be the product made from the normal alcoholic fermentation of the juice of sound, ripe grapes, without addition or abstraction, except such as may occur in the usual cellar treatment of clarifying and aging: *Provided, however,* That the product made from the juice of sound, ripe grapes by complete fermentation of the must under proper cellar treatment and corrected by the addition (under the supervision of a gauger or storekeeper-gauger in the capacity of gauger) of a solution of water and pure cane, beet, or dextrose sugar (containing, respectively, not less than 95 per centum of actual sugar, calculated on a dry basis) to the must or to the wine, to correct natural deficiencies, when such addition shall not increase the volume of the resultant product more than 35 per centum, and the resultant product does not contain less than five parts per thousand of acid before fermentation and not more than 13 per centum of alcohol after complete fermentation, shall be deemed to be wine within the meaning of this Act, and may be labeled, transported, and sold as "wine," qualified by the name of the locality where produced, and may be further qualified by the name of its own particular type or variety: *And provided further,* That wine as defined in this section may be sweetened with cane sugar or beet sugar or pure condensed grape must and fortified under the provisions of this Act, and wines so sweetened or fortified shall be considered sweet wine within the meaning of this Act. [40 Stat. L. 1109.]

SEC. 611. [Still wines, etc.—vermouth—amount of tax.] That upon all still wines, including vermouth, and all artificial or imitation wines or compounds sold as still wine, which are hereafter produced in or imported into the United States, or which on the day after the passage of this Act are on any winery premises or other bonded premises or in transit thereto or at any customhouse, there shall be levied, collected, and paid, in lieu of the internal-revenue taxes now imposed thereon by law, taxes at rates as follows, when sold, or removed for consumption or sale:

On wines containing not more than 14 per centum of absolute alcohol, 16 cents per wine gallon, the per centum of alcohol taxable under this section to be reckoned by volume and not by weight;

On wines containing more than 14 per centum and not exceeding 21 per centum of absolute alcohol, 40 cents per wine gallon;

On wines containing more than 21 per centum and not exceeding 24 per centum of absolute alcohol, \$1 per wine gallon;

All such wines containing more than 24 per centum of absolute alcohol by volume shall be classed as distilled spirits and shall pay tax accordingly. [40 Stat. L. 1110.]

**SEC. 612. [Fortification of wines — grape brandy or wine spirits — withdrawal — tax.]** That under such regulations and official supervision and upon the giving of such notices, entries, bonds, and other security as the Commissioner, with the approval of the Secretary, may prescribe, any producer of wines defined under the provisions of this title, may withdraw from any fruit distillery or special bonded warehouse grape brandy, or wine spirits, for the fortification of such wines on the premises where actually made: *Provided*, That there shall be levied and assessed against the producer of such wines a tax (in lieu of the internal-revenue tax now imposed thereon by law) of 60 cents per proof gallon of grape brandy or wine spirits whenever withdrawn and hereafter so used by him in the fortification of such wines during the preceding month, which assessment shall be paid by him within ten months from the date of notice thereof: *Provided further*, That nothing contained in this section shall be construed as exempting any wines, cordials, liqueurs, or similar compounds from the payment of any tax provided for in this title. [40 Stat. L. 1110.]

**SEC. 613. [Champagne — sparkling and carbonated wines — liqueurs, etc. — amount of tax.]** That upon the following articles which are hereafter produced in or imported into the United States, or which on the day after the passage of this Act are on any winery premises or other bonded premises or in transit thereto or at any customhouse, there shall be levied, collected, and paid taxes at rates as follows, when sold, or removed for consumption or sale:

On each bottle or other container of champagne or sparkling wine, 12 cents on each one-half pint or fraction thereof;

On each bottle or other container of artificially carbonated wine, 6 cents on each one-half pint or fraction thereof;

On each bottle or other container of liqueurs, cordials, or similar compounds, by whatever name sold or offered for sale, containing sweet wine fortified with grape brandy, 6 cents on each one-half pint or fraction thereof.

The tax imposed by this section shall, in the case of any article upon which a corresponding internal-revenue tax is now imposed by law, be in lieu of such tax. [40 Stat. L. 1110.]

**SEC. 614. [Champagne, wines, liqueurs, etc., on which tax has been paid — additional tax.]** That upon all articles specified in section 611 or 613 upon which the internal-revenue tax now imposed by law has been paid and which are on the day after the passage of this Act held by any person and intended for sale, there shall be levied, collected, and paid a floor tax equal to the difference between the tax imposed by this Act and the tax so paid. [40 Stat. L. 1111.]

**SEC. 615. [Sweet wines — grape brandy or wine spirits used in fortification — amount of tax.]** That upon all sweet wines held for sale by the producer thereof upon the day after the passage of this Act there shall be levied, assessed, collected, and paid a floor tax equivalent to 30 cents per proof gallon upon the grape brandy or wine spirits used in the fortification of such wine. [40 Stat. L. 1111.]

**SEC. 616. [Payment of taxes on wines — stamps — prerequisites to sale or removal.]** That the taxes imposed by section 611 or 613 shall be paid by stamp on removal of the wines from the customhouse, winery, or other bonded place of storage for consumption or sale, and every person hereafter producing, or having in his possession or under his control when this title takes effect, any wines subject to the tax imposed in section 611 or 613 shall file such notice,

describing the premises on which such wines are produced or stored; shall execute a bond in such form; shall make such inventories under oath; and shall, prior to sale or removal for consumption, affix to each cask or vessel containing such wine such marks, labels, or stamps as the Commissioner, with the approval of the Secretary, may from time to time prescribe; and the premises described in such notice shall, for the purpose of this Act, be regarded as bonded premises. But the provisions of this section, except as to payment of tax and the affixing of the required stamps or labels, shall not apply to wines held by retail dealers, as defined in section 3244 of the Revised Statutes, nor, subject to regulations prescribed by the Commissioner, with the approval of the Secretary, shall the tax imposed by section 611 apply to wines produced for the family use of the duly registered producer thereof and not sold or otherwise removed from the place of manufacture and not exceeding in any case two hundred gallons per year. [40 Stat. L. 1111.]

For R. S. sec. 3244, mentioned in the text, see 3 Fed. Stat. Ann. (2d ed.) 1045; 3 Fed. Stat. Ann. (1st ed.) 613.

**SEC. 617. [Wine spirits for fortifying sweet wines—use—withdrawals.]** That sections 42, 43, and 45 of the Act entitled “An Act to reduce the revenue and equalize duties on imports, and for other purposes,” approved October 1, 1890, as amended by section 68 of the Act entitled “An Act to reduce taxation, to provide revenue for the Government, and for other purposes,” approved August 27, 1894, are further amended to read as follows:

“SEC. 42. That any producer of pure sweet wines may use in the preparation of such sweet wines, under such regulations and after the filing of such notices and bonds, together with the keeping of such records and the rendition of such reports as to materials and products as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, wine spirits produced by any duly authorized distiller, and the Commissioner of Internal Revenue, in determining the liability of any distiller of wine spirits to assessment under section 3309 of the Revised Statutes, is authorized to allow such distiller credit in his computations for the wine spirits withdrawn to be used in fortifying sweet wines under this Act.

“SEC. 43. That the wine spirits mentioned in section 42 is the product resulting from the distillation of fermented grape juice, to which water may have been added prior to, during, or after fermentation, for the sole purpose of facilitating the fermentation and economical distillation thereof, and shall be held to include the product from grapes or their residues commonly known as grape brandy, and shall include commercial grape brandy which may have been colored with burnt sugar or caramel; and the pure sweet wine which may be fortified with wine spirits under the provisions of this Act is fermented or partially fermented grape juice only, with the usual cellar treatment, and shall contain no other substance whatever introduced before, at the time of, or after fermentation, except as herein expressly provided: *Provided*, That the addition of pure boiled or condensed grape must or pure crystallized cane or beet sugar, or pure dextrose sugar containing, respectively, not less than 95 per centum of actual sugar, calculated on a dry basis, or water, or any or all of them, to the pure grape juice before fermentation, or to the fermented product of such grape juice, or to both, prior to the fortification herein provided for, either for the purpose of perfecting sweet wines according to commercial standards or for mechanical purposes, shall not be excluded by the definition of pure sweet wine

aforesaid: *Provided, however,* That the cane or beet sugar, or pure dextrose sugar added for sweetening purposes shall not be in excess of 11 per centum of the weight of the wine to be fortified: *And provided further,* That the addition of water herein authorized shall be under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may from time to time prescribe: *Provided, however,* That records kept in accordance with such regulations as to the percentage of saccharine, acid, alcoholic, and added water content of the wine offered for fortification shall be open to inspection by any official of the Department of Agriculture thereto duly authorized by the Secretary of Agriculture; but in no case shall such wines to which water has been added be eligible for fortification under the provisions of this Act, where the same, after fermentation and before fortification, have an alcoholic strength of less than 5 per centum of their volume.

“SEC. 45. That under such regulations and official supervision, and upon the execution of such entries and the giving of such bonds, bills of lading, and other security as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, any producer of pure sweet wines as defined by this Act may withdraw wine spirits from any special bonded warehouse in original packages or from any registered distillery in any quantity not less than eighty wine gallons, and may use so much of the same as may be required by him under such regulations, and after the filing of such notices and bonds and the keeping of such records and the rendition of such reports as to materials and products and the disposition of the same as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, in fortifying the pure sweet wines made by him, and for no other purpose, in accordance with the foregoing limitations and provisions; and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is authorized whenever he shall deem it to be necessary for the prevention of violations of this law to prescribe that wine spirits withdrawn under this section shall not be used to fortify wines except at a certain distance prescribed by him from any distillery, rectifying house, winery, or other establishment used for producing or storing distilled spirits, or for making or storing wines other than wines which are so fortified, and that in the building in which such fortification of wines is practiced no wines or spirits other than those permitted by this regulation shall be stored in any room or part of the building in which fortification of wines is practiced. The use of wine spirits for the fortification of sweet wines under this Act shall be under the immediate supervision of an officer of internal revenue, who shall make returns describing the kinds and quantities of wine so fortified, and shall affix such stamps and seals to the packages containing such wines as may be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury; and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall provide by regulations the time within which wines so fortified with the wine spirits so withdrawn may be subject to inspection, and for final accounting for the use of such wine spirits and for rewarehousing or for payment of the tax on any portion of such wine spirits which remain not used in fortifying pure sweet wines.” [40 Stat. L. 1111.]

For Act of Oct. 1, 1890, as amended by Act of Aug. 27, 1894, both acts being mentioned in the text, see 3 Fed. Stat. Ann. (1st ed.) 708; 4 Fed. Stat. Ann. (2d ed.) 99.

For R. S. sec. 3309, mentioned in the text, see 3 Fed. Stat. Ann. (1st ed.) 678; 4 Fed. Stat. Ann. (2d ed.) 64.

**SEC. 618. [Withdrawal of domestic wines for storage—exemption from tax—use as distilling material.]** (a) That under such regulations and upon the execution of such notices, entries, bonds, and other security as the Commissioner, with the approval of the Secretary, may prescribe, domestic wines subject to the tax imposed by section 611 may be removed from the winery where produced, free of tax, for storage on other bonded premises or from such premises to other bonded premises (but not more than one such additional removal shall be allowed), or for exportation from the United States or for use as distilling material at any regularly registered distillery: *Provided, however,* That the distiller using any such wine as material shall, subject to the provisions of section 3309 of the Revised Statutes, as amended, be held to pay the tax on the product of such wines as will include both the alcoholic strength therein produced by fermentation and that obtained from the brandy or wine spirits added to such wines at the time of fortification.

(b) Under regulations prescribed by the Commissioner with the approval of the Secretary, it shall be lawful to produce grape wines on bonded winery premises by the usual method, and to transport and use the same, and like wines heretofore produced and now stored on bonded winery premises, as distilling material for the production of nonbeverage spirits in the production of non-alcoholic wines, containing less than  $\frac{1}{2}$  of 1 per centum of alcohol by volume, in any fruit brandy or industrial distillery: *Provided,* That all alcoholic spirits so obtained at any industrial distillery shall be denatured, and all spirits so obtained at any fruit distillery shall be removed and used only for nonbeverage purposes or for denaturation. [40 Stat. L. 1113.]

For R. S. sec. 3309, mentioned in the text, see 3 Fed. Stat. Ann. (1st ed.) 678; 4 Fed. Stat. Ann. (2d ed.) 64.

**SEC. 619. [Imported wines, vermouth, liqueurs, etc.—collection of tax—assessment.]** That the collection of the tax on imported still wines, including vermouth, and sparkling wines, including champagne, and on imported liqueurs, cordials, and similar compounds, may be made within the discretion of the Commissioner, with the approval of the Secretary, by assessment instead of by stamps. [40 Stat. L. 1113.]

**SEC. 620. [Violation of statutes affecting wines, etc.—penalties—exceptions—mixing or blending wines—materials used in fortification of sweet wines.]** That whoever evades or attempts to evade any tax imposed by sections 611 to 615, both inclusive, or any requirement of sections 610 to 621, both inclusive, or regulation issued pursuant thereto, or whoever, otherwise than as provided in such sections, recovers or attempts to recover any spirits from domestic or imported wine, or whoever rectifies, mixes, or compounds with distilled spirits any domestic wines, other than in the manufacture of liqueurs, cordials, or similar compounds, shall, on conviction, be punished for each such offense by a fine of not exceeding \$5,000, or imprisonment for not more than five years, or both, and in addition thereto by a penalty of double the tax evaded, or attempted to be evaded, to be assessed and collected in the same manner as taxes are assessed and collected, and all wines, spirits, liqueurs, cordials, or similar compounds as to which such violation occurs shall be forfeited to the United States. But the provisions of this section and the provisions of section 3244 of the Revised Statutes, as amended, relating to rectification, or other internal-revenue laws of the United States, shall not be held to apply to or prohibit the mixing or blending

of wines subject to tax under the provisions of sections 611 to 615, both inclusive, with each other or with other wines for the sole purpose of perfecting such wines according to commercial standards: *Provided*, That nothing herein contained shall be construed as prohibiting the use of tax-paid grain or other ethyl alcohol in the fortification of sweet wines as defined in section 610 of this Act and section 43 of the Act entitled "An Act to reduce the revenue and equalize duties on imports, and for other purposes," approved October 1, 1890, as amended by this Act. [40 Stat. L. 1113.]

For R. S. sec. 3244, mentioned in the text, see 3 Fed. Stat. Ann. (1st ed.) 613; 3 Fed. Stat. Ann. (2d ed.) 1045.

For Act of Oct. 1, 1890, mentioned in the text, see 3 Fed. Stat. Ann. (1st ed.) 708; 4 Fed. Stat. Ann. (2d ed.) 99.

**SEC. 621. [Distilleries and wineries—spirit meters, locks and seals—gaugers.]** That the Commissioner, by regulations to be approved by the Secretary, may require the use at each fruit distillery of such spirit meters, and such locks and seals to be affixed to fermenters, tanks, or other vessels and to such pipe connections as may in his judgment be necessary or expedient, and is hereby authorized to assign to any such distillery and to each winery where wines are to be fortified such number of gaugers or storekeeper-gaugers in the capacity of gaugers as may be necessary for the proper supervision of the manufacture of brandy or the making or fortifying of wines subject to tax imposed by this section; and the compensation of such officers shall not exceed \$5 per diem while so assigned, together with their actual and necessary traveling expenses, and also a reasonable allowance for their board bills, to be fixed by the Commissioner, with the approval of the Secretary, but not to exceed \$2.50 per diem for such board bills. [40 Stat. L. 1114.]

**SEC. 622. [Allowances for unavoidable loss of wines.]** That the Commissioner, with the approval of the Secretary, is hereby authorized to make such allowances for unavoidable loss of wines while on storage or during cellar treatment as in his judgment may be just and proper. [40 Stat. L. 1114.]

**SEC. 623. [Surveys—basis of capacity—amount of water—R. S. sec. 3264 amended.]** That the second paragraph of section 3264 of the Revised Statutes, as amended by section 5 of the Act of March 1, 1879, and as further amended by the Act of June 22, 1910, be amended so as to read as follows:

"In all surveys forty-five gallons of mash or beer brewed or fermented from grain shall represent not less than one bushel of grain, and seven gallons of mash or beer brewed or fermented from molasses shall represent not less than one gallon of molasses, except in distilleries operated on the sour-mash principle, in which distilleries sixty gallons of beer brewed or fermented from grain shall represent not less than one bushel of grain, and except that in distilleries where the filtration-aeration process is used, with the approval of the Commissioner of Internal Revenue; that is, where the mash after it leaves the mash tub is passed through a filtering machine before it is run into the fermenting tub, and only the filtered liquor passes into the fermenting tub, there shall hereafter be no limitation upon the number of gallons of water which may be used in the process of mashing or filtration for fermentation; but the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, in order to protect the revenue, shall be authorized to prescribe by regulation, to be made by him,

such character of survey as he may find suitable for distilleries using such filtration-aeration process. The provisions hereof relating to filtration-aeration process shall apply only to sweet-mash distilleries." [40 Stat. L. 1114.]

For R. S. sec. 3264, amended by this section, see 3 Fed. Stat. Ann. (1st ed.) 642; 4 Fed. Stat. Ann. (2d ed.) 31.

**SEC. 624. [Exportation of distilled spirits — withdrawals — laws governing.]** That under such regulations as the Commissioner, with the approval of the Secretary, may prescribe, alcohol or other distilled spirits of a proof strength of not less than one hundred and eighty degrees intended for export free of tax may be drawn from receiving cisterns at any distillery, or from storage tanks in any distillery warehouse, for transfer to tanks or tank cars for export from the United States, and all provisions of existing law relating to the exportation of distilled spirits not inconsistent herewith shall apply to spirits removed for export under the provisions of this Act. [40 Stat. L. 1114.]

**SEC. 625. [Distillers of fruit brandy — statutory exemptions — distilling material — R. S. sec. 3255 amended.]** That section 3255 of the Revised Statutes as amended by the Act of June 3, 1896, and as further amended by the Act of March 2, 1911, be further amended so as to read as follows:

"**Sec. 3255.** The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may exempt distillers of brandy made exclusively from apples, peaches, grapes, pears, pineapples, oranges, apricots, berries, plums, pawpaws, persimmons, prunes, figs, or cherries from any provision of this title relating to the manufacture of spirits, except as to the tax thereon, when in his judgment it may seem expedient to do so: *Provided*, That where, in the manufacture of wine, artificial sweetening has been used the wine or the fruit pomace residuum may be used in the distillation of brandy, and such use shall not prevent the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, from exempting such distiller from any provision of this title relating to the manufacture of spirits, except as to the tax thereon, when in his judgment it may seem expedient to do so: *And provided further*, That the distillers mentioned in this section may add to not less than five hundred gallons (or ten barrels) of grape cheese not more than five hundred gallons of a sugar solution made from cane, beet, starch, or corn sugar, 95 per centum pure, such solution to have a saccharine strength of not to exceed 10 per centum, and may ferment the resultant mixture on a winery or distillery premises, and such fermented product shall be regarded as distilling material." [40 Stat. L. 1114.]

For R. S. sec. 3255, before this amendment, see 4 Fed. Stat. Ann. (2d ed.) 22; 1912 Supp. Fed. Stat. Ann. 109.

**SEC. 626. [Gin — bottling in bond for export — exemption from tax.]** That distilled spirits known commercially as gin of not less than 80 per centum proof may at any time within eight years after entry in bond at any distillery be bottled in bond at such distillery for export without the payment of tax, under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe. [40 Stat. L. 1115.]

**SEC. 627. [Withdrawal of fermented liquor for bottling — failure to affix proper stamps — penalties — payment of tax by cancelling stamps — R. S.**



**sec. 3354 amended.]** That section 3354 of the Revised Statutes as amended by the Act approved June 18, 1890, be, and is hereby, amended to read as follows:

**"Sec. 3354.** Every person who withdraws any fermented liquor from any hogshead, barrel, keg, or other vessel upon which the proper stamp has not been affixed for the purpose of bottling the same, or who carries on or attempts to carry on the business of bottling fermented liquor in any brewery or other place in which fermented liquor is made, or upon any premises having communication with such brewery, or any warehouse, shall be liable to a fine of \$500, and the property used in such bottling or business shall be liable to forfeiture: *Provided, however,* That this section shall not be construed to prevent the withdrawal and transfer of unfermented, partially fermented, or fermented liquors from any of the vats in any brewery by way of a pipe line or other conduit to another building or place for the sole purpose of bottling the same, such pipe line or conduit to be constructed and operated in such manner and with such cisterns, vats, tanks, valves, cocks, faucets, and gauges, or other utensils or apparatus, either on the premises of the brewery or the bottling house, and with such changes of or additions thereto, and such locks, seals, or other fastenings, and under such rules and regulations as shall be from time to time prescribed by the Commissioner of Internal Revenue, subject to the approval of the Secretary of the Treasury, and all locks and seals prescribed shall be provided by the Commissioner of Internal Revenue at the expense of the United States: *Provided further,* That the tax imposed in section 3339 of the Revised Statutes shall be paid on all fermented liquor removed from a brewery to a bottling house by means of a pipe or conduit, at the time of such removal, by the cancellation and defacement, by the collector of the district or his deputy, in the presence of the brewer, of the number of stamps denoting the tax on the fermented liquor thus removed. The stamps thus canceled and defaced shall be disposed of and accounted for in the manner directed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury. And any violation of the rules and regulations hereafter prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, in pursuance of these provisions, shall be subject to the penalties above provided by this section. Every owner, agent, or superintendent of any brewery or bottling house who removes, or connives at the removal of, any fermented liquor through a pipe line or conduit, without payment of the tax thereon, or who attempts in any manner to defraud the revenue as above, shall forfeit all the liquors made by and for him, and all the vessels, utensils, and apparatus used in making the same." [40 Stat. L. 1115.]

For R. S. sec. 3354, before this amendment, see 4 Fed. Stat. Ann. (2d ed.) 133; 3 Fed. Stat. Ann. (1st ed.) 721.

For R. S. sec. 3339, mentioned in the text, see 4 Fed. Stat. Ann. (2d ed.) 126; 3 Fed. Stat. Ann. (1st ed.) 713.

**SEC. 628. [Bottled soft drinks and mineral water—tax on manufacturer, producer or importer—amount.]** That there shall be levied, assessed, collected, and paid in lieu of the taxes imposed by sections 313 and 315 of the Revenue Act of 1917—

(a) Upon all beverages derived wholly or in part from cereals or substitutes therefor, and containing less than one-half of one per centum of alcohol, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 15 per centum of the price for which so sold; and upon all

unfermented grape juice, ginger ale, root beer, sarsaparilla, pop, artificial mineral waters (carbonated or not carbonated), other carbonated waters or beverages, and other soft drinks, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 10 per centum of the price for which so sold; and

(b) Upon all natural mineral waters or table waters, sold by the producer, bottler, or importer thereof, in bottles or other closed containers, at over 10 cents per gallon, a tax of 2 cents per gallon. [40 Stat. L. 1116.]

For Act of Oct. 3, 1917, secs. 313, 315, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 302.

**SEC. 629. [Bottled soft drinks—monthly returns—payment of tax—penalty for failure to pay.]** That each manufacturer, producer, bottler, or importer of any of the articles enumerated in section 628 shall make monthly returns under oath in duplicate and pay the taxes imposed in respect to such articles by such section to the collector for the district in which is located the principal place of business, containing such information necessary for the assessment of the tax, and at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due. [40 Stat. L. 1116.]

**SEC. 630. [Soda fountains, ice cream parlors, and similar places—payment of tax to person conducting—amount.]** That on and after May 1, 1919, there shall be levied, assessed, collected, and paid a tax of 1 cent for each 10 cents or fraction thereof of the amount paid to any person conducting a soda fountain, ice-cream parlor, or other similar place of business, for drinks commonly known as soft drinks, compounded or mixed at such place of business, or for ice cream, ice-cream sodas, sundaes, or other similar articles of food or drink, when any of the above are sold on or after such date for consumption in or in proximity to such place of business. Such tax shall be paid by the purchaser to the vendor at the time of the sale and shall be collected, returned, and paid to the United States by such vendor in the same manner as provided in section 502. [40 Stat. L. 1116.]

#### TITLE VII.—TAX ON CIGARS, TOBACCO, AND MANUFACTURES THEREOF.

**SEC. 700. (a) [Cigars and cigarettes—tax—amount.]** That upon cigars and cigarettes manufactured in or imported into the United States, and hereafter sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid under the provisions of existing law, in lieu of the internal-revenue taxes now imposed thereon by law, the following taxes, to be paid by the manufacturer or importer thereof—

On cigars of all descriptions made of tobacco, or any substitute therefor, and weighing not more than three pounds per thousand, \$1.50 per thousand;

On cigars made of tobacco, or any substitute therefor, and weighing more than three pounds per thousand, if manufactured or imported to retail at not more than 5 cents each, \$4 per thousand;

If manufactured or imported to retail at more than 5 cents each and not more than 8 cents each, \$6 per thousand;

If manufactured or imported to retail at more than 8 cents each and not more than 15 cents each, \$9 per thousand;

If manufactured or imported to retail at more than 15 cents each and not more than 20 cents each, \$12 per thousand;

If manufactured or imported to retail at more than 20 cents each, \$15 per thousand;

On cigarettes made of tobacco, or any substitute therefor, and weighing not more than three pounds per thousand, \$3 per thousand;

Weighing more than three pounds per thousand, \$7.20 per thousand. [40 Stat. L. 1116.]

[SEC. 700 *continued.*] (b) [Price of cigars how fixed.] Whenever in this section reference is made to cigars manufactured or imported to retail at not over a certain price each, then in determining the tax to be paid regard shall be had to the ordinary retail price of a single cigar. [40 Stat. L. 1117.]

[SEC. 700 *continued.*] (c) [Labels on boxes, etc.] The Commissioner may, by regulation, require the manufacturer or importer to affix to each box, package, or container a conspicuous label indicating the clause of this section under which the cigars therein contained have been tax-paid, which must correspond with the tax-paid stamp on such box or container. [40 Stat. L. 1117.]

[SEC. 700 *continued.*] (d) [Cigarettes and small cigars—packing and stamping.] Every manufacturer of cigarettes (including small cigars weighing not more than three pounds per thousand) shall put up all the cigarettes and such small cigars that he manufactures or has manufactured for him, and sells or removes for consumption or sale, in packages or parcels containing five, eight, ten, twelve, fifteen, sixteen, twenty, twenty-four, forty, fifty, eighty, or one hundred cigarettes each, and shall securely affix to each of such packages or parcels a suitable stamp denoting the tax thereon and shall properly cancel the same prior to such sale or removal for consumption or sale under such regulations as the Commissioner, with the approval of the Secretary, shall prescribe; and all cigarettes imported from a foreign country shall be packed, stamped, and the stamps canceled in a like manner, in addition to the import stamp indicating inspection of the customhouse before they are withdrawn therefrom. [40 Stat. L. 1117.]

SEC. 701. (a) [Tobacco and snuff—tax—amount.] That upon all tobacco and snuff manufactured in or imported into the United States, and hereafter sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid, in lieu of the internal-revenue taxes now imposed thereon by law, a tax of 18 cents per pound, to be paid by the manufacturer or importer thereof. [40 Stat. L. 1117.]

[SEC. 701 *continued.*] (b) [Tobacco and snuff how put up and prepared—R. S. sec. 3362 amended.] Section 3362 of the Revised Statutes, as amended, is hereby amended to read as follows:

“Sec. 3362. All manufactured tobacco shall be put up and prepared by the

manufacturer for sale, or removal for sale or consumption, in packages of the following description and in no other manner:

"All smoking tobacco, snuff, fine-cut chewing tobacco, all cut and granulated tobacco, all shorts, the refuse of fine-cut chewing, which has passed through a riddle of thirty-six meshes to the square inch, and all refuse scraps, clippings, cuttings, and sweepings of tobacco, and all other kinds of tobacco not otherwise provided for, in packages containing one-eighth of an ounce, three-eighths of an ounce, and further packages with a difference between each package and the one next smaller of one-eighth of an ounce up to and including two ounces, and further packages with a difference between each package and the one next smaller of one-fourth of an ounce up to and including four ounces, and packages of five ounces, six ounces, seven ounces, eight ounces, ten ounces, twelve ounces, fourteen ounces, and sixteen ounces: *Provided*, That snuff may, at the option of the manufacturer, be put up in bladders and in jars containing not exceeding twenty pounds.

"All cavendish, plug, and twist tobacco, in wooden packages not exceeding two hundred pounds net weight.

"And every such wooden package shall have printed or marked thereon the manufacturer's name and place of manufacture, the registered number of the manufactory, and the gross weight, the tare, and the net weight of the tobacco in each package: *Provided*, That these limitations and descriptions of packages shall not apply to tobacco and snuff transported in bond for exportation and actually exported: *And provided further*, That perique tobacco, snuff flour, fine-cut shorts, the refuse of fine-cut chewing tobacco, refuse scraps, clippings, cuttings, and sweepings of tobacco, may be sold in bulk as material, and without the payment of tax, by one manufacturer directly to another manufacturer, or for export, under such restrictions, rules, and regulations as the Commissioner of Internal Revenue may prescribe: *And provided further*, That wood, metal, paper, or other materials may be used separately or in combination for packing tobacco, snuff, and cigars, under such regulations as the Commissioner of Internal Revenue may establish." [40 Stat. L. 1117.]

For R. S. sec. 3362, before the above amendment, see 4 Fed. Stat. Ann. (2d ed.) 141; 3 Fed. Stat. Ann. (1st ed.) 726.

SEC. 702. [Tobacco and snuff removed from factory or customhouse prior to Act—additional tax.] That upon all the articles enumerated in section 700 or 701, which were manufactured or imported, and removed from factory or customhouse on or prior to the date of the passage of this Act, and upon which the tax imposed by existing law has been paid, and which are, on the day after the passage of this Act, held by any person and intended for sale, there shall be levied, assessed, collected, and paid a floor tax equal to the difference between (a) the tax imposed by this Act upon such articles according to the class in which they are placed by this title, and (b) the tax imposed upon such articles by existing law other than section 4003 of the Revenue Act of 1917. [40 Stat. L. 1118.]

For Act of Oct. 3, 1917, sec. 403, see 1918 Supp. Fed. Stat. Ann. 304.

SEC. 703. [Cigarette papers — tax — amount — bond — records — return.] That there shall be levied, collected, and paid, in lieu of the taxes imposed by section 404 of the Revenue Act of 1917, upon cigarette paper made up into packages, books, sets, or tubes, made up in or imported into the United States

and hereafter sold by the manufacturer or importer to any person (other than to a manufacturer of cigarettes for use by him in the manufacture of cigarettes) the following taxes, to be paid by the manufacturer or importer: On each package, book, or set, containing more than twenty-five but not more than fifty papers,  $\frac{1}{2}$  cent; containing more than fifty but not more than one hundred papers, 1 cent; containing more than one hundred papers,  $\frac{1}{2}$  cent for each fifty papers or fractional part thereof; and upon tubes, 1 cent for each fifty tubes or fractional part thereof.

Every manufacturer of cigarettes purchasing any cigarette paper made up into tubes (a) shall give bond in an amount and with sureties satisfactory to the Commissioner that he will use such tubes in the manufacture of cigarettes or pay thereon a tax equivalent to the tax imposed by this section, and (b) shall keep such records and render under oath such returns as the Commissioner finds necessary to show the disposition of all tubes purchased or imported by such manufacturer of cigarettes. [40 Stat. L. 1118.]

For Act of Oct. 3, 1917, § 404, see 1918 Supp. Fed. Stat. Ann. 305.

**SEC. 704. [Leaf tobacco — tax — requirements imposed on dealers — R. S. sec. 3360 amended.]** That section 35 of the Act entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes," approved August 5, 1909, be, and is hereby, repealed, to take effect April 1, 1919.

That section 3360 of the Revised Statutes be, and is hereby, amended to read as follows:

"**Sec. 3360.** (a) Every dealer in leaf tobacco shall file with the collector of the district in which his business is carried on, a statement in duplicate, subscribed under oath, setting forth the place, and, if in a city, the street and number of the street, where his business is to be carried on, and the exact location of each place where leaf tobacco is held by him on storage, and, whenever he adds to or discontinues any of his leaf tobacco storage places, he shall give immediate notice to the collector of the district in which he is registered.

"Every such dealer shall give a bond with surety, satisfactory to, and to be approved by, the collector of the district, in such penal sum as the collector may require, not less than \$500; and a new bond may be required in the discretion of the collector or under instructions of the Commissioner.

"Every such dealer shall be assigned a number by the collector of the district, which number shall appear in every inventory, invoice and report rendered by the dealer, who shall also obtain certificates from the collector of the district setting forth the place where his business is carried on and the places designated by the dealer as the places of storage of his tobacco, which certificates shall be posted conspicuously within the dealer's registered place of business, and within each designated place of storage.

"(b) Every dealer in leaf tobacco shall make and deliver to the collector of the district a true inventory of the quantity of the different kinds of tobacco held or owned, and where stored by him, on the first day of January of each year, or at the time of commencing and at the time of concluding business, if before or after the first day of January, such inventory to be made under oath and rendered in such form as may be prescribed by the Commissioner.

"Every dealer in leaf tobacco shall render such invoices and keep such records as shall be prescribed by the Commissioner, and shall enter therein, day by day, and upon the same day on which the circumstance, thing or act to be

recorded is done or occurs, an accurate account of the number of hogsheads tierces, cases and bales, and quantity of leaf tobacco contained therein, purchased or received by him, on assignment, consignment, for storage, by transfer or otherwise, and of whom purchased or received, and the number of hogsheads tierces, cases and bales, and the quantity of leaf tobacco contained therein, sold by him, with the name and residence in each instance of the person to whom sold, and if shipped, to whom shipped, and to what district; such records shall be kept at his place of business at all times and preserved for a period of two years, and the same shall be open at all hours for the inspection of any internal-revenue officer or agent.

"Every dealer in leaf tobacco on or before the tenth day of each month, shall furnish to the collector of the district a true and complete report of all purchases, receipts, sales and shipments of leaf tobacco made by him during the month next preceding, which report shall be verified and rendered in such form as the Commissioner, with the approval of the Secretary, shall prescribe.

"(c) Sales or shipments of leaf tobacco by a dealer in leaf tobacco shall be in quantities of not less than a hogshead, tierce, case, or bale, except loose leaf tobacco comprising the breaks on warehouse floors, and except to a duly registered manufacturer of cigars for use in his own manufactory exclusively.

"Dealers in leaf tobacco shall make shipments of leaf tobacco only to other dealers in leaf tobacco, to registered manufacturers of tobacco, snuff, cigars or cigarettes, or for export.

"(d) Upon all leaf tobacco sold, removed or shipped by any dealer in leaf tobacco in violation of the provisions of subdivision (c), or in respect to which no report has been made by such dealer in accordance with the provisions of subdivision (b), there shall be levied, assessed, collected and paid a tax equal to the tax then in force upon manufactured tobacco, such tax to be assessed and collected in the same manner as the tax on manufactured tobacco.

"(e) Every dealer in leaf tobacco

"(1) who neglects or refuses to furnish the statement, to give bond, to keep books, to file inventory or to render the invoices, returns or reports required by the Commissioner, or to notify the collector of the district of additions to his places of storage; or

"(2) who ships or delivers leaf tobacco, except as herein provided; or

"(3) who fraudulently omits to account for tobacco purchased, received, sold, or shipped;

shall be fined not less than \$100 or more than \$500, or imprisoned not more than one year, or both.

"(f) For the purposes of this section a farmer or grower of tobacco shall not be regarded as a dealer in leaf tobacco in respect to the leaf tobacco produced by him." [40 Stat. L. 1118.]

For Act of Aug. 5, 1909, sec. 35, mentioned in the text, see 4 Fed. Stat. Ann. (2d ed.) 160; 1909 Supp. Fed. Stat. Ann. 827.

For R. S. sec. 3360, before the amendment here set out in the text, see 3 Fed. Stat. Ann. (1st ed.) 725; 4 Fed. Stat. Ann. (2d ed.) 140.

#### TITLE VIII.—TAX ON ADMISSIONS AND DUES.

SEC. 800. (a) [Admissions—tax—amount—theatres—roof gardens—cabarets.] That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 700 of the Revenue Act of 1917—

(1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place on or after such date, including admission by season ticket or subscription, to be paid by the person paying for such admission;

(2) In the case of persons (except bona fide employees, municipal officers on official business, persons in the military or naval forces of the United States when in uniform, and children under twelve years of age) admitted free or at reduced rates to any place at a time when and under circumstances under which an admission charge is made to other persons, a tax of 1 cent for each 10 cents or fraction thereof of the price so charged to such other persons for the same or similar accommodations, to be paid by the person so admitted;

(3) Upon tickets or cards of admission to theaters, operas, and other places of amusement, sold at news stands, hotels, and places other than the ticket offices of such theaters, operas, or other places of amusement, at not to exceed 50 cents in excess of the sum of the established price therefor at such ticket offices plus the amount of any tax imposed under paragraph (1), a tax equivalent to 5 per centum of the amount of such excess; and if sold for more than 50 cents in excess of the sum of such established price plus the amount of any tax imposed under paragraph (1), a tax equivalent to 50 per centum of the whole amount of such excess, such taxes to be returned and paid, in the manner provided in section 903, by the person selling such tickets;

(4) A tax equivalent to 50 per centum of the amount for which the proprietors, managers, or employees of any opera house, theater, or other place of amusement sell or dispose of tickets or cards of admission in excess of the regular or established price or charge therefor, such tax to be returned and paid, in the manner provided in section 903, by the person selling such tickets;

(5) In the case of persons having the permanent use of boxes or seats in an opera house or any place of amusement or a lease for the use of such box or seat in such opera house or place of amusement (in lieu of the tax imposed by paragraph (1)), a tax equivalent to 10 per centum of the amount for which a similar box or seat is sold for each performance or exhibition at which the box or seat is used or reserved by or for the lessee or holder, such tax to be paid by the lessee or holder; and

(6) A tax of  $1\frac{1}{2}$  cents for each 10 cents or fraction thereof of the amount paid for admission to any public performance for profit at any roof garden, cabaret, or other similar entertainment, to which the charge for admission is wholly or in part included in the price paid for refreshment, service, or merchandise; the amount paid for such admission to be deemed to be 20 per centum of the amount paid for refreshment, service, and merchandise; such tax to be paid by the person paying for such refreshment, service, or merchandise. [40 Stat. L. 1120.]

For Act of Oct. 3, 1917, sec. 700, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 354.

[SEC. 800 *continued.*] (b) [Tax exempt entertainments.] No tax shall be levied under this title in respect to any admissions all the proceeds of which inure exclusively to the benefit of religious, educational, or charitable institutions, societies, or organizations, societies for the prevention of cruelty to children or animals, or exclusively to the benefit of organizations conducted for the sole purpose of maintaining symphony orchestras and receiving substantial support from voluntary contributions, none of the profits of which are distributed to members of such organizations, or exclusively to the benefit of

persons in the military or naval forces of the United States, or admissions to agricultural fairs none of the profits of which are distributed to stockholders or members of the association conducting the same. [40 Stat. L. 1121.]

[SEC. 800 *continued.*] (c) [**"Admission" defined.**] The term "admission" as used in this title includes seats and tables, reserved or otherwise, and other similar accommodations, and the charges made therefor. [40 Stat. L. 1121.]

[SEC. 800 *continued.*] (d) [**Admission tickets or cards—price shown thereon.**] The price (exclusive of the tax to be paid by the person paying for admission) at which every admission ticket or card is sold shall be conspicuously and indelibly printed, stamped, or written on the face or back thereof, together with the name of the vendor if sold other than at the ticket office of the theater, opera, or other place of amusement. Whoever sells an admission ticket or card on which the name of the vendor and price is not so printed, stamped, or written, or at a price in excess of the price so printed, stamped, or written thereon, is guilty of a misdemeanor, and upon conviction thereof shall be fined not more than \$100. [40 Stat. L. 1121.]

SEC. 801. [**Club dues—membership fees.**] That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 701 of the Revenue Act of 1917, a tax equivalent to 10 per centum of any amount paid on or after such date, for any period after such date, (a) as dues or membership fees (where the dues or fees of an active resident annual member are in excess of \$10 per year) to any social, athletic, or sporting club or organization; or (b) as initiation fees to such a club or organization, if such fees amount to more than \$10, or if the dues or membership fees (not including initiation fees) of an active resident annual member are in excess of \$10 per year; such taxes to be paid by the person paying such dues or fees: *Provided*, That there shall be exempted from the provisions of this section all amounts paid as dues or fees to a fraternal society, order, or association, operating under the lodge system. In the case of life memberships a life member shall pay annually, at the time for the payment of dues by active resident annual members, a tax equivalent to the tax upon the amount paid by such a member, but shall pay no tax upon the amount paid for life membership. [40 Stat. L. 1121.]

For Act of Oct. 3, 1917, § 701, see 1918 Supp. Fed. Stat. Ann. 355.

SEC. 802. [**Collection of tax on admissions, dues or fees—returns.**] That every person (a) receiving any payments for such admission, dues, or fees shall collect the amount of the tax imposed by section 800 or 801 from the person making such payments, or (b) admitting any person free to any place for admission to which a charge is made, shall collect the amount of the tax imposed by section 800 from the person so admitted. Every club or organization having life members, shall collect from such members the amount of the tax imposed by section 801. In all the above cases returns and payments of the amount so collected shall be made at the same time and in the same manner as provided in section 502. [40 Stat. L. 1121.]

#### TITLE IX.—EXCISE TAXES.

SEC. 900. [**Enumeration of articles taxed—amount of tax.**] That there shall be levied, assessed, collected, and paid upon the following articles sold or leased



by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased —

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;

(4) Pianos, organs (other than pipe organs), piano players, graphophones, phonographs, talking machines, music boxes, and records used in connection with any musical instrument, piano player, graphophone, phonograph, or talking machine, 5 per centum;

(5) Tennis rackets, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles and cushions, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and goals, basket-ball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games), and all similar articles commonly or commercially known as sporting goods, 10 per centum;

(6) Chewing gum or substitutes therefor, 3 per centum;

(7) Cameras, weighing not more than 100 pounds, 10 per centum;

(8) Photographic films and plates, other than moving-picture films, 5 per centum;

(9) Candy, 5 per centum;

(10) Firearms, shells, and cartridges, except those sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, the District of Columbia, or any foreign country while engaged against the German Government in the present war, 10 per centum;

(11) Hunting and bowie knives, 10 per centum;

(12) Dirk knives, daggers, sword canes, stilletos, and brass or metallic knuckles, 10 per centum;

(13) Portable electric fans, 5 per centum;

(14) Thermos and thermostatic bottles, carafes, jugs, or other thermostatic containers, 5 per centum;

(15) Cigar or cigarette holders and pipes, composed wholly or in part of meerschaum or amber, humidors, and smoking stands, 10 per centum;

(16) Automatic slot-device vending machines, 5 per centum, and automatic, slot-device weighing machines, 10 per centum; if the manufacturer, producer, or importer of any such machine operates it for profit, he shall pay a tax in respect to each such machine put into operation equivalent to 5 per centum of its fair market value in the case of a vending machine, and 10 per centum of its fair market value in the case of a weighing machine;

(17) Liveries and livery boots and hats, 10 per centum;

- (18) Hunting and shooting garments and riding habits, 10 per centum;
- (19) Articles made of fur on the hide or pelt, or of which any such fur is the component material of chief value, 10 per centum;
- (20) Yachts and motor boats not designed for trade, fishing, or national defense; and pleasure boats and pleasure canoes if sold for more than \$15, 10 per centum; and
- (21) Toilet soaps and toilet soap powders, 3 per centum.

If any manufacturer, producer, or importer of any of the articles enumerated in this section customarily sells such articles both at wholesale and at retail, the tax in the case of any article sold by him at retail shall be computed on the price for which like articles are sold by him at wholesale.

The taxes imposed by this section shall, in the case of any article in respect to which a corresponding tax is imposed by section 600 of the Revenue Act of 1917, be in lieu of such tax. [40 Stat. L. 1122.]

For Act of Oct. 3, 1917, sec. 600, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 339.

**SEC. 901. [Articles subject to tax sold or leased at less than fair market price — effect.]** That if any person manufactures, produces or imports any article enumerated in section 900, or leases or licenses for exhibition any positive motion-picture film containing a picture ready for projection, and, whether through any agreement, arrangement, or understanding, or otherwise, sells, leases or licenses such article at less than the fair market price obtainable therefor, either (a) in such manner as directly or indirectly to benefit such person or any person directly or indirectly interested in the business of such person, or (b) with intent to cause such benefit, the amount for which such article is sold, leased or licensed shall be taken to be the amount which would have been received from the sale, lease or license of such article if sold, leased or licensed at the fair market price. [40 Stat. L. 1123.]

**SEC. 902. [Sculpture and other art articles — tax — amount.]** That there shall be levied, assessed, collected, and paid upon sculpture, painting, statuary, art porcelains, and bronzes, sold by any person other than the artist, a tax equivalent to 10 per centum of the price for which so sold. This section shall not apply to the sale of any such article to an educational institution or public art museum. [40 Stat. L. 1123.]

**SEC. 903. [Returns — payment of tax — penalty for nonpayment.]** That every person liable for any tax imposed by section 900, 902, or 906, shall make monthly returns under oath in duplicate and pay the taxes imposed by such sections to the collector for the district in which is located the principal place of business. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe.

The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due. [40 Stat. L. 1123.]

**SEC. 904. [Luxury tax — articles affected — payment.]** (a) That on and after May 1, 1919, there shall be levied, assessed, collected, and paid a tax equiva-

lent to 10 per centum of so much of the amount paid for any of the following articles as is in excess of the price hereinafter specified as to each such article, when such article is sold by or for a dealer or his estate on or after such date for consumption or use —

(1) Carpets and rugs, including fiber, except imported and American rugs made principally of wool, on the amount in excess of \$5 per square yard;

(2) Picture frames, on the amount in excess of \$10 each;

(3) Trunks, on the amount in excess of \$50 each;

(4) Valises, traveling bags, suit cases, hat boxes used by travelers, and fitted toilet cases, on the amount in excess of \$25 each;

(5) Purses, pocketbooks, shopping and hand bags, on the amount in excess of \$7.50 each;

(6) Portable lighting fixtures, including lamps of all kinds and lamp shades, on the amount in excess of \$25 each;

(7) Umbrellas, parasols, and sun shades, on the amount in excess of \$4 each;

(8) Fans, on the amount in excess of \$1 each;

(9) House or smoking coats or jackets, and bath or lounging robes, on the amount in excess of \$7.50 each;

(10) Men's waistcoats, sold separately from suits, on the amount in excess of \$5 each;

(11) Women's and misses' hats, bonnets, and hoods, on the amount in excess of \$15 each;

(12) Men's and boys' hats, on the amount in excess of \$5 each;

(13) Men's and boys' caps, on the amount in excess of \$2 each;

(14) Men's, women's, misses', and boys' boots, shoes, pumps, and slippers, not including shoes or appliances made to order for any person having a crippled or deformed foot or ankle, on the amount in excess of \$10 per pair;

(15) Men's and boys' neckties and neckwear, on the amount in excess of \$2 each;

(16) Men's and boys' silk stockings or hose, on the amount in excess of \$1 per pair;

(17) Women's and misses' silk stockings or hose, on the amount in excess of \$2 per pair;

(18) Men's shirts, on the amount in excess of \$3 each;

(19) Men's, women's, misses', and boys' pajamas, night gowns, and underwear, on the amount in excess of \$5 each; and

(20) Kimonos, petticoats, and waists, on the amount in excess of \$15 each.

(b) The tax imposed by this section shall not apply (1) to any article enumerated in paragraphs (2) to (8), both inclusive, of subdivision (a), if such article is made of, or ornamented, mounted, or fitted with, precious metals or imitations thereof or ivory, or (2) to any article made of fur on the hide or pelt, or of which any such fur is the component material of chief value, or to (3) any article enumerated in subdivision (17) or (18) of section 900.

(c) The taxes imposed by this section shall be paid by the purchaser to the vendor at the time of the sale and shall be collected, returned, and paid to the United States by such vendor in the same manner as provided in section 502. [40 Stat. L. 1123.]

**SEC. 905. [Jewelry — precious stones — time pieces — glasses — amount of tax — returns — payment of tax.]** That on and after April 1, 1919, there shall be levied, assessed, collected, and paid (in lieu of the tax imposed by subdivision

(e) of section 600 of the Revenue Act of 1917) upon all articles commonly or commercially known as jewelry, whether real or imitation; pearls, precious and semiprecious stones, and imitations thereof; articles made of, or ornamented, mounted or fitted with, precious metals or imitations thereof or ivory (not including surgical instruments); watches; clocks; opera glasses; lorgnettes; marine glasses; field glasses; and binoculars; upon any of the above when sold by or for a dealer or his estate for consumption or use, a tax equivalent to 5 per centum of the price for which so sold.

Every person selling any of the articles enumerated in this section shall make returns under oath in duplicate (monthly or quarterly as the Commissioner, with the approval of the Secretary, may prescribe) and pay the taxes imposed in respect to such articles by this section to the collector for the district in which is located the principal place of business. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe.

The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due. [40 Stat. L. 1124.]

For Act of Oct. 3, 1917, sec. 600, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 339.

**SEC. 906. [Motion-picture films—tax on owners, etc.]** That on and after the 1st day of May, 1919, any person engaged in the business of leasing or licensing for exhibition positive motion-picture films containing pictures ready for projection shall pay monthly an excise tax in respect to carrying on such business equal to 5 per centum of the total rentals earned from each such lease or license during the preceding month. If a person owning such a film exhibits it for profit he shall pay a tax equivalent to 5 per centum of the fair rental or license value of such film at the time and place where and for the period during which exhibited. If any such person has, prior to December 6, 1918, made a bona fide contract with any person for the lease or licensing, after the tax imposed by this section takes effect, of such a film for exhibition for profit, and if such contract does not permit the adding of the whole of the tax imposed by this section to the amount to be paid under such contract, then the lessee or licensee shall, in lieu of the lessor or licensor, pay so much of such tax as is not so permitted to be added to the contract price. The tax imposed by this section shall be in lieu of the tax imposed by subdivisions (c) and (d) of section 600 of the Revenue Act of 1917. [40 Stat. L. 1125.]

For Act of Oct. 3, 1917, sec. 600, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 339.

**SEC. 907. [Toilet articles—medicines—collection of tax—methods.]** (a) That on and after May 1, 1919, there shall be levied, assessed, collected and paid (in lieu of the taxes imposed by subdivisions (g) and (h) of section 600 of the Revenue Act of 1917) a tax of 1 cent for each 25 cents or fraction thereof of the amount paid for any of the following articles when sold by or for a dealer or his estate on or after such date for consumption or use:

(1) Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, tooth and mouth washes, dentrifices, tooth pastes, aromatic cachous, toilet powders (other than

soap powders), or any similar substance, article, or preparation by whatsoever name known or distinguished, any of the above which are used or applied or intended to be used or applied for toilet purposes;

(2) Pills, tablets, powders, tinctures, troches or lozenges, sirups, medicinal cordials or bitters, anodynes, tonics, plasters, liniments, salves, ointments, pastes, drops, waters (except those taxed under section 628 of this Act), essences, spirits, oils, and other medicinal preparations, compounds, or compositions (not including serums and antitoxins), upon the amount paid for any of the above as to which the manufacturer or producer claims to have any private formula, secret, or occult art for making or preparing the same, or has or claims to have any exclusive right or title to the making or preparing the same, or which are prepared, uttered, vended, or exposed for sale under any letters patent, or trade-mark, or which (if prepared by any formula, published or unpublished) are held out or recommended to the public by the makers, vendors, or proprietors thereof as proprietary medicines or medicinal proprietary articles or preparations, or as remedies or specifics for any disease, diseases, or affection whatever affecting the human or animal body: *Provided*, That the provisions of this section shall not apply to the sale of vaccines and bacterines which are not advertised to the general lay public, nor to the sale by a physician in personal attendance upon a patient of medicinal preparations not so advertised.

(b) The taxes imposed by this section shall be collected by whichever of the following methods the Commissioner may deem expedient: (1) by stamp affixed to such article by the vendor, the cost of which shall be reimbursed to the vendor by the purchaser; or (2) by payment to the vendor by the purchaser at the time of the sale, the taxes so collected being returned and paid to the United States by such vendor in the same manner as provided in section 502. [40 Stat. L. 1125.]

For Act of Oct. 3, 1917, sec. 600, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 339.

#### TITLE X — SPECIAL TAXES.

SEC. 1000. (a) [Corporations — capital stock tax — computation — surplus and undivided profits.] That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916 —

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to \$1 for each \$1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of \$5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

(2) Every foreign corporation shall pay annually a special excise tax with respect to carrying on or doing business in the United States, equivalent to \$1 for each \$1,000 of the average amount of capital employed in the transaction of its business in the United States during the preceding year ending June thirtieth. [40 Stat. L. 1126.]

For Act of Sept. 8, 1916, sec. 407, see 1918 Supp. Fed. Stat. Ann. 282.

[SEC. 1000 continued.] (b) [Insurance companies — computation of capital stock tax.] In computing the tax in the case of insurance companies such deposits and reserve funds as they are required by law or contract to maintain or hold for the protection of or payment to or apportionment among policyholders shall not be included. [40 Stat. L. 1126.]

[SEC. 1000 *continued.*] (c) **[Certain corporations exempt from tax — mutual insurance companies.]** The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or in the case of a foreign corporation not engaged in business in the United States) during the preceding year ending June 30, nor to any corporation enumerated in section 231. The taxes imposed by this section shall apply to mutual insurance companies, and in the case of every such domestic company the tax shall be equivalent to \$1 for each \$1,000 of the excess over \$5,000 of the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net additions to which are included in net income under the provisions of Title II, as of the close of the preceding accounting period used by such company for purposes of making its income tax return: *Provided*, That in the case of a foreign mutual insurance company the tax shall be equivalent to \$1 for each \$1,000 of the same proportion of the sum of such surplus and reserves, which the reserve fund upon business transacted within the United States is of the total reserve upon all business transacted, as of the close of the preceding accounting period used by such company for purposes of making its income tax return. [40 Stat. L. 1126.]

[SEC. 1000 *continued.*] (d) **[Returns.]** Section 257 shall apply to all returns filed with the Commissioner for purposes of the tax imposed by this section. [40 Stat. L. 1126.]

SEC. 1001. [a] **[Enumeration of persons in business subject to special tax and amount thereof.]** That on and after January 1, 1919, there shall be levied, collected, and paid annually the following special taxes —

(1) **[Brokers.]** Brokers shall pay \$50. Every person whose business it is to negotiate purchases or sales of stocks, bonds, exchange, bullion, coined money, bank notes, promissory notes, other securities, produce or merchandise, for others, shall be regarded as a broker. If a broker is a member of a stock exchange, or if he is a member of any produce exchange, board of trade, or similar organization, where produce or merchandise is sold, he shall pay an additional amount as follows: If the average value, during the preceding year ending June 30, of a seat or membership in such exchange or organization was \$2,000 or more but not more than \$5,000, \$100; if such value was more than \$5,000, \$150. [40 Stat. L. 1126.]

(2) **[Pawnbrokers.]** Pawnbrokers shall pay \$100. Every person whose business or occupation it is to take or receive, by way of pledge, pawn, or exchange, any goods, wares, or merchandise, or any kind of personal property whatever, as security for the repayment of money loaned thereon, shall be regarded as a pawnbroker. [40 Stat. L. 1127.]

(3) **[Ship brokers.]** Ship brokers shall pay \$50. Every person whose business it is as a broker to negotiate freights and other business for the owners of vessels, or for the shippers or consignors or consignees of freight carried by vessels, shall be regarded as a ship broker. [40 Stat. L. 1127.]

(4) **[Customhouse brokers.]** Customhouse brokers shall pay \$50. Every person whose occupation it is, as the agent of others, to arrange entries and other

customhouse papers, or transact business at any port of entry relating to the importation or exportation of goods, wares, or merchandise, shall be regarded as a customhouse broker. [40 Stat. L. 1127.]

(5) **[Proprietors of theaters, etc.]** Proprietors of theaters, museums, and concert halls, where a charge for admission is made, having a seating capacity of not more than two hundred and fifty, shall pay \$50; having a seating capacity of more than two hundred and fifty and not exceeding five hundred, shall pay \$100; having a seating capacity exceeding five hundred and not exceeding eight hundred, shall pay \$150; having a seating capacity of more than eight hundred, shall pay \$200. Every edifice used for the purpose of dramatic or operatic or other representations, plays, or performances, for admission to which entrance money is received, not including halls or armories rented or used occasionally for concerts or theatrical representations, and not including edifices owned by religious, educational or charitable institutions, societies or organizations where all the proceeds from admissions inure exclusively to the benefit of such institutions, societies or organizations or exclusively to the benefit of persons in the military or naval forces of the United States, shall be regarded as a theater: *Provided*, That in cities, towns, or villages of five thousand inhabitants or less the amount of such payment shall be one-half of that above stated: *Provided further*, That whenever any such edifice is under lease at the time the tax is due, the tax shall be paid by the lessee, unless otherwise stipulated between the parties to the lease. [40 Stat. L. 1127.]

(6) **[Proprietors of circuses.]** The proprietor or proprietors of circuses shall pay \$100. Every building, space, tent, or area, where feats of horsemanship or acrobatic sports or theatrical performances not otherwise provided for in this section are exhibited shall be regarded as a circus: *Provided*, That no special tax paid in one State, Territory, or the District of Columbia shall exempt exhibitions from the tax in another State, Territory, or the District of Columbia, and but one special tax shall be imposed for exhibitions within any one State, Territory, or District. [40 Stat. L. 1127.]

(7) **[Proprietors or agents of other public exhibitions.]** Proprietors or agents of all other public exhibitions or shows for money not enumerated in this section shall pay \$15: *Provided*, That a special tax paid in one State, Territory, or the District of Columbia shall not exempt exhibitions from the tax in another State, Territory, or the District of Columbia, and but one special tax shall be required for exhibitions within any one State, Territory, or the District of Columbia: *Provided further*, That this paragraph shall not apply to Chautauquas, lecture lyceums, agricultural or industrial fairs, or exhibitions held under the auspices of religious or charitable associations: *Provided further*, That an aggregation of entertainments, known as a street fair, shall not pay a larger tax than \$100 in any State, Territory, or in the District of Columbia. [40 Stat. L. 1127.]

(8) **[Proprietors of bowling alleys and billiard rooms.]** Proprietors of bowling alleys and billiard rooms shall pay \$10 for each alley or table. Every building or place where bowls are thrown or where games of billiards or pool are played, except in private homes, shall be regarded as a bowling alley or a billiard room, respectively. [40 Stat. L. 1127.]

(9) [**Proprietors of shooting galleries.**] Proprietors of shooting galleries shall pay \$20. Every building, space, tent, or area, where a charge is made for the discharge of firearms at any form of target shall be regarded as a shooting gallery. [40 Stat. L. 1128.]

(10) [**Proprietors of riding academies.**] Proprietors of riding academies shall pay \$100. Every building, space, tent, or area, where a charge is made for instruction in horsemanship or for facilities for the practice of horsemanship shall be regarded as a riding academy. [40 Stat. L. 1128.]

(11) [**Persons operating or renting automobiles for hire.**] Persons carrying on the business of operating or renting passenger automobiles for hire shall pay \$10 for each such automobile having a seating capacity of more than two and not more than seven, and \$20 for each such automobile having a seating capacity of more than seven. [40 Stat. L. 1128.]

(12) [**Persons in liquor business in prohibited territory.**] Every person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, retail dealer in malt liquor, or manufacturer of stills, as defined in section 3244 as amended and section 3247 of the Revised Statutes, in any State, Territory, or District of the United States contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law, shall pay, in addition to all other taxes, special or otherwise, imposed by existing law or by this Act, \$1,000.

The payment of the tax imposed by this subdivision shall not be held to exempt any person from any penalty or punishment provided for by the laws of any State, Territory, or District for carrying on such business in such State, Territory, or District, or in any manner to authorize the commencement or continuance of such business contrary to the laws of such State, Territory, or District, or in places prohibited by local or municipal law.

For R. S. sec. 3244, mentioned in the text, see 3 Fed. Stat. Ann. (2d ed.) 1045; 3 Fed. Stat. Ann. (1st ed.) 613.

For R. S. sec. 3247, see 4 Fed. Stat. Ann. (2d ed.) 18; 3 Fed. Stat. Ann. (1st ed.) 630.

[b] [**Taxes imposed in lieu of earlier taxes.**] The taxes imposed by this section shall, in the case of persons upon whom a corresponding tax is imposed by section 407 of the Revenue Act of 1916, be in lieu of such tax. [40 Stat. L. 1128.]

For Act of Sept. 8, 1916, sec. 407, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 282.

SEC. 1002. [**Manufacturers of tobacco, cigars, and cigarettes.**] That on and after January 1, 1919, there shall be levied, collected, and paid annually, in lieu of the taxes imposed by section 408 of the Revenue Act of 1916, the following special taxes, the amount of such taxes to be computed on the basis of the sales for the preceding year ending June 30—

Manufacturers of tobacco whose annual sales do not exceed fifty thousand pounds shall each pay \$6;

Manufacturers of tobacco whose annual sales exceed fifty thousand and do not exceed one hundred thousand pounds shall each pay \$12;

Manufacturers of tobacco whose annual sales exceed one hundred thousand and do not exceed two hundred thousand pounds shall each pay \$24;



Manufacturers of tobacco whose annual sales exceed two hundred thousand pounds shall each pay \$24, and at the rate of 16 cents per thousand pounds, or fraction thereof, in respect to the excess over two hundred thousand pounds;

Manufacturers of cigars whose annual sales do not exceed fifty thousand cigars shall each pay \$4;

Manufacturers of cigars whose annual sales exceed fifty thousand and do not exceed one hundred thousand cigars shall each pay \$6;

Manufacturers of cigars whose annual sales exceed one hundred thousand and do not exceed two hundred thousand cigars shall each pay \$12;

Manufacturers of cigars whose annual sales exceed two hundred thousand and do not exceed four hundred thousand cigars shall each pay \$24;

Manufacturers of cigars whose annual sales exceed four hundred thousand cigars shall each pay \$24, and at the rate of 10 cents per thousand cigars, or fraction thereof, in respect to the excess over four hundred thousand cigars;

Manufacturers of cigarettes, including small cigars weighing not more than three pounds per thousand shall each pay at the rate of 6 cents for every ten thousand cigarettes, or fraction thereof.

In arriving at the amount of special tax to be paid under this section, and in the levy and collection of such tax, each person engaged in the manufacture of more than one of the classes of articles specified in this section shall be considered and deemed a manufacturer of each class separately. [40 Stat. L. 1128.]

For Act of Sept. 8, 1916, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 285.

**SEC. 1003. [Yachts and boats.]** That sixty days after the passage of this Act, and thereafter on July 1 in each year, and also at the time of the original purchase of a new boat by a user, if on any other date than July 1, there shall be levied, assessed, collected, and paid in lieu of the tax imposed by section 603 of the Revenue Act of 1917, upon the use of yachts, pleasure boats, power boats, and sailing boats, of over five net tons, and motor boats with fixed engines, not used exclusively for trade, fishing, or national defense, or not built according to plans and specifications approved by the Navy Department, a special excise tax to be based on each yacht or boat, at rates as follows: Yachts, pleasure boats, power boats, motor boats with fixed engines, and sailing boats, of over five net tons, length not over fifty feet, \$1 for each foot; length over fifty feet and not over one hundred feet, \$2 for each foot; length over one hundred feet, \$4 for each foot; motor boats of not over five net tons with fixed engines, \$10.

In determining the length of such yachts, pleasure boats, power boats, motor boats with fixed engines, and sailing boats, the measurement of over-all length shall govern.

In the case of a tax imposed at the time of the original purchase of a new boat on any other date than July 1, and in the case of the tax taking effect sixty days after the passage of this Act, the amount to be paid shall be the same number of twelfths of the amount of the tax as the number of calendar months (including the month of sale, or the month in which is included the sixty-first day after the passage of this Act, as the case may be) remaining prior to the following July 1.

If the tax imposed by section 603 of the Revenue Act of 1917, for the fiscal year ending June 30, 1919, has been paid in respect to the use of any boat, the amount so paid shall under such regulations as the Commissioner, with the approval of the Secretary, may prescribe, be credited upon the first tax due

under this section in respect to the use of such boat, or be refunded to the person paying the first tax imposed by this section in respect to the use of such boat. [40 Stat. L. 1129.]

For Act of Oct. 3, 1917, § 603, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 341.

**SEC. 1004. [Effect of payment of tax imposed by earlier law — receipt — credits.]** That if the tax imposed by section 407 or 408 of the Revenue Act of 1916, for the fiscal year ending June 30, 1919, has been paid by any person subject to the corresponding tax imposed by this title, collectors may issue a receipt in lieu of special tax stamp for the amount by which the tax under this title is in excess of that paid or payable and evidenced by stamp under the Revenue Act of 1916. Such receipt shall be posted as in the case of the special tax stamp, as provided by law, and with it, within the place of business of the taxpayer.

If the corresponding tax imposed by section 407 of the Revenue Act of 1916 was not payable by stamp, the amount paid under such section for any period for which a tax is also imposed by this title may be credited against the tax imposed by this title. [40 Stat. L. 1129.]

For Act of Sept. 8, 1916, §§ 407 and 408, see 1918 Supp. Fed. Stat. Ann. 282, 285.

**SEC. 1005. [Non-payment of occupational tax — penalty.]** That any person who carries on any business or occupation for which a special tax is imposed by sections 1000, 1001, or 1002, without having paid the special tax therein provided, shall, besides being liable for the payment of such special tax, be subject to a penalty of not more than \$1,000 or to imprisonment for not more than one year, or both. [40 Stat. L. 1129.]

**SEC. 1006. [Opium, coca leaves and preparations therefrom — regulation of traffic — registration — amount of tax — collection of tax — Harrison Act amended.]** That section 1 of the Act of Congress approved December 17, 1914, is hereby amended to read as follows:

“SECTION 1. That on or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business and place or places where such business is to be carried on, and pay the special taxes hereinafter provided;

“Every person who on January 1, 1919, is engaged in any of the activities above enumerated, or who between such date and the passage of this Act first engages in any of such activities, shall within 30 days after the passage of this Act make like registration, and shall pay the proportionate part of the tax for the period ending June 30, 1919; and

“Every person who first engages in any of such activities after the passage of this Act shall immediately make like registration and pay the proportionate part of the tax for the period ending on the following June 30th;

“Importers, manufacturers, producers, or compounders, \$24 per annum; wholesale dealers, \$12 per annum; retail dealers, \$6 per annum; physicians, dentists, veterinary surgeons, and other practitioners lawfully entitled to distribute, dispense, give away, or administer any of the aforesaid drugs to patients upon whom they in the course of their professional practice are in attendance, shall pay \$3 per annum.

" Every person who imports, manufactures, compounds, or otherwise produces for sale or distribution any of the aforesaid drugs shall be deemed to be an importer, manufacturer, or producer.

" Every person who sells or offers for sale any of said drugs in the original stamped packages, as hereinafter provided, shall be deemed a wholesale dealer.

" Every person who sells or dispenses from original stamped packages, as hereinafter provided, shall be deemed a retail dealer: *Provided*, That the office, or if none, the residence, of any person shall be considered for the purpose of this Act his place of business; but no employee of any person who has registered and paid special tax as herein required, acting within the scope of his employment, shall be required to register and pay special tax provided by this section: *Provided further*, That officials of the United States, Territorial, District of Columbia, or insular possessions, State or municipal governments, who in the exercise of their official duties engage in any of the business herein described, shall not be required to register, nor pay special tax, nor stamp the aforesaid drugs as hereinafter prescribed, but their right to this exemption shall be evidenced in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations prescribe.

" It shall be unlawful for any person required to register under the provisions of this Act to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this section.

" That the word ' person ' as used in this Act shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person; and all provisions of existing law relating to special taxes, as far as necessary, are hereby extended and made applicable to this section.

" That there shall be levied, assessed, collected, and paid upon opium, coca leaves, any compound, salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal-revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce, such tax to be paid by the importer, manufacturer, producer, or compounder thereof, and to be represented by appropriate stamps, to be provided by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury; and the stamps herein provided shall be so affixed to the bottle or other container as to securely seal the stopper, covering, or wrapper thereof.

" The tax imposed by this section shall be in addition to any import duty imposed on the aforesaid drugs.

" It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by this section shall be prima facie evidence of liability to such special tax: *Provided*, That the provisions of this paragraph shall not apply to any person having in his or her possession any of the aforesaid drugs which have been obtained from a registered dealer in pursuance of a prescription, written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under this Act; and where the bottle or other con-

tainer in which such drug may be put up by the dealer upon said prescription bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person writing said prescription; or to the dispensing, or administration, or giving away of any of the aforesaid drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept as required by this Act of the drugs so dispensed, administered, distributed, or given away.

“And all the provisions of existing laws relating to the engraving, issuance, sale, accountability, cancellation, and destruction of tax-paid stamps provided for in the internal-revenue laws are, in so far as necessary, hereby extended and made to apply to stamps provided by this section.

“That all unstamped packages of the aforesaid drugs found in the possession of any person, except as herein provided, shall be subject to seizure and forfeiture, and all the provisions of existing internal-revenue laws relating to searches, seizures, and forfeitures of unstamped articles are hereby extended to and made to apply to the articles taxed under this Act and the persons upon whom these taxes are imposed.

“Importers, manufacturers, and wholesale dealers shall keep such books and records and render such monthly returns in relation to the transactions in the aforesaid drugs as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations require.

“The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful rules and regulations for carrying the provisions of this Act into effect.” [40 Stat. L. 1130.]

For Act of Dec. 17, 1914, sec. 1, before the amendment, see 4 Fed. Stat. Ann. (2d ed.) 177; 1916 Supp. Fed. Stat. Ann. 101.

**SEC. 1007. [Preparations containing limited quantities of opium, morphine, etc.—application of Harrison Act—record of sales, etc.—registration—decocainized coca leaves and preparations therefrom.]** That section 6 of such Act of December 17, 1914, is hereby amended to read as follows:

“SEC. 6. That the provisions of this Act shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce; or to liniments, ointments, or other preparations which are prepared for external use only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substitute for them: *Provided*, That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this Act: *Provided further*, That any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned in this section shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall

direct. Such record shall be preserved for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officers named in section 5 of this Act, and every such person so possessing or disposing of such preparations and remedies shall register as required in section 1 of this Act and, if he is not paying a tax under this Act, he shall pay a special tax of \$1 for each year, or fractional part thereof, in which he is engaged in such occupation, to the collector of internal revenue of the district in which he carries on such occupation as provided in this Act. The provisions of this Act as amended shall not apply to decocainized coca leaves or preparations made therefrom, or to other preparations of coca leaves which do not contain cocaine." [40 Stat. L. 1132.]

For Act of Dec. 17, 1914, sec. 6, before the amendment, see 4 Fed. Stat. Ann. (2d ed.) 183; 1916 Supp. Fed. Stat. Ann. 106.

**SEC. 1008. [Confiscation and forfeiture of seized opium, coca leaves, etc.—disposition of forfeited drugs.]** That all opium, its salts, derivatives, and compounds, and coca leaves, salts, derivatives, and compounds thereof, which may now be under seizure or which may hereafter be seized by the United States Government from any person or persons charged with any violation of the Act of October 1, 1890, as amended by the Acts of March 3, 1897, February 9, 1909, and January 17, 1914, or the Act of December 17, 1914, shall upon conviction of the person or persons from whom seized be confiscated by and forfeited to the United States; and the Secretary is hereby authorized to deliver for medical or scientific purposes to any department, bureau, or other agency of the United States Government, upon proper application therefor under such regulation as may be prescribed by the Commissioner, with the approval of the Secretary, any of the drugs so seized, confiscated, and forfeited to the United States.

The provisions of this section shall also apply to any of the aforesaid drugs seized or coming into the possession of the United States in the enforcement of any of the above-mentioned Acts where the owner or owners thereof are unknown. None of the aforesaid drugs coming into possession of the United States under the operation of said Acts, or the provisions of this section, shall be destroyed without certification by a committee appointed by the Commissioner, with the approval of the Secretary, that they are of no value for medical or scientific purposes. [40 Stat. L. 1132.]

For the different Opium Acts, now in force and mentioned in the text, see 4 Fed. Stat. Ann. (2d ed.) 173; 1916 Supp. Fed. Stat. Ann. 71.

**SEC. 1009. [War Revenue Act of 1914 — repeal.]** That the Act approved October 22, 1914, entitled "An Act to increase the internal revenue, and for other purposes," and the joint resolution approved December 17, 1915, entitled "Joint resolution extending the provisions of the Act entitled 'An Act to increase the internal revenue, and for other purposes,' approved October twenty-second, nineteen hundred and fourteen, to December thirty-first, nineteen hundred and sixteen," are hereby repealed, except that the provisions of such Act shall remain in force for the assessment and collection of all special taxes imposed by sections 3 and 4 thereof, or by such sections as extended by such joint resolution, for any year or part thereof ending prior to January 1, 1917, and of all other taxes imposed by such Act, or by such Act as so extended, accrued prior to September 8, 1916, and for the imposition and collection of all

penalties or forfeitures which have accrued or may accrue in relation to any of such taxes. [40 Stat. L. 1132.]

For Act of Oct. 22, 1914, mentioned in the text, see 4 Fed. Stat. Ann. (2d ed.) 284; 1916 Supp. Fed. Stat. Ann. 80.

For Res. of Dec. 17, 1915, mentioned in the text, see 4 Fed. Stat. Ann. (2d ed.) 306; 1916 Supp. Fed. Stat. Ann. 110.

#### TITLE XI. — STAMP TAXES.

SEC. 1100. [Instruments, matters, and things affected by title.] That on and after April 1, 1919, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax. [40 Stat. L. 1133.]

SEC. 1101. [Exemptions.] That there shall not be taxed under this title any bond, note, or other instrument, issued by the United States, or by any foreign Government, or by any State, Territory, or the District of Columbia, or local subdivision thereof, or municipal or other corporation exercising the taxing power; or any bond of indemnity required to be filed by any person to secure payment of any pension, allowance, allotment, relief, or insurance by the United States; or stocks and bonds issued by cooperative building and loan associations which are organized and operated exclusively for the benefit of their members and make loans only to their shareholders, or by mutual ditch or irrigating companies. [40 Stat. L. 1133.]

SEC. 1102. [Offenses — failure to pay tax or cancel stamps.] That whoever —

(a) Makes, signs, issues, or accepts, or causes to be made, signed, issued, or accepted, any instrument, document, or paper of any kind or description whatsoever without the full amount of tax thereon being duly paid;

(b) Consigns or ships, or causes to be consigned or shipped, by parcel post any parcel, package, or article without the full amount of tax being duly paid;

(c) Manufactures or imports and sells, or offers for sale, or causes to be manufactured or imported and sold, or offered for sale, any playing cards, package, or other article without the full amount of tax being duly paid;

(d) Makes use of any adhesive stamp to denote any tax imposed by this title without canceling or obliterating such stamp as prescribed in section 1104;

Is guilty of a misdemeanor and upon conviction thereof shall pay a fine of not more than \$100 for each offense. [40 Stat. L. 1133.]

SEC. 1103. [Offenses — fraud — tampering with stamped instrument — insufficient stamping — used stamps — reuse and possession — counterfeit stamps.] That whoever —

(a) Fraudulently cuts, tears, or removes from any vellum, parchment, paper, instrument, writing, package, or article, upon which any tax is imposed by this

title, any adhesive stamp or the impression of any stamp, die, plate, or other article provided, made, or used in pursuance of this title;

(b) Fraudulently uses, joins, fixes, or places to, with, or upon any vellum, parchment, paper, instrument, writing, package, or article, upon which any tax is imposed by this title, (1) any adhesive stamp, or the impression of any stamp, die, plate, or other article, which has been cut, torn, or removed from any other vellum, parchment, paper, instrument, writing, package, or article, upon which any tax is imposed by this title; or (2) any adhesive stamp or the impression of any stamp, die, plate, or other article of insufficient value; or (3) any forged or counterfeit stamp, or the impression of any forged or counterfeited stamp, die, plate, or other article;

(c) Willfully removes, or alters the cancellation, or defacing marks of, or otherwise prepares, any adhesive stamp, with intent to use, or cause the same to be used, after it has been already used, or knowingly or willfully buys, sells, offers for sale, or gives away, any such washed or restored stamp to any person for use, or knowingly uses the same;

(d) Knowingly and without lawful excuse (the burden of proof of such excuse being on the accused) has in possession any washed, restored, or altered stamp, which has been removed from any vellum, parchment, paper, instrument, writing, package, or article;

Is guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than \$1,000, or by imprisonment for not more than five years, or both, and any such reused, canceled, or counterfeit stamp and the vellum, parchment, document, paper, package, or article upon which it is placed or impressed shall be forfeited to the United States. [40 Stat. L. 1133.]

**SEC. 1104. [Cancellation of stamp.]** That whenever an adhesive stamp is used for denoting any tax imposed by this title, except as hereinafter provided, the person using or affixing the same shall write or stamp or cause to be written or stamped thereupon the initials of his or its name and the date upon which the same is attached or used, so that the same may not again be used: *Provided*, That the Commissioner may prescribe such other method for the cancellation of such stamps as he may deem expedient. [40 Stat. L. 1134.]

**SEC. 1105. [Preparation and distribution of stamps — collection of stamp taxes omitted from instrument, etc.]** (a) That the Commissioner shall cause to be prepared and distributed for the payment of the taxes prescribed in this title suitable stamps denoting the tax on the document, articles, or thing to which the same may be affixed, and shall prescribe such method for the affixing of said stamps in substitution for or in addition to the method provided in this title, as he may deem expedient.

(b) The Commissioner, with the approval of the Secretary, is authorized to procure any of the stamps provided for in this title by contract whenever such stamps can not be speedily prepared by the Bureau of Engraving and Printing; but this authority shall expire on January 1, 1920, except as to imprinted stamps furnished under contract, authorized by the Commissioner.

(c) All internal-revenue laws relating to the assessment and collection of taxes are hereby extended to and made a part of this title, so far as applicable, for the purpose of collecting stamp taxes omitted through mistake or fraud from any instrument, document, paper, writing, parcel, package, or article named herein. [40 Stat. L. 1134.]

**SEC. 1106. [Distribution of stamps to postmasters — bond — sale of stamps — receipts.]** That the Commissioner shall furnish to the Postmaster General without prepayment a suitable quantity of adhesive stamps to be distributed to and kept on sale by the various postmasters in the United States. The Postmaster General may require each such postmaster to give additional or increased bond as postmaster for the value of the stamps so furnished, and each such postmaster shall deposit the receipts from the sale of such stamps to the credit of and render accounts to the Postmaster General at such times and in such form as he may by regulations prescribe. The Postmaster General shall at least once monthly transfer all collections from this source to the Treasury as internal-revenue collections. [40 Stat. L. 1134.]

**SEC. 1107. [Distribution of stamps to assistant treasurer or designated depository — bond — regulations.]** That the collectors of the several districts shall furnish without prepayment to any assistant treasurer or designated depository of the United States located in their respective collection districts a suitable quantity of adhesive stamps for sale. In such cases the collector may require a bond, with sufficient sureties, to an amount equal to the value of the adhesive stamps so furnished, conditioned for the faithful return, whenever so required, of all quantities or amounts undisposed of, and for the payment monthly of all quantities or amounts sold or not remaining on hand. The Secretary may from time to time make such regulations as he may find necessary to insure the safe-keeping or prevent the illegal use of all such adhesive stamps. [40 Stat. L. 1135.]

#### SCHEDULE A.—STAMP TAXES.

1. *Bonds of indebtedness:* On all bonds, debentures, or certificates of indebtedness issued by any person, and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities, on each \$100 of face value or fraction thereof, 5 cents: *Provided*, That every renewal of the foregoing shall be taxed as a new issue: *Provided further*, That when a bond conditioned for the repayment or payment of money is given in a penal sum greater than the debt secured, the tax shall be based upon the amount secured.

2. *Bonds, indemnity and surety:* On all bonds executed for indemnifying any person who shall have become bound or engaged as surety, and on all bonds executed for the due execution or performance of any contract, obligation, or requirement, or the duties of any office or position, and to account for money received by virtue thereof, and on all policies of guaranty and fidelity insurance, including policies guaranteeing titles to real estate and mortgage guarantee policies, and on all other bonds of any description, made, issued, or executed, not otherwise provided for in this schedule, except such as may be required in legal proceedings, 50 cents: *Provided*, That where a premium is charged for the issuance, execution, renewal or continuance of such bond the tax shall be 1 cent on each dollar or fractional part thereof of the premium charged: *Provided further*, That policies of reinsurance shall be exempt from the tax imposed by this subdivision.

3. *Capital stock, issued:* On each original issue, whether on organization or reorganization, of certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, on each \$100 of face value or fraction



thereof, 5 cents: *Provided*, That where a certificate is issued without face value, the tax shall be 5 cents per share, unless the actual value is in excess of \$100 per share, in which case the tax shall be 5 cents on each \$100 of actual value or fraction thereof.

The stamps representing the tax imposed by this subdivision shall be attached to the stock books and not to the certificates issued.

4. *Capital stock, sales or transfers*: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each \$100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share, unless the actual value thereof is in excess of \$100 per share, in which case the tax shall be 2 cents on each \$100 of actual value or fraction thereof: *Provided*, That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited: *Provided further*, That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts: *Provided further*, That in case of sale where the evidence of transfer is shown only by the books of the corporation the stamp shall be placed upon such books; and where the change of ownership is by transfer of the certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers. Any person liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person, who makes any such sale, or who in pursuance of any such sale delivers any certificate or evidence of the sale of any stock, interest or right, or bill or memorandum thereof, as herein required, without having the proper stamps affixed thereto with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding \$1,000, or be imprisoned not more than six months, or both.

5. *Produce, sales of, on exchange*: Upon each sale, agreement of sale, or agreement to sell (not including so-called transferred or scratch sales), any products or merchandise at, or under the rules or usages of, any exchange, or board of trade, or other similar place, for future delivery, for each \$100 in value of the merchandise covered by said sale or agreement of sale or agreement to sell, 2 cents, and for each additional \$100 or fractional part thereof in excess of \$100, 2 cents: *Provided*, That on every sale or agreement of sale or agreement to sell as aforesaid there shall be made and delivered by the seller to the buyer

a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps in value equal to the amount of the tax on such sale: *Provided further*, That sellers of commodities described herein, having paid the tax provided by this subdivision, may transfer such contracts to a clearing-house corporation or association, and such transfer shall not be deemed to be a sale, or agreement of sale, or an agreement to sell within the provisions of this Act, provided that such transfer shall not vest any beneficial interest in such clearing-house association but shall be made for the sole purpose of enabling such clearing-house association to adjust and balance the accounts of the members of such clearing-house association on their several contracts. Every such bill, memorandum, or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person, who makes any such sale or agreement of sale, or agreement to sell, or who, in pursuance of any such sale, agreement of sale, or agreement to sell, delivers any such products or merchandise without a bill, memorandum, or other evidence thereof as herein required, or who delivers such bill, memorandum, or other evidence of sale, or agreement to sell, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding \$1,000 or be imprisoned not more than six months, or both.

No bill, memorandum, agreement, or other evidence of such sale, or agreement of sale, or agreement to sell, in case of cash sales of products or merchandise for immediate or prompt delivery which in good faith are actually intended to be delivered shall be subject to this tax.

6. [*Drafts, checks and notes.*] Drafts or checks (payable otherwise than at sight or on demand) upon their acceptance or delivery within the United States whichever is prior, promissory notes, except bank notes issued for circulation, and for each renewal of the same, for a sum not exceeding \$100, 2 cents; and for each additional \$100 or fractional part thereof, 2 cents.

This subdivision shall not apply to a promissory note secured by the pledge of bonds or obligations of the United States issued after April 24, 1917, or secured by the pledge of a promissory note which itself is secured by the pledge of such bonds or obligations: *Provided*, That in either case the par value of such bonds or obligations shall be not less than the amount of such note.

7. *Conveyances*: Deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds \$100 and does not exceed \$500, 50 cents; and for each additional \$500 or fractional part thereof, 50 cents. This subdivision shall not apply to any instrument or writing given to secure a debt.

8. *Entry of any goods, wares, or merchandise* at any customhouse, either for consumption or warehousing, not exceeding \$100 in value, 25 cents; exceeding \$100 and not exceeding \$500 in value, 50 cents; exceeding \$500 in value, \$1.

9. *Entry for the withdrawal of any goods* or merchandise from customs bonded warehouse, 50 cents.

10. *Passage ticket*, one way or round trip, for each passenger, sold or issued in the United States for passage by any vessel to a port or place not in the United States, Canada, or Mexico, if costing not exceeding \$30, \$1; costing more than \$30 and not exceeding \$60, \$3; costing more than \$60, \$5. This subdivision shall not apply to passage tickets costing \$10 or less.

11. *Proxy* for voting at any election for officers, or meeting for the transaction of business, of any corporation, except religious, educational, charitable, fraternal, or literary societies, or public cemeteries, 10 cents.

12. *Power of attorney* granting authority to do or perform some act for or in behalf of the grantor, which authority is not otherwise vested in the grantee, 25 cents. This subdivision shall not apply to any papers necessary to be used for the collection of claims from the United States or from any State for pensions, back pay, bounty, or for property lost in the military or naval service, or to powers of attorney required in bankruptcy cases.

13. *Playing cards*: Upon every pack of playing cards containing not more than fifty-four cards, manufactured or imported, and sold, or removed for consumption or sale, a tax of 8 cents per pack.

14. *Parcel-post packages*: Upon every parcel or package transported from one point in the United States to another by parcel post on which the postage amounts to 25 cents or more, a tax of 1 cent for each 25 cents or fractional part thereof charged for such transportation, to be paid by the consignor.

No such parcel or package shall be transported until a stamp or stamps representing the tax due shall have been affixed thereto.

15. [*Insurance policy*.] On each policy of insurance, or certificate, binder, covering note, memorandum, cablegram, letter, or other instrument by whatever name called whereby insurance is made or renewed upon property within the United States (including rents and profits) against peril by sea or on inland waters or in transit on land (including transshipments and storage at termini or way points) or by fire, lightning, tornado, wind-storm, bombardment, invasion, insurrection or riot, issued to or for or in the name of a domestic corporation or partnership or an individual resident of the United States by any foreign corporation or partnership or any individual not a resident of the United States, when such policy or other instrument is not signed or countersigned by an officer or agent of the insurer in a State, Territory, or district of the United States within which such insurer is authorized to do business, a tax of 3 cents on each dollar, or fractional part thereof of the premium charged: *Provided*, That policies of re-insurance shall be exempt from the tax imposed by this subdivision.

Any person to or for whom or in whose name any such policy or other instrument is issued, or any solicitor or broker acting for or on behalf of such person in the procurement of any such policy or other instrument, shall affix the proper stamps to such policy or other instrument, and for failure to affix such stamps with intent to evade the tax shall, in addition to other penalties provided therefor, pay a fine of double the amount of the tax. [40 Stat. L. 1135.]

## TITLE XII.—TAX ON EMPLOYMENT OF CHILD LABOR.

SEC. 1200. [*Kind of employment affected by title — hours of employment — amount of tax — net profits*.] That every person (other than a bona fide boys' or girls' canning club recognized by the Agricultural Department of a State and of the United States) operating (a) any mine or quarry situated in the

United States in which children under the age of sixteen years have been employed or permitted to work during any portion of the taxable year; or (b) any mill, cannery, workshop, factory, or manufacturing establishment situated in the United States in which children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen have been employed or permitted to work more than eight hours in any day or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian, during any portion of the taxable year, shall pay for each taxable year, in addition to all other taxes imposed by law, an excise tax equivalent to 10 per centum of the entire net profits received or accrued for such year from the sale or disposition of the product of such mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment. [40 Stat. L. 1138.]

**SEC. 1201. [Net profits how computed for purpose of tax.]** That in computing net profits under the provisions of this title, for the purpose of the tax there shall be allowed as deductions from the gross amount received or accrued for the taxable year from the sale or disposition of such products manufactured within the United States the following items:

- (a) The cost of raw materials entering into the production;
- (b) Running expenses, including rentals, cost of repairs, and maintenance, heat, power, insurance, management, and a reasonable allowance for salaries or other compensations for personal services actually rendered, and for depreciation;
- (c) Interest paid within the taxable year on debts or loans contracted to meet the needs of the business, and the proceeds of which have been actually used to meet such needs;
- (d) Taxes of all kinds paid during the taxable year with respect to the business or property relating to the production; and
- (e) Losses actually sustained within the taxable year in connection with the business of producing such products, including losses from fire, flood, storm, or other casualties, and not compensated for by insurance or otherwise. [40 Stat. L. 1138.]

**SEC. 1202. [Products sold at less than fair market price — collusion with purchaser — effect.]** That if any such person during any taxable year or part thereof, whether under any agreement, arrangement, or understanding or otherwise, sells or disposes of any product of such mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment at less than the fair market price obtainable therefor either (a) in such manner as directly or indirectly to benefit such person or any person directly or indirectly interested in the business of such person; or (b) with intent to cause such benefit; the gross amount received or accrued for such year or part thereof from the sale or disposition of such product shall be taken to be the amount which would have been received or accrued from the sale or disposition of such product if sold at the fair market price. [40 Stat. L. 1139.]

**SEC. 1203. [Good faith as relieving employer from tax — employment certificate — mistake as to age.]** (a) That no person subject to the provisions of this title shall be liable for the tax herein imposed if the only employment or permission to work which but for this section would subject him to the tax, has

been of a child as to whom such person has in good faith procured at the time of employing such child or permitting him to work, and has since in good faith relied upon and kept on file a certificate, issued in such form, under such conditions and by such persons as may be prescribed by a board consisting of the Secretary, the Commissioner, and the Secretary of Labor, showing the child to be of such age as not to subject such person to the tax imposed by this title. Any person who knowingly makes a false statement or presents false evidence in or in relation to any such certificate or application therefor shall be punished by a fine of not less than \$100 nor more than \$1,000, or by imprisonment for not more than three months, or by both such fine and imprisonment, in the discretion of the court.

In any State designated by such board an employment certificate or other similar paper as to the age of the child, issued under the laws of that State, and not inconsistent with the provisions of this title, shall have the same force and effect as a certificate herein provided for.

(b) The tax imposed by this title shall not be imposed in the case of any person who proves to the satisfaction of the Secretary that the only employment or permission to work which but for this section would subject him to the tax, has been of a child employed or permitted to work under a mistake of fact as to the age of such child, and without intention to evade the tax. [40 Stat. L. 1139.]

SEC. 1204. **[Returns.]** That on or before the first day of the third month following the close of each taxable year, a true and accurate return under oath shall be made by each person subject to the provisions of this title to the collector for the district in which such person has his principal office or place of business, in such form as the Commissioner, with the approval of the Secretary, shall prescribe, setting forth specifically the gross amount of income received or accrued during such year from the sale or disposition of the product of any mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment, in which children have been employed subjecting him to the tax imposed by this title, and from the total thereof deducting the aggregate items of allowance authorized by this title, and such other particulars as to the gross receipts and items of allowance as the Commissioner, with the approval of the Secretary may require. [40 Stat. L. 1139.]

SEC. 1205. **[Assessment and collection of tax.]** That all such returns shall be transmitted forthwith by the collector to the Commissioner, who shall, as soon as practicable, assess the tax found due and notify the person making such return of the amount of tax for which such person is liable, and such person shall pay the tax to the collector on or before thirty days from the date of such notice. [40 Stat. L. 1140.]

SEC. 1206. **[Inspection of mines, factories, etc.—penalty for obstructing inspection.]** That for the purposes of this Act the Commissioner, or any other person duly authorized by him, shall have authority to enter and inspect at any time any mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment. The Secretary of Labor, or any person duly authorized by him, shall, for the purpose of complying with a request of the Commissioner to make such an inspection, have like authority, and shall make report to the Commissioner of inspections made under such authority in such form as may be prescribed by the Commissioner with the approval of the Secretary of the Treasury.

Any person who refuses or obstructs entry or inspection authorized by this section shall be punished by a fine of not more than \$1,000, or by imprisonment for not more than one year, or both such fine and imprisonment. [40 Stat. L. 1140.]

SEC. 1207. [**"Taxable year"—meaning.**] That as used in this title the term "taxable year" shall have the same meaning as provided for the purposes of income tax in section 200. The first taxable year for the purposes of this title shall be the period between sixty days after the passage of this Act and December 31, 1919, both inclusive, or such portion of such period as is included within the fiscal year (as defined in section 200) of the taxpayer. [40 Stat. L. 1140.]

#### TITLE XIII.—GENERAL ADMINISTRATIVE PROVISIONS.

SEC. 1300. [**Commissioner of Internal Revenue—salary.**] That hereafter the salary of the Commissioner shall be \$10,000 a year. The difference between the amount appropriated under existing law and the salary herein established shall, for the period between the passage of this Act and July 1, 1919, be paid out of the appropriations for collecting internal revenue. [40 Stat. L. 1140.]

SEC. 1301. (a) [**Deputy commissioners—assistant to commissioner—salaries—duties of assistant.**] That hereafter there may be employed in the Bureau of Internal Revenue, in lieu of the deputy commissioners whose salaries are now fixed by law, five deputy commissioners and an assistant to the Commissioner, who shall each receive a salary of \$5,000 a year, payable monthly. The assistant to the Commissioner may be authorized by the Commissioner to perform any duties which the deputy commissioners may perform under existing law. [40 Stat. L. 1140.]

[SEC. 1301 *continued.*] (b) [**Salaries of collectors—readjustment.**] The salaries of collectors may be readjusted and increased under such regulations as may be prescribed by the Commissioner, subject to the approval of the Secretary, but no collector shall receive a salary in excess of \$6,000 a year. [40 Stat. L. 1140.]

[SEC. 1301 *continued.*] (c) [**Expenses of assessing and collecting taxes—appropriation.**] There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending June 30, 1919, the sum of \$7,500,000 for the expenses of assessing and collecting the internal-revenue taxes as provided in this Act, including the employment of necessary officers, attorneys, experts, agents, inspectors, deputy collectors, clerks, janitors, and messengers, in the District of Columbia and the several collection districts, to be appointed as provided by law, telegraph and telephone service, rental and repair of quarters, postage, and the purchase of such supplies, equipment, furniture, mechanical devices, printing, stationery, law books and books of reference, not to exceed \$500 for street car fares in the District of Columbia, and such other articles as may be necessary for use in the District of Columbia and the several collection districts: *Provided*, That not more than \$2,750,000 of the total amount appropriated by this section may be expended in the Bureau of Internal Revenue, in the District of Columbia. [40 Stat. L. 1140.]

[Sec. 1301 *continued.*] (d) [**" Advisory Tax Board "** — creation — membership — duties — powers — office — expenses and salaries.] (1) There is hereby created a board to be known as the "Advisory Tax Board," hereinafter called the Board, and to be composed of not to exceed six members to be appointed by the Commissioner with the approval of the Secretary. The Board shall cease to exist at the expiration of two years after the passage of this Act, or at such earlier time as the Commissioner with the approval of the Secretary may designate.

Vacancies in the membership of the Board shall be filled in the same manner as an original appointment. Any member shall be subject to removal by the Commissioner with the approval of the Secretary. The Commissioner with the approval of the Secretary shall designate the chairman of the Board. Each member shall receive an annual salary of \$9,000, payable monthly, together with actual necessary expenses when absent from the District of Columbia on official business.

(2) The Commissioner may, and on the request of any taxpayer directly interested shall, submit to the Board any question relating to the interpretation or administration of the income, war-profits or excess-profits tax laws, and the Board shall report its findings and recommendations to the Commissioner.

(3) The Board shall have its office in the Bureau of Internal Revenue in the District of Columbia. The expenses and salaries of members of the Board shall be audited, allowed, and paid out of appropriations for collecting internal revenue, in the same manner as expenses and salaries of employees of the Bureau of Internal Revenue are audited, allowed, and paid.

(4) The Board shall have the power to summon witnesses, take testimony, administer oaths, and to require any person to produce books, papers, documents, or other data relating to any matter under investigation by the Board. Any member of the Board may sign subpoenas and members and employees of the Bureau of Internal Revenue designated to assist the Board, when authorized by the Board, may administer oaths, examine witnesses, take testimony and receive evidence. [40 Stat. L. 1141.]

SEC. 1302. [**Internal revenue agents and inspectors — leave of absence.**] That all internal-revenue agents and inspectors shall be granted leave of absence with pay, which shall not be cumulative, not to exceed thirty days in any calendar year, under such regulations as the Commissioner, with the approval of the Secretary, may prescribe. [40 Stat. L. 1141.]

SEC. 1303. [**Legislative Drafting Service.**]

This section is not one relating to internal revenue, but provides for a legislative drafting service, and will be found under the title CONGRESS.

SEC. 1304. [**Imports from and exports to Virgin Islands.**] That there shall be levied, collected, and paid in the United States, upon articles coming into the United States from the Virgin Islands, a tax equal to the internal-revenue tax imposed in the United States upon like articles of domestic manufacture; such articles shipped from such islands to the United States shall be exempt from the payment of any tax imposed by the internal-revenue laws of such islands: *Provided*, That there shall be levied, collected, and paid in such islands, upon articles imported from the United States, a tax equal to the internal-revenue tax imposed in such islands upon like articles there manufactured; and such articles

going into such islands from the United States shall be exempt from payment of any tax imposed by the internal-revenue laws of the United States. [40 Stat. L. 1142.]

**SEC. 1305. [Certain laws made part of Act — records and returns — authority of commissioner to require — inquiry as to correctness of return.]** That all administrative, special, or stamp provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this Act, and every person liable to any tax imposed by this Act, or for the collection thereof, shall keep such records and render, under oath, such statements and returns, and shall comply with such regulations as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

Whenever in the judgment of the Commissioner necessary he may require any person, by notice served upon him, to make a return or such statements as he deems sufficient to show whether or not such person is liable to tax.

The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any revenue agent or inspector designated by him for that purpose, to examine any books, papers, records or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons. [40 Stat. L. 1142.]

**SEC. 1306. [Articles on which tax under prior law has been paid — additional tax — return — payment.]** That where floor taxes are imposed by this Act in respect to articles or commodities, in respect to which the tax imposed by existing law has been paid, the person required by this Act to pay the tax shall, within thirty days after its passage, make return under oath in such form and under such regulations as the Commissioner, with the approval of the Secretary, shall prescribe. Payment of the tax shown to be due may be extended to a date not exceeding seven months from the passage of this Act, upon the filing of a bond for payment in such form and amount and with such sureties as the Commissioner, with the approval of the Secretary, may prescribe. [40 Stat. L. 1142.]

**SEC. 1307. [Collection of taxes when method not specifically provided for — payment by stamp — administrative and penalty provisions applicable.]** That in all cases where the method of collecting the tax imposed by this Act is not specifically provided in this Act, the tax shall be collected in such manner as the Commissioner, with the approval of the Secretary, may prescribe. All administrative and penalty provisions of Title XI of this Act, in so far as applicable, shall apply to the collection of any tax which the Commissioner determines or prescribes shall be paid by stamp. [40 Stat. L. 1143.]

**SEC. 1308. [Offenses — failure to pay or collect or account for and pay over any tax — failure to make return or supply information.]** (a) That any person required under Titles V, VI, VII, VIII, IX, X, or XII, to pay, or to collect, account for and pay over any tax, or required by law or regulations made under



authority thereof to make a return or supply any information for the purposes of the computation, assessment or collection of any such tax, who fails to pay, collect, or truly account for and pay over any such tax, make any such return or supply any such information at the time or times required by law or regulation shall in addition to other penalties provided by law be subject to a penalty of not more than \$1,000.

(b) Any person who willfully refuses to pay, collect, or truly account for and pay over any such tax, make such return or supply such information at the time or times required by law or regulation, or who willfully attempts in any manner to evade such tax shall be guilty of a misdemeanor and in addition to other penalties provided by law shall be fined not more than \$10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

(c) Any person who willfully refuses to pay, collect, or truly account for and pay over any such tax shall in addition to other penalties provided by law be liable to a penalty of the amount of the tax evaded, or not paid, collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected: *Provided, however,* That no penalty shall be assessed under this subdivision for any offense for which a penalty may be assessed under authority of section 3176 of the Revised Statutes, as amended, or of section 605 or 620 of this Act, or for any offense for which a penalty has been recovered under section 3256 of the Revised Statutes.

(d) The term " person " as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs. [40 Stat. L. 1143.]

For R. S. sec. 3176, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 280.

For R. S. sec. 3256, mentioned in the text, see 3 Fed. Stat. Ann. (1st ed.) 634; 4 Fed. Stat. Ann. (2d ed.) 22.

**SEC. 1309. [Rules and regulations — authority of Commissioner to make — returns — necessity of oath.]** That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act.

The Commissioner with such approval may by regulation provide that any return required by Titles V, VI, VII, VIII, IX, or X to be under oath may, if the amount of the tax covered thereby is not in excess of \$10, be signed or acknowledged before two witnesses instead of under oath. [40 Stat. L. 1143.]

**SEC. 1310. (a) [Overpayment or overcollection of tax — credit — refund.]** That in the case of any overpayment or overcollection of any tax imposed by section 628 or 630 or by Title V, Title VIII, or Title IX, the person making such overpayment or overcollection may take credit therefor against taxes due upon any monthly return, and shall make refund of any excessive amount collected by him upon proper application by the person entitled thereto. [40 Stat. L. 1143.]

[SEC. 1310 continued.] (b) **[Purchaser's tax to vendor — sale on credit — payment of tax.]** Wherever in this Act a tax is required to be paid by the purchaser to the vendor at the time of a sale, and such sale is made on credit, then, under regulations prescribed by the Commissioner, with the approval of the Secretary, the tax may, at the option of the vendor, be returned and paid by him to the United States as if paid to him by the purchaser at the time of the

sale, and in such case the vendor shall have a right of action in any court of competent jurisdiction against the purchaser for the amount of the tax so returned and paid to the United States. [40 Stat. L. 1143.]

[SEC. 1310 *continued.*] (c) [Articles sold or leased for export—exemption from tax.] Under such rules and regulations as the Commissioner with the approval of the Secretary may prescribe, the taxes imposed under the provisions of Titles VI, VII or IX shall not apply in respect to articles sold or leased for export and in due course so exported. Under such rules and regulations the amount of any internal-revenue tax erroneously or illegally collected in respect to exported articles may be refunded to the exporter of the article, instead of to the manufacturer, if the manufacturer waives any claim for the amount so to be refunded. [40 Stat. L. 1144.]

SEC. 1311. [Stamps on hand under prior act—use under this act.] That where the rate of tax imposed by this Act, payable by stamps, is an increase over previously existing rates, stamps on hand in the collectors' offices and in the Bureau of Internal Revenue may continue to be used until the supply on hand is exhausted, but shall be sold and accounted for at the rates provided by this Act, and assessment shall be made against manufacturers and other taxpayers having such stamps on hand on the day this Act takes effect for the difference between the amount paid for such stamps and the tax due at the rates provided by this Act. [40 Stat. L. 1144.]

SEC. 1312. [Taxes payable by vendee or lessee—executory contracts.] (1) That (a) if any person has prior to May 9, 1917, made a bona fide contract with a dealer for the sale or lease, after the tax takes effect, of any article in respect to which a tax is imposed under Title VI, VII, or IX, or under subdivision 13 of Schedule A of Title XI, or under this subdivision, and (b) if such contract does not permit the adding of the whole of such tax to the amount to be paid under such contract, then the vendee or lessee shall, in lieu of the vendor or lessor, pay so much of such tax as is not so permitted to be added to the contract price. If a contract of the character above described was made with any person other than a dealer, the tax collected under this Act shall be the tax in force on May 9, 1917.

(2) If (a) any person has prior to September 3, 1918, made a bona fide contract with a dealer for the sale or lease, after the tax takes effect, of any article in respect to which a tax is imposed under Title VI, VII, or IX, or under subdivision 13 of Schedule A of Title XI, or under this subdivision, and in respect to which no corresponding tax was imposed by the Revenue Act of 1917, and (b) such contract does not permit the adding, to the amount to be paid under such contract, of the whole of the tax imposed by this Act, then the vendee or lessee shall, in lieu of the vendor or lessor, pay so much of the tax imposed by this Act as is not so permitted to be added to the contract price. If a contract of the character above described was made with any person other than a dealer, no tax shall be collected under this Act.

(3) If (a) any person has prior to September 3, 1918, made a bona fide contract with a dealer for the sale or lease, after the tax takes effect, of any article in respect to which a tax is imposed under Title VI, VII, or IX, or under subdivision 13 of Schedule A of Title XI, or under this subdivision, and in respect to which a corresponding tax was imposed by the Revenue Act of 1917, and (b)

such contract does not permit the adding, to the amount to be paid under such contract, of the whole of the difference between such tax and the corresponding tax imposed by the Revenue Act of 1917, then the vendee or lessee shall, in lieu of the vendor or lessor, pay so much of such difference as is not so permitted to be added to the contract price. If a contract of the character above described was made with any person other than a dealer, the tax collected under this Act shall be the tax in force on September 3, 1918.

(4) The taxes payable by the vendee or lessee under this section shall be paid to the vendor or lessor at the time the sale or lease is consummated, and collected, returned, and paid to the United States by such vendor or lessor in the same manner as provided in section 502.

(5) The term "dealer" as used in this section includes a vendee who purchases any article with intent to use it in the manufacture or production of another article intended for sale.

(6) This section shall not apply to any tax imposed by section 906. [40 Stat. L. 1144.]

For the Revenue Act of 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 720.

**SEC. 1313. [Payment of tax — disregarding fractional part of cent.]** That in the payment of any tax under this Act not payable by stamp a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to 1 cent. [40 Stat. L. 1145.]

**SEC. 1314. [Payment of tax — certificates of indebtedness — uncertified checks.]** That collectors may receive, at par with an adjustment for accrued interest, certificates of indebtedness issued by the United States and uncertified checks in payment of income, war-profits and excess-profits taxes and any other taxes payable other than by stamp, during such time and under such regulations as the Commissioner, with the approval of the Secretary, shall prescribe; but if a check so received is not paid by the bank on which it is drawn the person by whom such check has been tendered shall remain liable for the payment of the tax and for all legal penalties and additions the same as if such check had not been tendered. [40 Stat. L. 1145.]

**SEC. 1315. [Restamping tax-paid goods — original stamps destroyed — R. S. sec. 3315 amended.]** That section 3315 of the Revised Statutes, as amended, is hereby amended to read as follows:

"**Sec. 3315.** The Commissioner of Internal Revenue may, under regulations prescribed by him with the approval of the Secretary of the Treasury, issue stamps for restamping packages of distilled spirits, tobacco, cigars, snuff, cigarettes, fermented liquors, and wines which have been duly stamped but from which the stamps have been lost or destroyed by unavoidable accident." [40 Stat. L. 1145.]

For R. S. sec. 3315, mentioned in the text, see 4 Fed. Stat. Ann. (2d ed.) 70; 3 Fed. Stat. Ann. (1st ed.) 792.

**SEC. 1316. (a) [Refundment of taxes, penalties, etc. — R. S. sec. 3220 amended.]** That section 3220 of the Revised Statutes is hereby amended to read as follows:

"**Sec. 3220.** The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and

pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section." [40 Stat. L. 1145.]

For R. S. sec. 3220, here amended, see 3 Fed. Stat. Ann. (2d ed.) 1028; 3 Fed. Stat. Ann. (1st ed.) 597.

[SEC. 1316 *continued.*] (b) [Suits to recover taxes collected under second assessment — burden of proof as to fraud — R. S. sec. 3225 amended.] Section 3225 of the Revised Statutes of the United States is hereby amended to read as follows:

"Sec. 3225. When a second assessment is made in case of any list, statement, or return, which in the opinion of the collector or deputy collector was false or fraudulent, or contained any understatement or undervaluation, such assessment shall not be remitted, nor shall taxes collected under such assessment be refunded, or paid back, or recovered by any suit, unless it is proved that such list, statement, or return was not willfully false or fraudulent and did not contain any willful understatement or undervaluation." [40 Stat. L. 1145.]

For R. S. sec. 3225, before the amendment in the text, see 1918 Supp. Fed. Stat. Ann. 279.

[SEC. 1316 *continued.*] (c) [Permanent indefinite appropriations — refunding taxes illegally collected — R. S. sec. 3689 repealed in part.] That the paragraph of section 3689 of the Revised Statutes, as amended, reading as follows: "Refunding taxes illegally collected (internal revenue): To refund and pay back duties erroneously or illegally assessed or collected under the internal-revenue laws," is repealed from and after June 30, 1920; and the Secretary of the Treasury shall submit for the fiscal year 1921, and annually thereafter, an estimate of appropriations to refund and pay back duties or taxes erroneously or illegally assessed or collected under the internal-revenue laws, and to pay judgments, including interest and costs, rendered for taxes or penalties erroneously or illegally assessed or collected under the internal-revenue laws. [40 Stat. L. 1145.]

For R. S. sec. 3689, partly repealed by this paragraph, see 3 Fed. Stat. Ann. (2d ed.) 141; 2 Fed. Stat. Ann. (1st ed.) 904.

SEC. 1317. [R. S. secs. 3164, 3165, 3167, 3172, 3173 and 3176 amended.] That sections 3164, 3165, 3167, 3172, 3173, and 3176 of the Revised Statutes as amended are hereby amended to read as follows:

[Duty of collectors to report violations of law to district attorney.]

"Sec. 3164. It shall be the duty of every collector of internal revenue having knowledge of any willful violation of any law of the United States relating to the revenue, within thirty days after coming into possession of such knowledge, to file with the district attorney of the district in which any fine, penalty, or for-

feiture may be incurred, a statement of all the facts and circumstances of the case within his knowledge, together with the names of the witnesses, setting forth the provisions of law believed to be so violated on which reliance may be had for condemnation or conviction. [40 Stat. L. 1146.]

For R. S. sec. 3164, as it read before this amendment, see 3 Fed. Stat. Ann. (1st ed.) 573; 4 Fed. Stat. Ann. (2d ed.) 989.

**[Revenue officers who may administer oaths and take evidence.]**

**"Sec. 3165.** Every collector, deputy collector, internal-revenue agent, and internal-revenue officer assigned to duty under an internal-revenue agent, is authorized to administer oaths and to take evidence touching any part of the administration of the internal-revenue laws with which he is charged, or where such oaths and evidence are authorized by law or regulation authorized by law to be taken. [40 Stat. L. 1146.]

For R. S. sec. 3165, as it read before this amendment, see 3 Fed. Stat. Ann. (1st ed.) 573; 4 Fed. Stat. Ann. (2d ed.) 989.

**[Disclosure by revenue officers of operations, etc., prohibited — penalty.]**

**"Sec. 3167.** It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding \$1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment. [40 Stat. L. 1146.]

For R. S. sec. 3167, as it read before this amendment, see 1918 Supp. Fed. Stat. Ann. 278.

**[Canvass of districts for persons liable to, and objects subject to, taxation.]**

**"Sec. 3172.** Every collector shall, from time to time, cause his deputies to proceed through every part of his district and inquire after and concerning all persons therein who are liable to pay any internal-revenue tax, and all persons owning or having the care and management of any objects liable to pay any tax, and to make a list of such persons and enumerate said objects. [40 Stat. L. 1146.]

For R. S. sec. 3172, as it read before this amendment, see 1918 Supp. Fed. Stat. Ann. 280.

**[Annual returns of persons liable to tax.] "Sec. 3173.** It shall be the duty of any person, partnership, firm, association, or corporation, made liable to any duty, special tax, or other tax imposed by law, when not otherwise provided for, (1) in case of a special tax, on or before the thirty-first day of July in each year, and (2) in other cases before the day on which the taxes accrue, to make a list or return, verified by oath, to the collector or a deputy collector of the dis-

trict where located, of the articles or objects, including the quantity of goods, wares, and merchandise, made or sold and charged with a tax, the several rates and aggregate amount, according to the forms and regulations to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, for which such person, partnership, firm, association, or corporation is liable: *Provided*, That if any person liable to pay any duty or tax, or owning, possessing, or having the care or management of property, goods, wares, and merchandise, article or objects liable to pay any duty, tax, or license, shall fail to make and exhibit a list or return required by law, but shall consent to disclose the particulars of any and all the property, goods, wares, and merchandise, articles, and objects liable to pay any duty or tax, or any business or occupation liable to pay any tax as aforesaid, then, and in that case, it shall be the duty of the collector or deputy collector to make such list or return, which, being distinctly read, consented to, and signed and verified by oath by the person so owning, possessing, or having the care and management as aforesaid, may be received as the list of such person: *Provided further*, That in case no annual list or return has been rendered by such person to the collector or deputy collector as required by law, and the person shall be absent from his or her residence or place of business at the time the collector or a deputy collector shall call for the annual list or return, it shall be the duty of such collector or deputy collector to leave at such place of residence or business, with some one of suitable age and discretion, if such be present, otherwise to deposit in the nearest post office, a note or memorandum addressed to such person, requiring him or her to render to such collector or deputy collector the list or return required by law within ten days from the date of such note or memorandum, verified by oath. And if any person, on being notified or required as aforesaid, shall refuse or neglect to render such list or return within the time required as aforesaid, or whenever any person who is required to deliver a monthly or other return of objects subject to tax fails to do so at the time required, or delivers any return which, in the opinion of the collector, is erroneous, false, or fraudulent, or contains any undervaluation or understatement, or refuses to allow any regularly authorized Government officer to examine the books of such person, firm, or corporation, it shall be lawful for the collector to summon such person, or any other person having possession, custody, or care of books of account containing entries relating to the business of such person or any other person he may deem proper, to appear before him and produce such books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof. The collector may summon any person residing or found within the State or Territory in which his district lies; and when the person intended to be summoned does not reside and can not be found within such State or Territory, he may enter any collection district where such person may be found and there make the examination herein authorized. And to this end he may there exercise all the authority which he might lawfully exercise in the district for which he was commissioned: *Provided*, That 'person,' as used in this section, shall be construed to include any corporation, joint-stock company or association, or insurance company when such construction is necessary to carry out its provisions. [40 Stat. L. 1146.]

For R. S. sec. 3173, as it read before this amendment, see 1918 Supp. Fed. Stat. Ann. 290.

[On failure, return to be made by officer—penalty for failure to make return.] " Sec. 3176. If any person, corporation, company, or association fails

to make and file a return or list at the time prescribed by law or by regulation made under authority of law, or makes, willfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise. In any such case the Commissioner may, from his own knowledge and from such information as he can obtain through testimony or otherwise, make a return or amend any return made by a collector or deputy collector. Any return or list so made and subscribed by the Commissioner, or by a collector or deputy collector and approved by the Commissioner, shall be *prima facie* good and sufficient for all legal purposes.

"If the failure to file a return or list is due to sickness or absence, the collector may allow such further time, not exceeding thirty days, for making and filing the return or list as he deems proper.

"The Commissioner of Internal Revenue shall determine and assess all taxes, other than stamp taxes, as to which returns or lists are so made under the provisions of this section. In case of any failure to make and file a return or list within the time prescribed by law, or prescribed by the Commissioner of Internal Revenue or the collector in pursuance of law, the Commissioner of Internal Revenue shall add to the tax 25 per centum of its amount, except that when a return is filed after such time and it is shown that the failure to file it was due to a reasonable cause and not to willful neglect, no such addition shall be made to the tax. In case a false or fraudulent return or list is willfully made, the Commissioner of Internal Revenue shall add to the tax 50 per centum of its amount.

"The amount so added to any tax shall be collected at the same time and in the same manner and as part of the tax unless the tax has been paid before the discovery of the neglect, falsity, or fraud, in which case the amount so added shall be collected in the same manner as the tax." [40 Stat. L. 1147.]

For R. S. sec. 3176, as it read before this amendment, see 1918 Supp. Fed. Stat. Ann. 281.

**SEC. 1318. [Attendance of witnesses — production of testimony — enforcement of provisions of Act by appropriate remedies.]** That if any person is summoned under this Act to appear, to testify, or to produce books, papers or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

The district courts of the United States at the instance of the United States are hereby invested with such jurisdiction to make and issue, both in actions at law and suits in equity, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and process, and to render such judgments and decrees, granting in proper cases both legal and equitable relief together, as may be necessary or appropriate for the enforcement of the provisions of this Act. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such provisions. [40 Stat. L. 1148.]

**SEC. 1319. [False statements that price of article sold or leased included a tax.]** That whoever in connection with the sale or lease, or offer for sale or lease, of any article, or for the purpose of making such sale or lease, makes any statement, written or oral, (1) intended or calculated to lead any person to believe that any part of the price at which such article is sold or leased, or offered for

sale or lease, consists of a tax imposed under the authority of the United States, or (2) ascribing a particular part of such price to a tax imposed under the authority of the United States, knowing that such statement is false or that the tax is not so great as the portion of such price ascribed to such tax, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than \$1,000, or by imprisonment not exceeding one year, or both. [40 Stat. L. 1148.]

SEC. 1320. [Bonds in lieu of surety.] That wherever by the laws of the United States or regulations made pursuant thereto, any person is required to furnish any recognizance, stipulation, bond, guaranty, or undertaking, hereinafter called "penal bond", with surety or sureties, such person may, in lieu of such surety or sureties, deposit as security with the official having authority to approve such penal bond, United States Liberty bonds or other bonds of the United States in a sum equal at their par value to the amount of such penal bond required to be furnished, together with an agreement authorizing such official to collect or sell such bonds so deposited in case of any default in the performance of any of the conditions or stipulations of such penal bond. The acceptance of such United States bonds in lieu of surety or sureties required by law shall have the same force and effect as individual or corporate sureties, or certified checks, bank drafts, post-office money orders, or cash, for the penalty or amount of such penal bond. The bonds deposited hereunder, and such other United States bonds as may be substituted therefor from time to time as such security, may be deposited with the Treasurer, or an Assistant Treasurer of the United States, a Government depository, Federal Reserve bank, or member bank, which shall issue receipt therefor, describing such bonds so deposited. As soon as security for the performance of such penal bond is no longer necessary, such bonds so deposited, shall be returned to the depositor: *Provided*, That in case a person or persons supplying a contractor with labor or material as provided by the Act of Congress, approved February 24, 1905 (33 Stat., 811), entitled "An Act to amend an Act approved August thirteenth, eighteen hundred and ninety-four, entitled 'An Act for the protection of persons furnishing materials and labor for the construction of public works,'" shall file with the obligee, at any time after a default in the performance of any contract subject to said Acts, the application and affidavit therein provided, the obligee shall not deliver to the obligor the deposited bonds nor any surplus proceeds thereof until the expiration of the time limited by said Acts for the institution of suit by such person or persons, and, in case suit shall be instituted within such time, shall hold said bonds or proceeds subject to the order of the court having jurisdiction thereof: *Provided further*, That nothing herein contained shall affect or impair the priority of the claim of the United States against the bonds deposited or any right or remedy granted by said Acts or by this section to the United States for default upon any obligation of said penal bond: *Provided further*, That all laws inconsistent with this section are hereby so modified as to conform to the provisions hereof: *And provided further*, That nothing contained herein shall affect the authority of courts over the security, where such bonds are taken as security in judicial proceedings, or the authority of any administrative officer of the United States to receive United States bonds for security in cases authorized by existing laws. The Secretary may prescribe rules and regulations necessary and proper for carrying this section into effect. [40 Stat. L. 1148.]

For Act of Aug. 13, 1894, as amended, mentioned in the text, see 10 Fed. Stat. Ann. (1st ed.) 343; 8 Fed. Stat. Ann. (2d ed.) 374.



## TITLE XIV.—GENERAL PROVISIONS.

SEC. 1400. [Revenue Acts of 1916 and 1917 how affected by this Act.]

(a) That the following parts of Acts are hereby repealed, subject to the limitations provided in subdivision (b):

(1) The following titles of the Revenue Act of 1916:

Title I (called "Income Tax");

Title II (called "Estate Tax");

Title III (called "Munitions Manufacturers' Tax"), as amended;

Title IV (called "Miscellaneous Taxes").

(2) The following parts of the Act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the extensions of fortifications, and for other purposes," approved March 3, 1917:

Title III (called "Estate Tax");

Section 402 (called "Returns of Dividends").

(3) The following titles of the Revenue Act of 1917:

Title I (called "War Income Tax");

Title II (called "War Excess-Profits Tax");

Title III (called "War Tax on Beverages");

Title IV (called "War Tax on Cigars, Tobacco, and Manufactures Thereof");

Title V (called "War Tax on Facilities Furnished by Public Utilities, and Insurance");

Title VI (called "War Excise Taxes");

Title VII (called "War Tax on Admissions and Dues");

Title VIII (called "War Stamp Taxes");

Title IX (called "War Estate Tax");

Title X (called "Administrative Provisions");

Title XII (called "Income-Tax Amendments").

(b) Such parts of Acts shall remain in force for the assessment and collection of all taxes which have accrued thereunder, and for the imposition and collection of all penalties or forfeitures which have accrued and may accrue in relation to any such taxes, and except that the unexpended balance of any appropriation heretofore made and now available for the administration of any such part of an Act shall be available for the administration of this Act or the corresponding provision thereof: *Provided*, That, except as otherwise provided in this Act, no taxes shall be collected under Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917, or Title I or II of the Revenue Act of 1917, in respect to any period after December 31, 1917: *Provided further*. That the assessment and collection of all estate taxes, and the imposition and collection of all penalties or forfeitures, which have accrued under Title II of the Revenue Act of 1916 as amended by the Act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the extensions of fortifications, and for other purposes," approved March 3, 1917, or Title IX of the Revenue Act of 1917, shall be according to the provisions of Title IV of this Act. In the case of any tax imposed by any part of an Act herein repealed, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect under the provisions of this Act.

Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917 shall remain in force for the assessment and collection of the income tax in Porto Rico and the Philippine Islands, except as may be otherwise provided by their respective legislatures. [40 Stat. L. 1149.]

For the Revenue Acts of 1916 and 1917, see 1918 Supp. Fed. Stat. Ann. 270 et seq.

SEC. 1401. [See POSTAL SERVICE.]

SEC. 1402. [Invalidity of part of Act — effect on remainder.] That if any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment has been rendered. [40 Stat. L. 1150.]

SEC. 1403. [Revenue Act of 1916 how cited.] That the Revenue Act of 1916 is hereby amended by adding at the end thereof a section to read as follows:

“SEC. 903. That this Act may be cited as the ‘Revenue Act of 1916.’” [40 Stat. L. 1150.]

For the Revenue Act of 1916, here amended, see 1918 Supp. Fed. Stat. Ann. 270.

SEC. 1404. [Revenue Act of 1917 how cited.] That the Revenue Act of 1917 is hereby amended by adding at the end thereof a section to read as follows:

“SEC. 1303. That this Act may be cited as the ‘Revenue Act of 1917.’” [40 Stat. L. 1150.]

For the Revenue Act of 1917, here amended, see 1918 Supp. Fed. Stat. Ann. 270.

SEC. 1405. [This Act how cited.] That this Act may be cited as the “Revenue Act of 1918.” [40 Stat. L. 1151.]

SEC. 1406. [See WAR DEPARTMENT AND MILITARY ESTABLISHMENT.]

SEC. 1407. [See INTOXICATING LIQUORS.]

SEC. 1408. [Contracts made by any person with government — filing copies with Commissioner — access to all data relating to such contracts.] That every person who on or after April 6, 1917, has entered into any contract, undertaking, or agreement, with the United States, or with any department, bureau, officer, commission, board, or agency under the United States or acting in its behalf, or with any other person having contract relations with the United States, for the performance of any work or the supplying of any materials or property for the use of or for the account of the United States, shall, within thirty days after a request of the Commissioner therefor, file with the Commissioner a true and correct copy of every such contract, undertaking, or agreement.

Whoever fails to comply with such request of the Commissioner shall be guilty of a misdemeanor and shall be punished by a fine of not more than \$1,000, or by imprisonment for not more than one year, or both.

The Commissioner shall (when not violative of the technical military or naval secrets of the Government) have access to all information and data relating to any such contract, undertaking, or agreement, in the possession, control or custody of any department, bureau, board, agency, officer or commission of the

United States, and may call upon any such department, bureau, board, agency, officer or commission for a full statement and description of any allowance for amortization, obsolescence, depreciation or loss, or of any valuation, appraisal, adjustment or final settlement, made in pursuance of any such contract, undertaking, or agreement. [40 Stat. L. 1151.]

SEC. 1409. [Time of taking effect of Act.] That unless otherwise herein specially provided, this Act shall take effect on the day following its passage. [40 Stat. L. 1152.]

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SEC. 6. \* \* \* [Cotton Futures Act — contracts when exempt from tax — information furnished by cotton dealers — sections 5 and 8 amended.] That the United States cotton-futures Act, approved August eleventh, nineteen hundred and sixteen (Thirty-ninth Statutes at Large, page four hundred and seventy-six), is hereby amended as follows:

In the fifth subdivision of section five of said Act, strike out the words "good ordinary" whenever the same occur and substitute therefor the words "low middling"; strike out the words "low middling" and substitute therefor the word "middling"; and strike out the words "if stained, cotton that is below the grade of middling" and substitute therefor the words "if yellow stained, cotton that is below the grade of strict middling, or, if blue stained, cotton that is below the grade of good middling," so that the said subdivision shall read as follows:

"Fifth. Provide that cotton that, because of the presence of extraneous matter of any character, or irregularities or defects, is reduced in value below that of low middling, or cotton that is below the grade of low middling, or, if tinged, cotton that is below the grade of strict middling, or, if yellow stained, cotton that is below the grade of good middling, the grades mentioned being of the official cotton standards of the United States, or cotton that is less than seventh-eighths of an inch in length of staple, or cotton of perished staple or of immature staple, or cotton that is 'gin cut' or reginned, or cotton that is 'repacked' or 'false packed' or 'mixed packed' or 'water packed,' shall not be delivered on, under, or in settlement of such contract."

Strike out the sentence comprising the seventh subdivision of section five of said Act and substitute therefor the following:

"Seventh. Provide that all tenders of cotton and settlements therefor under such contract shall be in accordance with the classification thereof made under the regulations of the Secretary of Agriculture by such officer or officers of the Government as shall be designated for the purpose, and the costs of such classification shall be fixed, assessed, collected, and paid as provided in such regulations. All moneys collected as such costs may be used as a revolving fund for carrying out the purposes of this subdivision, and section nineteen of this Act is amended accordingly."

Strike out the last sentence of section five of said Act and substitute therefor the following:

"The Secretary of Agriculture is authorized to prescribe regulations for carrying out the purposes of the seventh subdivision of this section, and the certificates of the officers of the Government as to the classification of any cotton for the purposes of said subdivision shall be accepted in the courts of the United States in all suits between the parties to such contract, or their privies, as prima facie evidence of the true classification of the cotton involved."

The foregoing amendments to section five of said Act shall become effective on and after the approval of this Act, but nothing herein shall be construed to diminish any authority conferred on any official of the United States necessary to enable him to carry out any duties remaining to be performed by him under said Act as unamended, or to impair the effect of such Act as to any contract subject to its provisions entered into prior to the effective date of said amendments, or to impair the effect of the findings of the Secretary of Agriculture upon any dispute referred to him under said section five as unamended.

Effective on and after the date of the passage of this Act, insert at the end of section eight of said Act the following:

*“ Provided further, That it shall be the duty of any person engaged in the business of dealing in cotton, when requested by the Secretary of Agriculture or any agent acting under his instructions, to answer correctly to the best of his knowledge, under oath or otherwise, all questions touching his knowledge of the number of bales, the classification, the price or bona fide price offered, and other terms of purchase or sale, of any cotton involved in any transaction participated in by him, or to produce all books, letters, papers, or documents in his possession or under his control relating to such matter. Any such person who shall, within a reasonable time prescribed by the Secretary of Agriculture or such agent, willfully fail or refuse to answer such questions or to produce such books, letters, papers, or documents, or who shall willfully give any answer that is false or misleading, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding \$500.”* [40 Stat. L. 1351.]

This section is from the Act of March 4, 1919, ch. 125, entitled “An Act To enable the President to carry out the price guaranties made to producers of wheat of the crops of nineteen hundred and eighteen and nineteen hundred and nineteen and to protect the United States against undue enhancement of its liabilities thereunder.” The rest of the section is set out, *supra*, p. 27.

The Cotton Futures Act here amended is set out in 1918 Supp. Fed. Stat. Ann. 359 et seq.

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See ANIMALS

# INTOXICATING LIQUORS

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## CROSS-REFERENCE

See also *INDIANS*.

[SEC. 1.] \* \* \* [Sales of intoxicating liquors, etc.—prohibition pending demobilization—importation—zones established by President about plants for war materials.] That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export. The Commissioner of Internal Revenue is hereby authorized and directed to prescribe rules and regulations, subject to the approval of the Secretary of the Treasury, in regard to the manufacture and sale of distilled spirits and removal of distilled spirits held in bond after June thirtieth, nineteen hundred and nineteen, until this Act shall cease to operate, for other than beverage purposes; also in regard to the manufacture, sale, and distribution of wine for sacramental, medicinal, or other than beverage uses. After the approval of this Act no distilled, malt, vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the present war and period of demobilization: *Provided*, That this provision against importation shall not apply to shipments en route to the United States at the time of the passage of this Act.

Any person who violates any of the foregoing provisions shall be punished by imprisonment not exceeding one year, or by fine not exceeding \$1,000, or by both such imprisonment and fine: *Provided*, That the President of the United States be, and hereby is, authorized and empowered, at any time after the passage of

this Act, to establish zones of such size as he may deem advisable about coal mines, munition factories, shipbuilding plants, and such other plants for war material as may seem to him to require such action whenever in his opinion the creation of such zones is necessary to, or advisable in, the proper prosecution of the war, and that he is hereby authorized and empowered to prohibit the sale, manufacture, or distribution of intoxicating liquors in such zones, and that any violation of the President's regulations in this regard shall be punished by imprisonment for not more than one year, or by fine of not more than \$1,000, or by both such fine and imprisonment: *Provided further*, That nothing in this Act shall be construed to interfere with the power conferred upon the President by section fifteen of the food-control Act, approved August tenth, nineteen hundred and seventeen (Public Numbered Forty, Sixty-fifth Congress). [40 Stat. L. 1046.]

This, and section 2 which follows, are from an Act entitled "An Act To enable the Secretary of Agriculture to carry out, during the fiscal year ending June thirtieth, nineteen hundred and nineteen, the purposes of the Act entitled 'An Act To provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products,' and for other purposes," approved Nov. 21, 1918, ch. 212.

For Act of Aug. 10, 1917, § 15, referred to in the text, see 1918 Supp. Fed. Stat. Ann. 188.

The language of the next to the last proviso is that of a joint resolution of Congress "authorizing the President to establish zones in which intoxicating liquors may be sold, manufactured, or distributed." It became a law Sept. 12, 1918, and will be found in 40 Stat. L. 959, ch. 170.

**Constitutionality.**—Assuming that the implied power of Congress to enact such a measure as the War-time Prohibition Act of November 21, 1918, must not depend upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace, but upon some actual emergency or necessity arising out of the war or incident to it, the power is not limited to victories in the field and the dispersion of the hostile forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. *Hamilton v. Kentucky Distilleries, etc., Co.*, (1919) 251 U. S. 146, 40 S. Ct. 106, 63 U. S. (L. ed.) —. See to the same effect *U. S. v. Ranier Brewing Co.*, (N. D. Cal. 1919), 259 Fed. 350; *U. S. v. Minery*, (D. C. Conn. 1919) 250 Fed. 707; *U. S. v. Baumgartner*, (S. D. Cal. 1919) 250 Fed. 722.

Private property was not taken for public purposes without compensation, contrary to U. S. Const., 5th Amend., by the enactment by Congress, in the exercise of the war power, of the provisions of the War-time Prohibition Act of November 21, 1918, fixing a period of seven months and nine days from its passage, during which distilled spirits might be disposed of free from any restriction imposed by the federal government, and thereafter permitting, until the end of the war and the termination of demobilization, an unrestricted sale for export, and, within the United States, sales for other than beverage purposes. *Hamilton v. Kentucky, etc., Distilleries, etc., Co.*, (1919) 251 U. S. 146, 40 S. Ct. 106, 63 U. S. (L. ed.) —.

**Eighteenth amendment as removing restriction on sale of liquor.**—The restriction

on the sale of distilled spirits for beverage purposes, imposed by this act, was not impliedly removed by the adoption of the 18th Amendment to the Federal Constitution, which, in express terms, postponed the effective date of the prohibition of the liquor traffic thereby imposed, until one year after ratification. *Hamilton v. Kentucky Distilleries, etc. Co.*, (1919) 146 U. S. 251, 40 S. Ct. 106, 63 U. S. (L. ed.) —.

**War emergency when over.**—The War-time Prohibition Act of November 21, 1918, cannot be said to have ceased to be valid prior to the limitation therein fixed, viz., "the conclusion of the present war and thereafter until the termination of demobilization," on the theory that the war emergency has passed, where the Treaty of Peace has not yet been concluded, the railways are still under national control by virtue of the war powers, other war activities have not been brought to a close, and it cannot even be said that the man power of the nation has been restored to a peace footing. *Hamilton v. Kentucky Distilleries, etc., Co.*, (1919) 251 U. S. 146, 40 S. Ct. 106, 63 U. S. (L. ed.) —. See to the same effect *U. S. v. Minery*, (D. C. Conn. 1919) 250 Fed. 707.

The provision of the War-time Prohibition Act of November 21, 1918, that it shall not cease to be operative until the "conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President," is not satisfied by passing references in various messages and proclamations of the President to the war as ended, and to demobilization as accomplished, nor by newspaper interviews with high officers of the Army, or with officials of the War Department. *Hamilton v. Kentucky Distilleries,*



etc., Co., (1919) 251 U. S. 146, 40 S. Ct. 106, 63 U. S. (L. ed.) —.

Information as requiring allegation that beer was intoxicating.—The use of grains, cereals, fruit, or other food products in the manufacture and production of beer for beverage purposes, which, while containing as much as  $\frac{1}{2}$  of 1 per cent of alcohol by weight and volume, is not alleged to be intoxicating, was not prohibited by the provisions of the War-time Prohibition Act of November 21, 1918, that to conserve the nation's man power and to increase efficiency in the production of war essentials no grains, cereals, fruit, or other food products shall, after May 1, 1919, until the conclusion of the war and until demobilization is proclaimed by the President, be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquors for beverage purposes. A different conclusion is not demanded because

of Treasury Department rulings that all beer containing  $\frac{1}{2}$  of 1 per cent of alcohol is taxable, or of the determination of the Internal Revenue Department that a beverage containing that amount of alcohol is to be regarded as intoxicating within the intendment of the act. U. S. v. Standard Brewery, (1919) 251 U. S. 210, 40 S. Ct. 139, 63 U. S. (L. ed.) —, affirming (D. C. Md. 1919) 260 Fed. 486, and overruling U. S. v. Pittsburg Brewing Co., (W. D. Pa. 1919) 260 Fed. 762; U. S. v. Schmander, (D. C. Conn. 1919) 258 Fed. 25). See to the same effect U. S. v. Petts, (D. C. Mass. 1919) 260 Fed. 663; Jacob Hoffman Brewing Co. v. McElligott, (C. C. A. 2d Cir. 1919) 259 Fed. 525, affirming (S. D. N. Y. 1919) 259 Fed. 321; U. S. v. Ranier Brewing Co., (N. D. Cal. 1919) 259 Fed. 359; U. S. Baumgartner, (S. D. Cal. 1919) 259 Fed. 722.

**SEC. 2. [Distilled spirits or alcohol from Porto Rico — admission for limited purpose.]** That under such rules, regulations, and bonds as the Secretary of the Treasury may prescribe, distilled spirits or alcohol produced prior to October third, nineteen hundred and seventeen, from products the growth of the island of Porto Rico may be admitted from said island into the United States for industrial purposes in the arts and sciences. Such alcohol or distilled spirits shall not be used for beverage purposes nor in the production of any article used as a beverage.

Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined not more than \$1,000 or imprisoned not more than two years. He shall, in addition, be liable to double the tax evaded, together with the tax, to be collected by assessment or on any bond given. [40 Stat. L. 1048.]

**SEC. 1407. [Liquor advertisements — prohibition in mail — interstate shipments of liquor — dry territory.]** That the provisions of section 5 of the Act entitled "An Act making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1918, and for other purposes," approved March 3, 1917, relating to intoxicating liquors in interstate commerce, as amended by section 1110 of an Act entitled "An Act to provide revenue to defray war expenses, and for other purposes," approved October 3, 1917, be, and the same are hereby, made applicable to the District of Columbia. [40 Stat. L. 1151.]

This is from the "Internal Revenue Act of 1918," enacted Feb. 24, 1919, and in effect the following day. The Act is set out *supra*, p. 80.

For Act of March 3, 1917, sec. 5, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 394.

For Act of Oct. 3, 1917, sec. 1110, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 396.

**An Act To prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries.**

[Act of Oct. 28, 1919, ch. 28, 41 Stat. L. 305.]

[Name of Act.] That the short title of this Act shall be the "National Prohibition Act."<sup>1</sup> [41 Stat. L. 305.]

## TITLE I.

### TO PROVIDE FOR THE ENFORCEMENT OF WAR PROHIBITION.

[SEC. 1.] [Terms defined—"War Prohibition Act"—"beer, wine, or other intoxicating malt or vinous liquors."] The term "War Prohibition Act" used in this Act shall mean the provisions of any Act or Acts prohibiting the sale and manufacture of intoxicating liquors until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States. The words "beer, wine, or other intoxicating malt or vinous liquors" in the War Prohibition Act shall be hereafter construed to mean any such beverages which contain one-half of 1 per centum or more of alcohol by volume: *Provided*, That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced, if it contains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in section 37 of Title II of this Act, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the commissioner may by regulation prescribe. [41 Stat. L. 305.]

**Constitutionality.**—The provision of the Act extending the prohibition of the Act of November 21, 1918, against the manufacture and sale of intoxicating liquors, to malt liquors, whether in fact intoxicating or not, with an alcoholic content of as much as  $\frac{1}{2}$  of 1 per cent of alcohol by volume, is constitutional. And this is so notwithstanding that

the Act fails to provide for compensation in the case of liquors acquired before its passage, and which before that time could have been lawfully sold. *Ruppert v. Caffey*, (1919) 251 U. S. 264, 40 S. Ct. 141, 63 U. S. (L. ed.) —. See to the same effect *Scatena v. Caffey*, (S. D. N. Y. 1919) 260 Fed. 756.

**SEC. 2. [Investigation and report of violation of act—Commissioner of Internal Revenue—apprehension of offenders—preliminary hearing.]** The Commissioner of Internal Revenue, his assistants, agents, and inspectors, shall investigate and report violations of the War Prohibition Act to the United States attorney for the district in which committed, who shall be charged with the duty of prosecuting, subject to the direction of the Attorney General, the offenders as in the case of other offenses against laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents, and inspectors may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. [41 Stat. L. 306.]

<sup>1</sup> This Act is popularly known as the Volstead Act. Title II was enacted to make effective the Eighteenth Amendment to the Constitution. That Amendment is set out *infra*, p. —.

**SEC. 3. [Property when public and common nuisance — lien on property — leased premises.]** Any room, house, building, boat, vehicle, structure, or place of any kind where intoxicating liquor is sold, manufactured, kept for sale, or bartered in violation of the War Prohibition Act, and all intoxicating liquor and all property kept and used in maintaining such a place, is hereby declared to be a public and common nuisance, and any person who maintains or assists in maintaining such public and common nuisance shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than \$100 nor more than \$1,000, or be imprisoned for not less than thirty days or more than one year, or both. If a person has knowledge that his property is occupied or used in violation of the provisions of the War Prohibition Act and suffers the same to be so used, such property shall be subject to a lien for, and may be sold to pay, all fines and costs assessed against the occupant of such building or property for any violation of the War Prohibition Act occurring after the passage hereof, which said lien shall attach from the time of the filing of notice of the commencement of the suit in the office where the records of the transfer of real estate are kept; and any such lien may be established and enforced by legal action instituted for that purpose in any court having jurisdiction. Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease. [41 Stat. L. 306.]

**SEC. 4. [Abatement of nuisance — injunction — contempt.]** The United States attorney for the district where such nuisance as is defined in this Act exists, or any officer designated by him or the Attorney General of the United States, may prosecute a suit in equity in the name of the United States to abate and enjoin the same. Actions in equity to enjoin and abate such nuisances may be brought in any court having jurisdiction to hear and determine equity causes. The jurisdiction of the courts of the United States under this section shall be concurrent with that of the courts of the several States.

If it be made to appear by affidavit, or other evidence under oath, to the satisfaction of the court, or judge in vacation, that the nuisance complained of exists, a temporary writ of injunction shall forthwith issue restraining the defendant or defendants from conducting or permitting the continuance of such nuisance until the conclusion of the trial. Where a temporary injunction is prayed for, the court may issue an order restraining the defendants and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation constituting the nuisance. No bond shall be required as a condition for making any order or issuing any writ of injunction under this Act. If the court shall find the property involved was being unlawfully used as aforesaid at or about the time alleged in the petition, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or places of any kind, for a period of not exceeding one year, or during the war and the period of demobilization. Whenever an action to enjoin a nuisance shall have been brought pursuant to the provisions of this Act, if the owner, lessee, tenant, or occupant appears and pays all costs of the proceedings and files a bond, with sureties to be approved by the clerk of the court in which the action is brought, in the liquidated sum of not less than \$500 nor more than \$1,000, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein a period of one year thereafter, or during the war and period of demobilization, the court, or in vacation the judge, may, if satis-

fied of his good faith, direct by appropriate order that the property, if already closed or held under the order of abatement, be delivered to said owner, and said order of abatement canceled, so far as the same may relate to said property; or if said bond be given and costs therein paid before judgment on an order of abatement, the action shall be thereby abated as to said room, house, building, boat, vehicle, structure, or place only. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law.

In the case of the violation of any injunction, temporary or permanent, granted pursuant to the provisions of this Title, the court, or in vacation a judge thereof, may summarily try and punish the defendant. The proceedings for punishment for contempt shall be commenced by filing with the clerk of the court from which such injunction issued information under oath setting out the alleged facts constituting the violation, whereupon the court or judge shall forthwith cause a warrant to issue under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. Any person found guilty of contempt under the provisions of this section shall be punished by a fine of not less than \$500 nor more than \$1,000, or by imprisonment of not less than thirty days nor more than twelve months, or by both fine and imprisonment. [41 Stat. L. 306.]

**SEC. 5. [Enforcement by Commissioner of Internal Revenue and assistants — power conferred.]** The Commissioner of Internal Revenue, his assistants, agents, and inspectors, and all other officers of the United States whose duty it is to enforce criminal laws, shall have all the power for the enforcement of the War Prohibition Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the laws of the United States. [41 Stat. L. 307.]

**SEC. 6. [Invalidity of part of act — effect as to remainder.]** If any section or provision of this Act shall be held to be invalid, it is hereby provided that all other provisions of this Act which are not expressly held to be invalid shall continue in full force and effect. [41 Stat. L. 307.]

**SEC. 7. [Effect of act on existing legislation.]** None of the provisions of this Act shall be construed to repeal any of the provisions of the "War Prohibition Act," or to limit or annul any order or regulation prohibiting the manufacture, sale, or disposition of intoxicating liquors within certain prescribed zones or districts, nor shall the provisions of this Act be construed to prohibit the use of the power of the military or naval authorities to enforce the regulations of the President or Secretary of War or Navy issued in pursuance of law, prohibiting the manufacture, use, possession, sale, or other disposition or intoxicating liquors during the period of the war and demobilization thereafter. [41 Stat. L. 307.]

## TITLE II.

### PROHIBITION OF INTOXICATING BEVERAGES.

**SEC. 1. [Terms defined — authority of assistants to commissioner.]** When used in Title II and Title III of this Act (1) The word "liquor" or the phrase

"intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes: *Provided*, That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced, if it contains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in section 37 of this title, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the commissioner may by regulation prescribe.

(2) The word "person" shall mean and include natural persons, associations, copartnerships, and corporations.

(3) The word "commissioner" shall mean Commissioner of Internal Revenue.

(4) The term "application" shall mean a formal written request supported by a verified statement of facts showing that the commissioner may grant the request.

(5) The term "permit" shall mean a formal written authorization by the commissioner setting forth specifically therein the things that are authorized.

(6) The term "bond" shall mean an obligation authorized or required by or under this act or any regulation, executed in such form and for such a penal sum as may be required by a court, the commissioner or prescribed by regulation.

(7) The term "regulation" shall mean any regulation prescribed by the commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the commissioner is authorized to make such regulations.

Any act authorized to be done by the commissioner may be performed by any assistant or agent designated by him for that purpose. Records required to be filed with the commissioner may be filed with an assistant commissioner or other person designated by the commissioner to receive such records. [41 Stat. L. 307.]

**SEC. 2. [Investigation and report of violation of act—Commissioner of Internal Revenue—apprehension of offenders—prosecution—search warrants.]** The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this Act to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents, and inspectors may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. Section 1014 of the Revised Statutes of the United States is hereby made applicable in the enforcement of this Act. Officers mentioned in said section 1014 are authorized to issue search warrants under

the limitations provided in Title XI of the Act approved June 15, 1917 (Fortieth Statutes at Large, page 217, et seq.). [41 Stat. L. 308.]

For R. S. sec. 1014, see 2 Fed. Stat. Ann. (2d ed.) 654; 2 Fed. Stat. Ann. (1st ed.) 321.

For Act of June 15, 1917, title XI, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 123.

**SEC. 3. [Application of Act to Eighteenth Amendment of Constitution — liquor for nonbeverage purposes — wine for sacramental purposes — warehouse receipts.]** No persons shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: *Provided*, That nothing in this Act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts. [41 Stat. L. 308.]

The Eighteenth Amendment to the Constitution is set out *infra*. See Index.

**SEC. 4. [Enumeration of certain articles not affected by act — permit to manufacture — sale of articles — use for beverage purposes.]** The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this Act if they correspond with the following descriptions and limitations, namely:

(a) Denatured alcohol or denatured rum produced and used as provided by laws and regulations now or hereafter in force.

(b) Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopœia, National Formulary or the American Institute of Homeopathy that are unfit for use for beverage purposes.

(c) Patented, patent, and proprietary medicines that are unfit for use for beverage purposes.

(d) Toilet, medicinal, and antiseptic preparations and solutions that are unfit for use for beverage purposes.

(e) Flavoring extracts and sirups that are unfit for use as a beverage, or for intoxicating beverage purposes.

(f) Vinegar and preserved sweet cider.

A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor, give the bonds, keep the records, and make the reports specified in this Act and as directed by the commissioner. No such manufacturer shall sell, use, or dispose of any liquor otherwise than as an ingredient of the articles authorized to be manufactured therefrom. No more alcohol shall be used in the manufacture of any extract, sirup, or the articles named in paragraphs b, c, and d of this section which may be used for beverage purposes than the quantity necessary for extraction or solution of the elements contained therein and for the preservation of the article.

Any person who shall knowingly sell any of the articles mentioned in paragraphs a, b, c, and d of this section for beverage purposes, or any extract or sirup for intoxicating beverage purposes, or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes, or shall sell any beverage containing one-half of 1 per centum or more of alcohol by volume in which any extract, sirup, or other article is used as an ingredient, shall be subject to the penalties provided in section 29 of this Title. If the commissioner shall find, after notice and hearing as provided for in section 5 of this Title, that any person has sold any flavoring extract, sirup, or beverage in violation of this paragraph, he shall notify such person, and any known principal for whom the sale was made, to desist from selling such article; and it shall thereupon be unlawful for a period of one year thereafter for any person so notified to sell any such extract, sirup, or beverage without making an application for, giving a bond, and obtaining a permit so to do, which permit may be issued upon such conditions as the commissioner may deem necessary to prevent such illegal sales, and in addition the commissioner shall require a record and report of sales. [41 Stat. L. 309.]

**SEC. 5. [Failure of enumerated articles to conform to descriptions — analysis — revocation of permit.]** Whenever the commissioner has reason to believe that any article mentioned in section 4 does not correspond with the descriptions and limitations therein provided, he shall cause an analysis of said article to be made, and if, upon such analysis, the commissioner shall find that said article does not so correspond, he shall give not less than fifteen days' notice in writing to the person who is the manufacturer thereof to show cause why said article should not be dealt with as an intoxicating liquor, such notice to be served personally or by registered mail, as the commissioner may determine, and shall specify the time when, the place where, and the name of the agent or official before whom such person is required to appear.

If the manufacturer of said article fails to show to the satisfaction of the commissioner that the article corresponds to the descriptions and limitations provided in section 4 of this Title, his permit to manufacture and sell such article shall be revoked. The manufacturer may by appropriate proceeding in a court of equity have the action of the commissioner reviewed, and the court may affirm, modify, or reverse the finding of the commissioner as the facts and law of the case may warrant, and during the pendency of such proceedings may restrain the manufacture, sale, or other disposition of such article. [41 Stat. L. 309.]

**SEC. 6. [Permits to manufacture, etc., liquor.]** No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided, and except that any person who in the opinion of the commissioner is conducting a bona fide hospital or sanatorium engaged in the treatment of persons suffering from alcoholism, may, under such rules, regulations, and conditions as the commissioner shall prescribe, purchase and use, in accordance with the methods in use in such institution, liquor, to be administered to the patients of such institution under the direction of a duly qualified physician employed by such institution.

All permits to manufacture, prescribe, sell, or transport liquor, may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof: *Provided*, That the commissioner may without formal application or new bond extend any permit granted under this Act or laws now in force after August 31 in any year to December 31 of the succeeding year: *Provided further*, That permits to purchase liquor for the purpose of manufacturing or selling as provided in this Act shall not be in force to exceed ninety days from the day of issuance. A permit to purchase liquor for any other purpose shall not be in force to exceed thirty days. Permits to purchase liquor shall specify the quantity and kind to be purchased and the purpose for which it is to be used. No permit shall be issued to any person who within one year prior to the application therefor or issuance thereof shall have violated the terms of any permit issued under this Title or any law of the United States or of any State regulating traffic in liquor. No permit shall be issued to anyone to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of his State to compound and dispense medicine prescribed by a duly licensed physician. No one shall be given a permit to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession. Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

The commissioner may prescribe the form of all permits and applications and the facts to be set forth therein. Before any permit is granted the commissioner may require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and the provisions of this title. In the event of the refusal by the commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in section 5 hereof.

Nothing in this title shall be held to apply to the manufacture, sale, transportation, importation, possession, or distribution of wine for sacramental purposes, or like religious rites, except section 6 (save as the same requires a permit to purchase) and section 10 hereof, and the provisions of this Act prescribing penalties for the violation of either of said sections. No person to whom a permit may be issued to manufacture, transport, import, or sell wines for sacramental purposes or like religious rites shall sell, barter, exchange, or furnish any such to any person not a rabbi, minister of the gospel, priest, or an officer duly authorized for the purpose by any church or congregation, nor to any such except upon an application duly subscribed by him, which application, authenticated as regulations may prescribe, shall be filed and preserved by the seller. The head of any conference or diocese or other ecclesiastical jurisdiction may designate any rabbi, minister, or priest to supervise the manufacture of wine to be used for the purposes and rites in this section mentioned, and the person so designated may, in the discretion of the commissioner, be granted a permit to supervise such manufacture. [41 Stat. L. 310.]

SEC. 7. [Prescriptions for liquors.] No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician



shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once. Any pharmacist filling a prescription shall at the time indorse upon it over his own signature the word "canceled," together with the date when the liquor was delivered, and then make the same a part of the record that he is required to keep as herein provided.

Every physician who issues a prescription for liquor shall keep a record, alphabetically arranged in a book prescribed by the commissioner, which shall show the date of issue, amount prescribed, to whom issued, the purpose or ailment for which it is to be used and directions for use, stating the amount and frequency of the dose. [41 Stat. L. 311.]

**SEC. 8. [Prescription blanks.]** The commissioner shall cause to be printed blanks for the prescriptions herein required, and he shall furnish the same, free of cost, to physicians holding permits to prescribe. The prescription blanks shall be printed in book form and shall be numbered consecutively from one to one hundred, and each book shall be given a number, and the stubs in each book shall carry the same numbers as and be copies of the prescriptions. The books containing such stubs shall be returned to the commissioner when the prescription blanks have been used, or sooner, if directed by the commissioner. All unused, mutilated, or defaced blanks shall be returned with the book. No physician shall prescribe and no pharmacist shall fill any prescription for liquor except on blanks so provided, except in cases of emergency, in which event a record and report shall be made and kept as in other cases. [41 Stat. L. 311.]

**SEC. 9. [Revocation of permits.]** If at any time there shall be filed with the commissioner a complaint under oath setting forth facts showing, or if the commissioner has reason to believe, that any person who has a permit is not in good faith conforming to the provisions of this Act, or has violated the laws of any State relating to intoxicating liquor, the commissioner or his agent shall immediately issue an order citing such person to appear before him on a day named not more than thirty and not less than fifteen days from the date of service upon such permittee of a copy of the citation, which citation shall be accompanied by a copy of such complaint, or in the event that the proceedings be initiated by the commissioner with a statement of the facts constituting the violation charged, at which time a hearing shall be had unless continued for cause. Such hearings shall be held within the judicial district and within fifty miles of the place where the offense is alleged to have occurred, unless the parties agree on another place. If it be found that such person has been guilty of willfully violating any such laws, as charged, or has not in good faith conformed to the provisions of this Act, such permit shall be revoked, and no permit shall be granted to such person within one year thereafter. Should the permit be revoked by the commissioner, the permittee may have a review of his decision before a court of equity in the manner provided in section 5 hereof. During the pendency of such action such permit shall be temporarily revoked. [41 Stat. L. 311.]

**SEC. 10. [Record of liquor manufactured, etc.]** No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold, or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. The commissioner may prescribe the form of such record, which shall at all times be open to inspection as in this Act provided. [41 Stat. L. 312.]

**SEC. 11. [Copies of permits to purchase — part of records — wholesale purchases.]** All manufacturers and wholesale or retail druggists shall keep as a part of the records required of them a copy of all permits to purchase on which a sale of any liquor is made, and no manufacturer or wholesale druggist shall sell or otherwise dispose of any liquor except at wholesale and only to persons having permits to purchase in such quantities. [41 Stat. L. 312.]

**SEC. 12. [Labels on liquor containers.]** All persons manufacturing liquor for sale under the provisions of this title shall securely and permanently attach to every container thereof, as the same is manufactured, a label stating name of manufacturer, kind and quantity of liquor contained therein, and the date of its manufacture, together with the number of the permit authorizing the manufacture thereof; and all persons possessing such liquor in wholesale quantities shall securely keep and maintain such label thereon; and all persons selling at wholesale shall attach to every package of liquor, when sold, a label setting forth the kind and quantity of liquor contained therein, by whom manufactured, the date of sale, and the person to whom sold; which label shall likewise be kept and maintained thereon until the liquor is used for the purpose for which such sale was authorized. [41 Stat. L. 312.]

**SEC. 13. [Shipments of liquor — record by carrier — delivery — verified copy of permit to purchase.]** It shall be the duty of every carrier to make a record at the place of shipment of the receipt of any liquor transported, and he shall deliver liquor only to persons who present to the carrier a verified copy of a permit to purchase which shall be made a part of the carrier's permanent record at the office from which delivery is made.

The agent of the common carrier is hereby authorized to administer the oath to the consignee in verification of the copy of the permit presented, who, if not personally known to the agent, shall be identified before the delivery of the liquor to him. The name and address of the person identifying the consignee shall be included in the record. [41 Stat. L. 312.]

**SEC. 14. [Shipments — duty of shipper to disclose character of package — information on outside of package.]** It shall be unlawful for a person to use or induce any carrier, or any agent or employee thereof, to carry or ship any package or receptacle containing liquor without notifying the carrier of the true nature and character of the shipment. No carrier shall transport nor shall any person receive liquor from a carrier unless there appears on the outside of the package containing such liquor the following information:

Name and address of the consignor or seller, name and address of the consignee, kind and quantity of liquor contained therein, and number of the permit to purchase or ship the same, together with the name and address of the person using the permit. [41 Stat. L. 312.]

**SEC. 15. [False statements on package—effect.]** It shall be unlawful for any consignee to accept or receive any package containing any liquor upon which appears a statement known to him to be false, or for any carrier or other person to consign, ship, transport, or deliver any such package, knowing such statement to be false. [41 Stat. L. 313.]

**SEC. 16. [Shipments—bona fide consignee.]** It shall be unlawful to give to any carrier or any officer, agent, or person acting or assuming to act for such carrier an order requiring the delivery to any person of any liquor or package containing liquor consigned to, or purporting or claimed to be consigned to a person, when the purpose of the order is to enable any person not an actual bona fide consignee to obtain such liquor. [41 Stat. L. 313.]

**SEC. 17. [Liquor advertisements—price lists.]** It shall be unlawful to advertise anywhere, or by any means or method, liquor, or the manufacture, sale, keeping for sale or furnishing of the same, or where, how, from whom, or at what price the same may be obtained. No one shall permit any sign or billboard containing such advertisement to remain upon one's premises. But nothing herein shall prohibit manufacturers and wholesale druggists holding permits to sell liquor from furnishing price lists, with description of liquor for sale, to persons permitted to purchase liquor, or from advertising alcohol in business publications or trade journals circulating generally among manufacturers of lawful alcoholic perfumes, toilet preparations, flavoring extracts, medicinal preparations, and like articles: *Provided, however,* That nothing in this Act or in the Act making appropriations for the Post Office Department, approved March 3, 1917 (Thirty-ninth Statutes at Large, Part 1, page 1058. et seq.), shall apply to newspapers published in foreign countries when mailed to this country. [41 Stat. L. 313.]

For Act of March 3, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 394.

**SEC. 18. [Advertisements of things pertaining to manufacture of liquor.]** It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, direction, or recipe advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor. [41 Stat. L. 313.]

**SEC. 19. [Soliciting liquor orders.]** No person shall solicit or receive, nor knowingly permit his employee to solicit or receive, from any person any order for liquor or give any information of how liquor may be obtained in violation of this Act. [41 Stat. L. 313.]

**SEC. 20. [Injuries resulting from intoxication—recovery of damages.]** Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawfully selling to or unlawfully assisting

in procuring liquor for such intoxicated person, have caused or contributed to such intoxication, and in any such action such person shall have a right to recover actual and exemplary damages. In case of the death of either party, the action or right of action given by this section shall survive to or against his or her executor or administrator, and the amount so recovered by either wife or child shall be his or her sole and separate property: Such action may be brought in any court of competent jurisdiction. In any case where parents shall be entitled to such damages, either the father or mother may sue alone therefor, but recovery by one of such parties shall be a bar to suit brought by the other. [41 Stat. L. 313.]

**SEC. 21. [Property when common nuisance — lien on property.]** Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000 or be imprisoned for not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction. [41 Stat. L. 313.]

**SEC. 22. [Abatement of nuisance — injunction.]** An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any State or any subdivision thereof or by the commissioner or his deputies or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidavits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining the defendant and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation of this Act constituting such nuisance. No bond shall be required in instituting such proceedings. It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the petition are true, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof

shall give bond with sufficient surety, to be approved by the court making the order, in the penal and liquidated sum of not less than \$500 nor more than \$1,000, payable to the United States, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this title upon said property. [41 Stat. L. 314.]

**SEC. 23. [Person when guilty of nuisance — fees of officers enforcing act — forfeiture of leases.]** That any person who shall, with intent to effect a sale of liquor, by himself, his employee, servant, or agent, for himself or any person, company or corporation, keep or carry around on his person, or in a vehicle, or other conveyance whatever, or leave in a place for another to secure, any liquor, or who shall travel to solicit, or solicit, or take, or accept orders for the sale, shipment, or delivery of liquor in violation of this title is guilty of a nuisance and may be restrained by injunction, temporary and permanent, from doing or continuing to do any of said acts or things.

In such proceedings it shall not be necessary to show any intention on the part of the accused to continue such violations if the action is brought within sixty days following any such violation of the law.

For removing and selling property in enforcing this Act the officer shall be entitled to charge and receive the same fee as the sheriff of the county would receive for levying upon and selling property under execution, and for closing the premises and keeping them closed a reasonable sum shall be allowed by the court.

Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease. [41 Stat. L. 314.]

**SEC. 24. [Violation of injunction — punishment for contempt.]** In the case of the violation of any injunction, temporary or permanent, granted pursuant to the provisions of this title, the court, or in vacation a judge thereof, may summarily try and punish the defendant. The proceedings for punishment for contempt shall be commenced by filing with the clerk of the court from which such injunction issued information under oath setting out the alleged facts constituting the violation, whereupon the court or judge shall forthwith cause a warrant to issue under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. Any person found guilty of contempt under the provisions of this section shall be punished by a fine of not less than \$500 nor more than \$1,000, or by imprisonment of not less than thirty days nor more than twelve months, or by both fine and imprisonment. [41 Stat. L. 315.]

**SEC. 25. [Possession of liquor or property designed for manufacture — search warrants.]** It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that

such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process. [41 Stat. L. 315.]

For Act of June 15, 1917, Title XI, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 128.

**SEC. 26. [Transportation of liquor unlawfully — seizure of vehicle or conveyance.]** When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts. [41 Stat. L. 315.]

**SEC. 27. [Disposition of seized liquors.]** In all cases in which intoxicating liquors may be subject to be destroyed under the provisions of this Act the court shall have jurisdiction upon the application of the United States attorney to order them delivered to any department or agency of the United States Government for medicinal, mechanical, or scientific uses, or to order the same sold at private sale for such purposes to any person having a permit to purchase liquor the proceeds to be covered into the Treasury of the United States to the credit of miscellaneous receipts, and all liquor heretofore seized in any suit or proceeding brought for violation of law may likewise be so disposed of, if not claimed within sixty days from the date this section takes effect. [41 Stat. L. 316.]

**SEC. 28. [Enforcement by Commissioner of Internal Revenue and assistants — power conferred.]** The commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States. [41 Stat. L. 316.]

**SEC. 29. [Violations of act — penalties.]** Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than \$1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than \$200 nor more than \$2,000 and be imprisoned not less than one month nor more than five years.

Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than \$500; for a second offense not less than \$100 nor more than \$1,000 or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than \$500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this Act against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar. [41 Stat. L. 316.]

**SEC. 30. [Evidence — witnesses — incriminating testimony.]** No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence in obedience to a subpoena of any court in any suit or proceeding based upon or growing out of any alleged violation of this Act; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, he may so testify or produce evidence. but no person shall be exempt from prosecution and punishment for perjury committed in so testifying. [41 Stat. L. 317.]

**SEC. 31. [Unlawful sale of liquor — venue of prosecution.]** In case of a sale of liquor where the delivery thereof was made by a common or other carrier the sale and delivery shall be deemed to be made in the county or district wherein the delivery was made by such carrier to the consignee, his agent or employee, or in the county or district wherein the sale was made, or from which the shipment was made, and prosecution for such sale or delivery may be had in any such county or district. [41 Stat. L. 317.]

**SEC. 32. [Affidavit, information or indictment — sufficiency — separate offenses — bill of particulars.]** In any affidavit, information, or indictment for the violation of this Act, separate offenses may be united in separate counts and the defendant may be tried on all at one trial and the penalty for all offenses may be imposed. It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so. [41 Stat. L. 317.]

**SEC. 33. [Possession of liquor — presumptions arising — report — possession in private dwelling.]** After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the eighteenth amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used. [41 Stat. L. 317.]

**SEC. 34. [Records and reports — inspection — evidence — copies.]** All records and reports kept or filed under the provisions of this Act shall be subject to inspection at any reasonable hour by the commissioner or any of his agents or by any public prosecutor or by any person designated by him, or by any peace officer in the State where the record is kept, and copies of such records and reports duly certified by the person with whom kept or filed may be introduced in evidence with like effect as the originals thereof, and verified copies of such records shall be furnished to the commissioner when called for. [41 Stat. L. 317.]

**SEC. 35. [Effect of Act on existing legislation — liquor taxes and penalties — compromising civil causes.]** All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone



from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of \$500 on retail dealers and \$1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

The commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced. [41 Stat. L. 317.]

**SEC. 36. [Invalidity of part of Act — effect as to remainder.]** If any provision of this Act shall be held invalid it shall not be construed to invalidate other provisions of the Act. [41 Stat. L. 318.]

**SEC. 37. [Effect of Act on liquor already manufactured — manufacture of low per cent. alcoholic beverages — tax.]** Nothing herein shall prevent the storage in United States bonded warehouses of all liquor manufactured prior to the taking effect of this Act, or prevent the transportation of such liquor to such warehouses or to any wholesale druggist for sale to such druggist for purposes not prohibited when the tax is paid, and permits may be issued therefor.

A manufacturer of any beverage containing less than one-half of 1 per centum of alcohol by volume may, on making application and giving such bond as the commissioner shall prescribe, be given a permit to develop in the manufacture thereof by the usual methods of fermentation and fortification or otherwise a liquid such as beer, ale, porter, or wine, containing more than one-half of 1 per centum of alcohol by volume, but before any such liquid is withdrawn from the factory or otherwise disposed of the alcoholic contents thereof shall under such rules and regulations as the commissioner may prescribe be reduced below such one-half of 1 per centum of alcohol: *Provided*, That such liquid may be removed and transported, under bond and under such regulations as the commissioner may prescribe, from one bonded plant or warehouse to another for the purpose of having the alcohol extracted therefrom. And such liquids may be developed, under permit, by persons other than the manufacturers of beverages containing less than one-half of 1 per centum of alcohol by volume, and sold to such manufacturers for conversion into such beverages. The alcohol removed from such liquid, if evaporated and not condensed and saved, shall not be subject to tax; if saved, it shall be subject to the same law as other alcoholic liquors. Credit shall be allowed on the tax due on any alcohol so saved to the amount of any tax paid upon distilled spirits or brandy used in the fortification of the liquor from which the same is saved.

When fortified wines are made and used for the production of nonbeverage alcohol, and dealcoholized wines containing less than one-half of 1 per centum of alcohol by volume, no tax shall be assessed or paid on the spirits used in such fortification, and such dealcoholized wines produced under the provisions

of this Act, whether carbonated or not, shall not be subject to the tax on artificially carbonated or sparkling wines, but shall be subject to the tax on still wines only.

In any case where the manufacturer is charged with manufacturing or selling for beverage purposes any malt, vinous, or fermented liquids containing one-half of 1 per centum or more of alcohol by volume, or in any case where the manufacturer, having been permitted by the commissioner to develop a liquid such as ale, beer, porter, or wine containing more than one-half of 1 per centum of alcohol by volume in the manner and for the purpose herein provided, is charged with failure to reduce the alcoholic content of any such liquid below such one-half of 1 per centum before withdrawing the same from the factory, then in either such case the burden of proof shall be on such manufacturer to show that such liquid so manufactured, sold, or withdrawn contains less than one-half of 1 per centum of alcohol by volume. In any suit or proceeding involving the alcoholic content of any beverage, the reasonable expense of analysis of such beverage shall be taxed as costs in the case. [41 Stat. L. 318.]

**SEC. 38. [Employees to enforce provisions of Act—appointment—civil service.]** The Commissioner of Internal Revenue and the Attorney General of the United States are hereby respectively authorized to appoint and employ such assistants, experts, clerks, and other employees in the District of Columbia or elsewhere, and to purchase such supplies and equipment as they may deem necessary for the enforcement of the provisions of this Act, but such assistants, experts, clerks, and other employees, except such executive officers as may be appointed by the Commissioner or the Attorney General to have immediate direction of the enforcement of the provisions of this Act, and persons authorized to issue permits, and agents and inspectors in the field service, shall be appointed under the rules and regulations prescribed by the Civil Service Act: *Provided*, That the Commissioner and Attorney General in making such appointments shall give preference to those who have served in the military or naval service in the recent war, if otherwise qualified, and there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sum as may be required for the enforcement of this Act including personal services in the District of Columbia, and for the fiscal year ending June 30, 1920, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$2,000,000 for the use of the Commissioner of Internal Revenue and \$100,000 for the use of the Department of Justice for the enforcement of the provisions of this Act, including personal services in the District of Columbia and necessary printing and binding. [41 Stat. L. 319.]

**SEC. 39. [Property of nonviator of Act proceeded against—summons.]** In all cases wherein the property of any citizen is proceeded against or wherein a judgment affecting it might be rendered, and the citizen is not the one who in person violated the provisions of the law, summons must be issued in due form and served personally, if said person is to be found within the jurisdiction of the court. [41 Stat. L. 319.]

## TITLE III.

## INDUSTRIAL ALCOHOL.

**SEC. 1. [Terms defined — “alcohol” — “container.”]** When used in this title —

The term “alcohol” means that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, from whatever source or whatever processes produced.

The term “container” includes any receptacle, vessel, or form of package, tank, or conduit used or capable of use for holding, storing, transferring, or shipment of alcohol. [41 Stat. L. 319.]

## INDUSTRIAL ALCOHOL PLANTS AND WAREHOUSES.

**SEC. 2. [Alcohol plants — bonding.]** Any person now producing alcohol shall, within thirty days after the passage of this Act, make application to the commissioner for registration of his industrial alcohol plant, and as soon thereafter as practicable the premises shall be bonded and permit may issue for the operation of such plant, and any person hereafter establishing a plant for the production of alcohol shall likewise before operation make application, file bond, and receive permit. [41 Stat. L. 319.]

**SEC. 3. [Warehouses — bonding — entry, storage and withdrawal of alcohol — regulations.]** Warehouses for the storage and distribution of alcohol to be used exclusively for other than beverage purposes may be established upon filing of application and bond, and issuance of permit at such places, either in connection with the manufacturing plant or elsewhere, as the commissioner may determine; and the entry and storage of alcohol therein, and the withdrawals of alcohol therefrom shall be made in such containers and by such means as the commissioner by regulation may prescribe. [41 Stat. L. 319.]

**SEC. 4. [Transfer of alcohol from one plant or warehouse to another.]** Alcohol produced at any registered industrial alcohol plant or stored in any bonded warehouse may be transferred under regulations to any other registered industrial alcohol plant or bonded warehouse for any lawful purpose. [41 Stat. L. 320.]

**SEC. 5. [Taxes on alcohol — lien.]** Any tax imposed by law upon alcohol shall attach to such alcohol as soon as it is in existence as such, and all proprietors of industrial alcohol plants and bonded warehouses shall be jointly and severally liable for any and all taxes on any and all alcohol produced thereat or stored therein. Such taxes shall be a first lien on such alcohol and the premises and plant in which such alcohol is produced or stored, together with all improvements and appurtenances thereunto belonging or in any wise appertaining. [41 Stat. L. 320.]

**SEC. 6. [Effect of constitutional amendment on distilled spirits in bonded warehouses — disposition.]** Any distilled spirits produced and fit for beverage purposes remaining in any bonded warehouse on or before the date when the eighteenth amendment of the Constitution of the United States goes into effect, may, under regulations, be withdrawn therefrom either for denaturation at any bonded denaturing plant or for deposit in a bonded warehouse established

under this Act; and when so withdrawn, if not suitable as to proof, purity, or quality for other than beverage purposes, such distilled spirits shall be redistilled, purified, and changed in proof so as to render such spirits suitable for other purposes, and having been so treated may thereafter be denatured or sold in accordance with the provisions of this Act. [41 Stat. L. 320.]

**SEC. 7. [Distilleries or bonded warehouses heretofore legally established — disposition.]** Any distillery or bonded warehouse heretofore legally established may, upon filing application and bond and the granting of permit, be operated as an industrial alcohol plant or bonded warehouse under the provisions of this title and regulations made thereunder. [41 Stat. L. 320.]

**SEC. 8. [Alcohol how made — use and disposition.]** Alcohol may be produced at any industrial alcohol plant established under the provisions of this title, from any raw materials or by any processes suitable for the production of alcohol, and, under regulations, may be used at any industrial alcohol plant or bonded warehouse or sold or disposed of for any lawful purpose, as in this Act provided. [41 Stat. L. 320.]

**SEC. 9. [Exemption of plants and warehouses from certain statutory provisions.]** Industrial alcohol plants and bonded warehouses established under the provisions of this title shall be exempt from the provisions of sections 3154, 3244, 3258, 3259, 3260, 3263, 3264, 3266, 3267, 3268, 3269, 3271, 3273, 3274, 3275, 3279, 3280, 3283, 3284, 3285, 3286, 3287, 3288, 3289, 3290, 3291, 3292, 3293, 3294, 3295, 3302, 3303, 3307, 3308, 3309, 3310, 3311, 3312, 3313, 3314, and 3327 of the Revised Statutes; sections 48 to 60, inclusive, and sections 62 and 67 of the Act of August 27, 1894 (Twenty-eighth Statutes, pages 563 to 568), and from such other provisions of existing laws relating to distilleries and bonded warehouses as may, by regulations, be declared inapplicable to industrial alcohol plants and bonded warehouses established under this Act.

Regulations may be made embodying any provision of the sections above enumerated. [41 Stat. L. 320.]

See the title **INTERNAL REVENUE** in 3 Fed. Stat. Ann. (2d ed.) 954, 3 Fed. Stat. Ann. (1st ed.) 540, for the statutes mentioned in the text.

#### **TAX-FREE ALCOHOL.**

**SEC. 10. [Denaturing plants — establishment — sale of denatured alcohol tax-free — distilled vinegar.]** Upon the filing of application and bond and issuance of permit denaturing plants may be established upon the premises of any industrial alcohol plant, or elsewhere, and shall be used exclusively for the denaturation of alcohol by the admixture of such denaturing materials as shall render the alcohol, or any compound in which it is authorized to be used, unfit for use as an intoxicating beverage.

Alcohol lawfully denatured may, under regulations, be sold free of tax either for domestic use or for export.

Nothing in this Act shall be construed to require manufacturers of distilled vinegar to raise the proof of any alcohol used in such manufacture or to denature the same. [41 Stat. L. 320.]

**SEC. 11. [Withdrawals of alcohol tax free.]** Alcohol produced at any industrial alcohol plant or stored in any bonded warehouse may, under regulations, be withdrawn tax free as provided by existing law from such plant or warehouse for transfer to any denaturing plant for denaturation, or may, under regulations, before or after denaturation, be removed from any such plant or warehouse for any lawful tax-free purpose.

Spirits of less proof than one hundred and sixty degrees may, under regulations, be deemed to be alcohol for the purpose of denaturation, under the provisions of this title.

Alcohol may be withdrawn, under regulations, from any industrial plant or bonded warehouse tax free by the United States or any governmental agency thereof, or by the several States and Territories or any municipal subdivision thereof or by the District of Columbia, or for the use of any scientific university or college of learning, any laboratory for use exclusively in scientific research, or for use in any hospital or sanatorium.

But any person permitted to obtain alcohol tax free, except the United States and the several States and Territories and subdivisions thereof, and the District of Columbia, shall first apply for and secure a permit to purchase the same and give the bonds prescribed under title II of this Act, but alcohol withdrawn for nonbeverage purposes for the use of the United States and the several States, Territories and subdivisions thereof, and the District of Columbia may be purchased and withdrawn subject only to such regulations as may be prescribed. [41 Stat. L. 321.]

#### GENERAL PROVISIONS.

**SEC. 12. [Additional penalties.]** The penalties provided in this title shall be in addition to any penalties provided in title 2 of this Act, unless expressly otherwise therein provided. [41 Stat. L. 321.]

**SEC. 13. [Regulations by Commissioner of Internal Revenue.]** The commissioner shall from time to time issue regulations respecting the establishment, bonding, and operation of industrial alcohol plants, denaturing plants, and bonded warehouses authorized herein, and the distribution, sale, export, and use of alcohol which may be necessary, advisable, or proper, to secure the revenue, to prevent diversion of the alcohol to illegal uses, and to place the nonbeverage alcohol industry and other industries using such alcohol as a chemical raw material or for other lawful purpose upon the highest possible plane of scientific and commercial efficiency consistent with the interests of the Government, and which shall insure an ample supply of such alcohol and promote its use in scientific research and the development of fuels, dyes, and other lawful products. [41 Stat. L. 321.]

**SEC. 14. [Loss of alcohol by evaporation, etc — refund of tax.]** Whenever any alcohol is lost by evaporation or other shrinkage, leakage, casualty, or unavoidable cause during distillation, redistillation, denaturation, withdrawal, piping, shipment, warehousing, storage, packing, transfer, or recovery, of any such alcohol the commissioner may remit or refund any tax incurred under existing law upon such alcohol, provided he is satisfied that the alcohol has not been diverted to any illegal use: *Provided, also,* That such allowance shall not be granted if the person claiming same is indemnified against such loss by a valid claim of insurance. [41 Stat. L. 321.]

**SEC. 15. [Operators of industrial alcohol or denaturing plants — violation of laws and regulations — penalty.]** Whoever operates an industrial alcohol plant or a denaturing plant without complying with the provisions of this title and lawful regulations made thereunder, or whoever withdraws or attempts to withdraw or secure tax free any alcohol subject to tax, or whoever otherwise violates any of the provisions of this title or of regulations lawfully made thereunder shall be liable, for the first offense, to a penalty of not exceeding \$1,000, or imprisonment not exceeding thirty days, or both, and for a second or cognate offense to a penalty of not less than \$100 nor more than \$10,000, and to imprisonment of not less than thirty days nor more than one year. It shall be lawful for the commissioner in all cases of second or cognate offense to refuse to issue for a period of one year a permit for the manufacture or use of alcohol upon the premises of any person responsible in any degree for the violation. [41 Stat. L. 321.]

**SEC. 16. [Collection of taxes — assessment or stamp.]** Any tax payable upon alcohol under existing law may be collected either by assessment or by stamp as regulations shall provide; and if by stamp, regulations shall issue prescribing the kind of stamp to be used and the manner of affixing and canceling the same. [41 Stat. L. 322.]

**SEC. 17. [Release of seized property.]** When any property is seized for violation of this title it may be released to the claimant or to any intervening party, in the discretion of the commissioner, on a bond given and approved. [41 Stat. L. 322.]

**SEC. 18. [Application of administrative laws to this title.]** All administrative provisions of internal-revenue law, including those relating to assessment, collection, abatement, and refund of taxes and penalties, and the seizure and forfeiture of property, are made applicable to this title in so far as they are not inconsistent with the provisions thereof. [41 Stat. L. 322.]

**SEC. 19. [Prior statutes relating to alcohol — repeal.]** All prior statutes relating to alcohol as defined in this title are hereby repealed in so far as they are inconsistent with the provisions of this title. [41 Stat. L. 322.]

**SEC. 20. [Canal Zone — prohibition extended to — offenses.]** That it shall be unlawful to import or introduce into the Canal Zone, or to manufacture, sell, give away, dispose of, transport, or have in one's possession or under one's control within the Canal Zone, any alcoholic, fermented, brewed, distilled, vinous, malt, or spirituous liquors, except for sacramental, scientific, pharmaceutical, industrial, or medicinal purposes, under regulations to be made by the President, and any such liquors within the Canal Zone in violation hereof shall be forfeited to the United States and seized: *Provided*, That this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad.

That each and every violation of any of the provisions of this section shall be punished by a fine of not more than \$1,000 or imprisonment not exceeding six months for a first offense, and by a fine not less than \$200 nor more than \$2,000 and imprisonment not less than one month nor more than five years for a second or subsequent offense.

That all offenses heretofore committed within the Canal Zone may be prosecuted and all penalties therefor enforced in the same manner and to the same extent as if this Act had not been passed. [41 Stat. L. 322.]

SEC. 21. [Act when in effect.] Titles I and III and sections 1, 27, 37, and 38 of title II of this Act shall take effect and be in force from and after the passage and approval of the Act. The other sections of title II shall take effect and be in force from and after the date when the eighteenth amendment of the Constitution of the United States goes into effect. [41 Stat. L. 322.]

F H GILLET

*Speaker of the House of Representatives.*

THOS. R. MARSHALL

*Vice President of the United States and  
President of the Senate.*

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IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES.

*October 27, 1919.*

The President of the United States having returned to the House of Representatives, in which it originated, the bill (H. R. 6810) entitled "An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries," with his objections thereto, the House proceeded in pursuance of the Constitution to reconsider the same; and

*Resolved*, That the said bill pass, two thirds of the House of Representatives agreeing to pass the same.

Attest:

WM. TYLER PAGE

*Clerk.*

IN THE SENATE OF THE UNITED STATES.

*Legislative Day, October 22, 1919, Calendar Day October 28, 1919.*

The Senate having proceeded to reconsider the bill (H. R. 6810) "An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries," returned by the President of the United States to the House of Representatives, in which it originated, with his objections, and passed by the House on a reconsideration of the same, it was

*RESOLVED*, That the said bill pass, two-thirds of the Senators present having voted in the affirmative.

Attest:

3.40 P. M.

GEORGE A. SANDERSON

*Secretary.*

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JUDGES

See JUDICIARY

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## JUDICIAL OFFICERS

*Act of Feb. 26, 1919, ch. 49, 224.*

*Sec. 1. United States District Courts — Clerks — Appointment — Fees and Emoluments — Salaries, 224.*

- 2. Salaries of Clerks — Amount, 225.*
- 3. Allowances to Clerks — Traveling Expenses, 225.*
- 4. Deputies and Clerical Assistants to Clerks, 225.*
- 5. Office Expenses — Allowance, 225.*
- 6. Salaries When Payable, 225.*
- 7. Expense Accounts of Clerks, etc.— Payment, 225.*
- 8. Necessary Office Expenses of Clerk — Payment, 225.*
- 9. Fees and Disbursements — Quarterly Accounting — Auditing Accounts — Disposition of Amount Returned, 225.*

*Act of Feb. 26, 1919, ch. 51, 226.*

*Connecticut — Salary of District Attorney, 226.*

*United States Court for China — Expenses of Court and District Attorney, 226.*

*Act of July 19, 1919, ch. 24, 226.*

*Sec. 1. Marshals and Deputy Marshals — Per Diem in Lieu of Subsistence, 226.*  
*District Attorneys and Assistants — Per Diem in Lieu of Subsistence, 227.*

*District of Columbia — Office of District Attorney, 227.*

*Assistant District Attorneys — Compensation, 227.*

*Clerks of Circuit Courts of Appeal — Allowance for Travel Expenses, 227.*

*Criers and Bailiffs — Attendance — Vacation, 227.*

### CROSS-REFERENCE

See also *JUDICIARY*.

**An Act To fix the salaries of the clerks of the United States district courts and to provide for their office expenses, and for other purposes.**

[*Act of Feb. 26, 1919, ch. 49, 40 Stat. L. 1182.*]

[SEC. 1.] [United States district courts — clerks — appointment — fees and emoluments— salaries.] That on and after the first day of July, nineteen hundred and eighteen, all clerks of United States district courts shall be appointed by the judge for the district, or the senior judge if there be more than one judge in the district, subject to the approval of the senior circuit judge for the circuit in which the district is situated, and all fees and emoluments authorized by law to be paid to the clerks of the United States district courts, except the clerks of the district courts of Alaska, shall be charged as heretofore and shall be collected, as far as possible, and paid into the Treasury of the United States in such manner and at such times as hereinafter provided; and such clerks shall be paid, in lieu of the fees and emoluments now allowed by law, an annual salary as hereinafter provided: *Provided*, That this section shall not be construed to require or authorize fees to be charged or collected from the United States. [40 Stat. L. 1182.]



**SEC. 2. [Salaries of clerks — amount.]** That the clerk of the United States district court for each of the judicial districts of the United States, except the clerks of the district courts of Alaska, shall be paid, in lieu of the fees, salaries, and per centum now allowed by law, an annual salary to be fixed by the Attorney General at not less than \$2,500 nor more than \$5,000, based in each instance upon the amount of business transacted by the court and the fees and the emoluments received by the clerks in the four years last preceding. [40 Stat. L. 1182.]

**SEC. 3. [Allowances to clerks — traveling expenses.]** That when any clerk of a district court is necessarily absent from his official residence on any official business he shall be allowed his actual traveling expenses only and his necessary and actual expenses for lodging and subsistence, the latter not to exceed \$4 per day. [40 Stat. L. 1182.]

**SEC. 4. [Deputies and clerical assistants to clerks.]** That when, in the opinion of the Attorney General, the public interest requires it he may, on the recommendation of the clerk of a district court, which recommendation shall state facts (as distinguished from conclusions) showing necessity for the same, allow such clerk to employ necessary deputies and clerical assistants, upon compensation to be fixed by the Attorney General from time to time and paid as hereinafter provided.

When any such deputy or clerical assistant is necessarily absent from the place of his regular employment on official business he shall be allowed his actual traveling expenses only and his necessary and actual expenses for lodging and subsistence, the latter not to exceed \$3 per day. [40 Stat. L. 1182.]

**SEC. 5. [Office expenses — allowance.]** That the necessary office expenses of the clerks of the district courts of the United States shall be allowed when authorized by the Attorney General. [40 Stat. L. 1182.]

**SEC. 6. [Salaries when payable.]** That the salaries of the clerks, deputy clerks, and clerical assistants to the clerks of the district courts shall be paid monthly by the marshals of the respective districts. [40 Stat. L. 1182.]

**SEC. 7. [Expense accounts of clerks, etc. — payment.]** That the expense accounts of clerks of the United States district courts, when made out and verified, and the expense accounts of their deputy clerks and clerical assistants, when made out and certified as correct by the clerk of such court, covering the necessary expenses incurred by such clerk, deputy clerk, or clerical assistants when necessarily absent from the place of regular employment on official business, shall be paid by the marshal, who shall include them in his accounts with the United States. [40 Stat. L. 1182.]

**SEC. 8. [Necessary office expenses of clerk — payment.]** That the necessary office expenses of the clerk of the United States district court, as allowed and authorized by the Attorney General, shall be paid by the marshal and included in his accounts with the United States. [40 Stat. L. 1182.]

**SEC. 9. [Fees and disbursements — quarterly accounting — auditing accounts — disposition of amount returned.]** That the clerk of every district court, except the clerks of the district courts of Alaska, shall account quarterly for all

the fees and emoluments earned during the quarter last preceding such accounting, except where the person requiring the services is relieved by law from prepayment of fees and costs, and for all fees and emoluments received within the quarter which had been earned prior thereto. Such accounting shall be in writing and shall be made to the Attorney General, in such form as he may prescribe, on the first days of January, April, July, and October in each year, or within twenty days thereafter, and shall include all moneys received in connection with the admission of attorneys to practice in the court, all that portion retained by the clerk of moneys received for services in naturalization proceedings in whatever capacity rendered, and all other amounts received for services in any way connected with the clerk's office. Such accounts shall be made in duplicate and be verified by the oath of the officer making them. The Attorney General shall cause each such return or account to be carefully examined by the proper officer of the Department of Justice and shall approve the same as he may deem just and proper, and shall transmit it with his approval to the Auditor for the State and Other Departments, by whom an account shall be stated against the officer rendering such return or account. Immediately upon receipt of notice from the auditor, or within ten days thereafter, the clerk shall deposit to the credit of the Treasurer of the United States the amount so stated against him. [40 Stat. L. 1183.]

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**An Act To increase the salary of the United States district attorney for the district of Connecticut.**

[Act of Feb. 26, 1919, ch. 51, 40 Stat. L. 1183.]

[Connecticut—salary of district attorney.] That from and after the passage of this Act the salary of the United States district attorney for the district of Connecticut shall be at the rate of \$4,500 a year. [40 Stat. L. 1183.]

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\* \* \* [United States Court for China—expenses of court and district attorney.] The judge of the said court and the district attorney shall, when the sessions of the court are held at other cities than Shanghai, receive in addition to their salaries their necessary actual expenses during such sessions, not to exceed \$8 per day each, and so much as may be necessary for said purposes during the fiscal year ending June 30, 1920, is hereby appropriated. [40 Stat. L. 1331.]

This is from Diplomatic and Consular Service Appropriation Act of March 4, 1919, ch. 123, following an appropriation for the United States Court for China. Similar provisions have appeared in like Acts for preceding years.

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[SEC. 1.] \* \* \* [Marshals and deputy marshals—per diem in lieu of subsistence.] That marshals and office deputy marshals (except in the District of Alaska) may be granted a per diem of not to exceed \$4 and \$3, respectively,

in lieu of subsistence, instead of, but under the conditions prescribed for, the present allowance for actual expenses of subsistence. [41 Stat. L. 209.]

This and the following five paragraphs are from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

A like provision to the one above was contained in the Sundry Civil Appropriation Act of July 1, 1918, and will be found in 1918 Supp. Fed. Stat. Ann. 398.

**\* \* \* [District attorneys and assistants — per diem in lieu of subsistence.]** That United States district attorneys and their regular assistants may be granted a per diem of not to exceed \$4 in lieu of subsistence, instead of, but under the conditions prescribed for, the present allowance for actual expenses of subsistence. [41 Stat. L. 209.]

This is from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

**\* \* \* [District of Columbia — office of district attorney.]** From and after July 1, 1919, sections 6, 8, 13, 14, 15, 16, and 18 of the Legislative, Executive, and Judicial Appropriation Act, approved May 28, 1896, shall be applicable to the office of the district attorney for the District of Columbia and his assistants. Certificates to the effect that the public interest requires the appointment of assistants to the said district attorney shall be made by the chief justice of the Supreme Court of the District of Columbia and the district attorney. The district attorney shall be paid a salary of \$6,000 per annum in full compensation for all his official services and his principal assistant shall be paid a salary not in excess of \$4,000 per annum, as the Attorney General may from time to time determine. [41 Stat. L. 209.]

This is from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

For sections of Act of May 28, 1896, mentioned in the text, see 4 Fed. Stat. Ann. (2d ed.) 718; 4 Fed. Stat. Ann. (1st ed.) 133.

**\* \* \* [Assistant district attorneys — compensation.]** That except as otherwise prescribed by law the compensation of such of the assistant district attorneys authorized by section 8 of the act approved May 28, 1896, as the Attorney General may deem necessary, may be fixed at not exceeding \$3,000 per annum. [41 Stat. L. 209.]

This is from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

For Act of May 28, 1896, sec. 8, mentioned in the text, see 4 Fed. Stat. Ann. (2d ed.) 622; 4 Fed. Stat. Ann. (1st ed.) 71.

A like provision to the one above was contained in the Sundry Civil Appropriation Act of July 1, 1918, and will be found in 1918 Supp. Fed. Stat. Ann. 398.

**\* \* \* [Clerks of circuit courts of appeal — allowance for travel expenses.]** That after July 1, 1919, only actual expenses of travel and expenses of lodging and subsistence, not to exceed \$5 per day, shall be allowed any clerk of a United States circuit court of appeals when absent from his official residence on official business. [41 Stat. L. 210.]

This is from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

**\* \* \* [Criers and bailiffs — attendance — vacation.]** That all persons employed under section 715 of the Revised Statutes shall be deemed to be in actual attendance when they attend upon the order of the courts: *Provided further*, That no such persons shall be employed during vacation. [41 Stat. L. 210.]

This is from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

For R. S. sec. 715 (now Jud. Code sec. 5), mentioned in the text, see 4 Fed. Stat. Ann. (2d ed.) 819 note; 4 Fed. Stat. Ann. (1st ed.) 81.

A like provision to the above was contained in the Sundry Civil Appropriation Act of July 1, 1918, and will be found in 1918 Supp. Fed. Stat. Ann. 398.

## JUDICIARY

*Act of Feb. 25, 1919, ch. 29, 228.*

*Sec. 1. Salary of District Judge — Jud. Code, Sec. 2 Amended, 228.*

*2. Circuit Judges — Number — Appointment — Salary — Residence — Duty to Sit in Circuit Court of Appeals — Jud. Code, Sec. 118 Amended, 228.*

*3. Judges of District of Columbia — Salaries, 229.*

*4. Court of Claims — Appointment, Oath, and Salary of Judges — Jud. Code, Sec. 136 Amended, 229.*

*5. United States Court of Customs Appeal — Salary of Judges, 229.*

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**An Act To amend an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.**

[*Act of Feb. 25, 1919, ch. 29, 40 Stat. L. 1156.*]

[SEC. 1.] [Salary of district judge — Jud. Code, sec. 2 amended.] That section two of the Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be, and the same hereby is, amended so as to read as follows:

"SEC. 2. Each of the district judges, including the judges in Porto Rico, Hawaii, and Alaska exercising Federal jurisdiction, shall receive a salary of \$7,500 a year, to be paid in monthly installments." [40 Stat. L. 1156.]

For sec. 2, here amended, see 4 Fed. Stat. Ann. (2d ed.) 816; 1912 Supp. Fed. Stat. Ann. 133.

SEC. 2. [Circuit judges — number — appointment — salary — residence — duty to sit in Circuit Court of Appeals — Jud. Code, sec. 118, amended.] That section one hundred and eighteen of the Act aforesaid be, and the same is hereby, amended to read as follows:

"SEC. 118. There shall be in the second, seventh, and eighth circuits, respectively, four circuit judges; in the fourth circuit, two circuit judges; and in each of the other circuits, three circuit judges, to be appointed by the President, by and with the advice and consent of the Senate. All circuit judges shall receive

a salary of \$8,500 a year each, payable monthly. Each circuit judge shall reside within his circuit. The circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit, and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law: *Provided*, That nothing in this section shall be construed to prevent any circuit judge holding district court or otherwise, as provided for and authorized in other sections of this Act." [40 Stat. L. 1156.]

For sec. 118, here amended, see 5 Fed. Stat. Ann. (2d ed.) 601; 1912 Supp. Fed. Stat. Ann. 192.

**SEC. 3. [Judges of District of Columbia — salaries.]** That the judges of the Supreme Court of the District of Columbia shall receive salaries the same as salaries provided by this Act to be paid to judges of district courts of the United States, and such salaries shall be paid as now provided by law. The judges of the Court of Appeals of the District of Columbia shall receive salaries the same as the salaries provided by this Act to be paid to judges of the circuit court of appeals of the United States, and such salaries shall be paid as now provided by law. [40 Stat. L. 1157.]

**SEC. 4. [Court of claims — appointment, oath, and salary of judges—Jud. Code, sec. 136 amended.]** That section one hundred and thirty-six of the Act aforesaid be, and the same is hereby, amended so as to read as follows:

" SEC. 136. The Court of Claims established by Act of February twenty-fourth, eighteen hundred and fifty-five, shall be continued. It shall consist of a Chief Justice and four judges, who shall be appointed by the President by and with the advice and consent of the Senate, and hold their offices during good behavior. Each of them shall take an oath to support the Constitution of the United States and to discharge faithfully the duties of his office. The Chief Justice shall be entitled to receive an annual salary of \$8,000, and each of the other judges an annual salary of \$7,500, payable monthly from the Treasury." [40 Stat. L. 1157.]

For sec. 136, here amended, see 5 Fed. Stat. Ann. (2d ed.) 646; 1912 Supp. Fed. Stat. Ann. 198.

**SEC. 5. [United States Court of Customs Appeal — salary of judges.]** That the judges of the United States Court of Customs Appeal shall receive salaries equal in amount to the salaries provided by this Act to be paid judges of the Circuit Court of Appeals of the United States, payable monthly from the Treasury. [40 Stat. L. 1157.]

**SEC. 6. [Resignation or retirement from active service of judges — continuance of salary — additional judges — vacancies — Jud. Code, sec. 260 amended.]** That section two hundred and sixty of the Act aforesaid be, and the same is hereby, amended so as to read as follows:

" SEC. 260. That when any judge of any court of the United States, appointed to hold his office during good behavior, resigns his office after having held a commission or commissions as judge of any such court or courts at least ten years continuously, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his resignation for the office that he held at the time of his resignation. But,

instead of resigning, any judge other than a justice of the Supreme Court, who is qualified to resign under the foregoing provisions, may retire, upon the salary of which he is then in receipt, from regular active service on the bench, and the President shall thereupon be authorized to appoint a successor; but a judge so retiring may nevertheless be called upon by the senior circuit judge of that circuit and be by him authorized to perform such judicial duties in such circuit as such retired judge may be willing to undertake, or he may be called upon by the Chief Justice and be by him authorized to perform such judicial duties in any other circuit as such retired judge may be willing to undertake, or he may be called upon either by the presiding judge or senior judge of any other such court and be by him authorized to perform such judicial duties in such court as such retired judge may be willing to undertake.

“In the event any circuit judge, or district judge, having so held a commission or commissions at least ten years continuously, and having attained the age of seventy years as aforesaid, shall nevertheless remain in office, and not resign or retire as aforesaid, the President, if he finds that any such judge is unable to discharge efficiently all the duties of his office by reason of mental or physical disability of permanent character, may, when necessary for the efficient dispatch of business, appoint, by and with the advice and consent of the Senate, an additional circuit judge of the circuit or district judge of the district to which such disabled judge belongs. And the judge so retiring voluntarily, or whose mental or physical condition caused the President to appoint an additional judge, shall be held and treated as if junior in commission to the remaining judges of said court, who shall, in the order of the seniority of their respective commissions, exercise such powers and perform such duties as by law may be incident to seniority. In districts where there may be more than one district judge, if the judges or a majority of them can not agree upon the appointment of officials of the court, to be appointed by such judges, then the senior judge shall have the power to make such appointments.

“Upon the death, resignation, or retirement of any circuit or district judge, so entitled to resign, following the appointment of any additional judge as provided in this section, the vacancy caused by such death, resignation, or retirement of the said judge so entitled to resign shall not be filled.” [40 Stat. L. 1157.]

For sec. 260, here amended, see 5 Fed. Stat. Ann. (2d ed.) 926; 1912 Supp. Fed. Stat. Ann. 241.

SEC. 7. [Act when in effect.] That this Act shall take effect and be in force on and after the first day of the month next following its approval. [40 Stat. L. 1158.]

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**Joint Resolution Providing that one term of the United States District Court for the Eastern Judicial District of Oklahoma shall be held annually at Hugo, Oklahoma.**

[Res. of Feb. 26, 1919, No. 53, ch. 54, 40 Stat. L. 1184.]

[Oklahoma — terms of district court — place of holding.] That one term of the United States District Court for the Eastern District of Oklahoma shall be held each year on the second Monday in May at Hugo, in said State and district, and all Acts and parts of Acts not in accordance herewith are hereby modified

in accordance with the provisions of this Act: *Provided*, That suitable quarters for holding said court shall be furnished without expense to the Government. [40 Stat. L. 1184.]

**An Act To amend section two hundred and sixty-nine of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary."**

[Act of Feb. 26, 1919, ch. 48, 40 Stat. L. 1181.]

[New trials — judgment on appeal, certiorari, error, or motion for new trial — technical errors, defects or exceptions — Jud. Code, sec. 269 amended.] That section two hundred and sixty-nine of the Act approved March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary," be, and the same is hereby, amended so as to read as follows:

"SEC. 269. All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." [40 Stat. L. 1181.]

For sec. 269, here amended, see 5 Fed. Stat. Ann. (2d ed.) 1047; 1912 Supp. Fed. Stat. Ann. 243.

**Failure to take exceptions to remarks of counsel.**—By virtue of this amendment a judgment will be reversed for error committed by an assistant United States attorney in his argument to the jury although there were no exceptions taken at the trial to such arguments. *August v. U. S.*, (C. C. A. 8th Cir.) 257 Fed. 388, wherein the court said: "We think, whatever may be our power otherwise, or our inclination to exercise it, the late amendment to section 269, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. L. 1163, as amended by Act Feb. 26, 1919, c. 48), fully authorizes and commands us to look to the entire record before the court, and render judgment without regard to the technical error of the want of exceptions to the remark of counsel."

**Technical error in sentence.**—In *Shore v. Splain*, (Ct. of App. D. C. 1919) 258 Fed. 150, an application for a writ of habeas corpus to secure the release of a person on the ground that a sentence under which he was imprisoned was defective because pronounced by a judge who had no authority to pronounce it, was refused. It appeared that the judge was a municipal court judge and had been designated to sit temporarily as a police court judge, but that at the time of the pronouncement of the sentence the regular judge was back exercising his functions. The court held that the objection to the sentence savored of a technicality involving no substantial right and was cured by this statutory amendment.

**Defect in pleading.**—An indictment under the Harrison Narcotic Drug Act which failed to negative exceptions peculiarly within the defendant's own knowledge was held sufficient in view of this statutory amendment, a criticism on the ground of the failure to negative the exceptions being considered technical, unsubstantial and unprejudicial. *Stetson v. U. S.*, (C. C. A. 6th Cir. 1919) 257 Fed. 19.

**Exclusion of evidence.**—A nonprejudicial ruling of a trial judge excluding evidence is not ground for a reversal by virtue of the amendment. *Thompson v. U. S.*, (C. C. A. 8th Cir. 1919) 258 Fed. 196.

**Variance as to person administering oath in perjury charge.**—In *West v. U. S.*, (C. C. A. 6th Cir. 1919) 258 Fed. 413, which was a prosecution for perjury, it was held that if the facts showed a variance between the proof and the indictment as to who administered the oath, the variance was immaterial and nonprejudicial and covered by the amendment of the Judicial Code.

**The "record"** to which the act refers is that which is legally the record, and in examining that the court is to disregard "technical errors, defects or exceptions which do not affect the substantial rights of the parties." But matters which could not have been regarded as in the record prior to the passage of the act are not held to be in the record since the passage of the act. Thus the testimony, the charge and refusal of requests to charge are not in the record although they

may be found in the transcript, unless they have been put in the record by a bill of exceptions. *Buessel v. U. S.*, (C. C. A. 2d Cir. 1919) 258 Fed. 811, wherein the court said: "We are not prepared to say that it was the intention of Congress, by the act recently passed, to make bills of exceptions no longer necessary, and that here-

after we are to hold that any matter found in the transcript is to be regarded as in the record, even though the trial judge has not examined and certified to its correctness by putting his signature to a bill of exceptions. We do not think that such could have been the intention."

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**An Act Providing for the appointment of an additional district judge for the northern judicial district of the State of Texas.**

*[Act of Feb. 26, 1919, ch. 50, 40 Stat. L. 1183.]*

[SEC. 1.] [Texas — northern district — additional district judge.] That the President of the United States, by and with the advice and consent of the Senate, shall appoint an additional judge of the district court of the United States for the northern judicial district of the State of Texas, who shall possess the same powers, perform the same duties, and receive the same compensation and allowance as the present judge of said district. [40 Stat. L. 1183.]

SEC. 2. [Death or resignation of senior judge — filling vacancy.] That whenever a vacancy shall occur in the office of the district judge for the northern district of Texas senior in commission such vacancy shall not be filled, and thereafter there shall be but one district judge in said district. [40 Stat. L. 1183.]

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**An Act To fix the time of holding court in the Amarillo division of the northern district of Texas.**

*[Act of March 1, 1919, ch. 87, 40 Stat. L. 1270.]*

[Texas — northern district — terms of court.] That hereafter the terms of the district court of the United States in the Amarillo division of the northern district of Texas shall be held at Amarillo, Texas, on the third Monday in April and the second Monday in September of each year. [40 Stat. L. 1270.]



## LABOR

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## CROSS-REFERENCES

See also *CLAIMS; POSTAL SERVICE; PUBLIC OFFICERS AND EMPLOYEES.*

**An Act To protect the lives and health and morals of women and minor workers in the District of Columbia, and to establish a Minimum Wage Board, and define its powers and duties, and to provide for the fixing of minimum wages for such workers, and for other purposes.**

[*Act of Sept. 19, 1918, ch. 174, 40 Stat. L. 960.*]

[SEC. 1.] [**Women and minor workers — minimum wage — District of Columbia.**] That where used in this Act —

The term " Board " means the Minimum Wage Board created by section two;

The term " Commissioners " means the Commissioners of the District of Columbia;

The term " woman " includes only a woman of eighteen years of age or over;

The term " minor " means a person of either sex under the age of eighteen years;

The term " occupation " includes a business, industry, trade, or branch thereof, but shall not include domestic service. [*40 Stat. L. 960.*]

SEC. 2. [**" Minimum Wage Board " — creation — membership — quorum — vacancies.**] That there is hereby created a Board to be known as the " Minimum Wage Board," to be composed of three members to be appointed by the Commissioners of the District of Columbia. As far as practicable, the members shall be so chosen that one will be representative of employees, one representative of employers, and one representing the public.

The Commissioners shall make their first appointments hereunder within thirty days after this Act takes effect, and shall designate one of the three members first appointed to hold office until January first, nineteen hundred and nineteen; one to hold office until January first, nineteen hundred and twenty; and one to hold office until January first, nineteen hundred and twenty-one. On or before the first day of January of each year, beginning with the year nineteen hundred and nineteen, the Commissioners shall appoint a member to succeed the member whose term expires on such first day of January, and such new appointee shall hold office for the term of three years from such first day of January. Each member shall hold office until his successor is appointed and has qualified; and any vacancy that may occur in the membership of the Board shall be filled by appointment by the Commissioners for the unexpired portion of the term.

A majority of the members shall constitute a quorum to transact business, and the act or decision of such a majority shall be deemed the act or decision of the Board; and no vacancy shall impair the right of the remaining members to exercise all the powers of the Board. [*40 Stat. L. 961.*]

SEC. 3. [**Chairman of Board — secretary — salaries.**] That the first members appointed shall, within twenty days after their appointment, meet and organize the Board by electing one of their number as chairman and by choosing a secretary, who shall not be a member of the Board; and on or before the tenth day of January of each year thereafter the Board shall elect a chairman and choose a secretary for the ensuing year. The chairman and the secretary shall each hold

office until his successor is elected or chosen; but the Board may at any time remove the secretary. The secretary shall perform such duties as may be prescribed and receive such salary, not in excess of \$2,500 per annum, as may be fixed by the Board. None of the members shall receive any salary as such. The Board shall have power to employ agents and such other assistants as may be necessary for the proper performance of its duties: *Provided*, That until further authorization by Congress, the sum which it may expend, including the salary of the secretary, shall not exceed the sum of \$5,000. [40 Stat. L. 961.]

**SEC. 4. [Hearings by Board — witnesses — evidence — subpoenas.]** That at any public hearing held by the Board any person interested in the matter being investigated may appear and testify. Any member of the Board shall have power to administer oaths and the Board may require by subpoena the attendance and testimony of witnesses, the production of all books, registers and other evidence relative to any matters under investigation, at any such public hearing or at any session of any conference held as hereinafter provided. In case of disobedience to a subpoena the Board may invoke the aid of the Supreme Court of the District of Columbia in requiring the attendance and testimony of witnesses and the production of documentary evidence. In case of contumacy or refusal to obey a subpoena the court may issue an order requiring appearance before the Board, the production of documentary evidence, and the giving of evidence touching the matter in question, and any failure to obey such order of the court may be punished by such court as a contempt thereof. [40 Stat. L. 961.]

**SEC. 5. [Rules and regulations.]** That the Board is hereby authorized and empowered to make rules and regulations for the carrying into effect of this Act, including rules and regulations for the selection of members of the conferences hereinafter provided for and the mode of procedure thereof. [40 Stat. L. 962.]

**SEC. 6. [Reports by Board.]** That the Board shall, on or before the first day of January of the year nineteen hundred and nineteen, and of each year thereafter, make a report to the Commissioners of its work and the proceedings under this Act. [40 Stat. L. 962.]

**SEC. 7. [Appropriations to cover expenses.]** That there is hereby authorized to be appropriated, out of the revenues of the District of Columbia, for the fiscal year ending June thirtieth, nineteen hundred and nineteen, the sum of \$5,000, or so much thereof as may be necessary, to carry into effect the provisions of this Act. [40 Stat. L. 962.]

**SEC. 8. [Powers of Board — investigations — ascertainment of wages in different occupations — information by employers.]** That the Board shall have full power and authority: (1), To investigate and ascertain the wages of women and minors in the different occupations in which they are employed in the District of Columbia; (2), to examine, through any member or authorized representative, any book, pay roll or other record of any employer of women or minors that in any way appertains to or has a bearing upon the question of wages of any such women or minors; and (3), to require from such employer full and true statements of the wages paid to all women and minors in his employment.

Every employer shall keep a register of the names of the women and minors employed by him in any occupation in the District of Columbia, of the hours worked by each, and of all payments made to each, whether paid by the time or by the piece; and shall, on request, permit any member or authorized representative of the Board to examine such register.

To assist the Board in carrying out this Act the Commissioners shall at all times give it any information or statistics in their possession under the Act of Congress approved February twenty-fourth, nineteen hundred and fourteen, entitled "An Act to regulate the hours of employment and safeguard the health of females employed in the District of Columbia." (Public, numbered sixty, Sixty-third Congress.) [40 Stat. L. 962.]

**SEC. 9. [Standards of minimum wages declared.]** That the Board is hereby authorized and empowered to ascertain and declare, in the manner hereinafter provided, the following things: (a), Standards of minimum wages for women in any occupation within the District of Columbia, and what wages are inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals; and (b), standards of minimum wages for minors in any occupation within the District of Columbia, and what wages are unreasonably low for any such minor workers. [40 Stat. L. 962.]

**SEC. 10. [Conference — creation — membership — powers.]** That if, after investigation, the Board is of opinion that any substantial number of women workers in any occupation are receiving wages inadequate to supply them with the necessary cost of living and maintain them in health and protect their morals, it may call and convene a conference for the purpose and with the powers of considering and inquiring into and reporting on the subject investigated by the Board and submitted by it to such conference. The conference shall be composed of not more than three representatives of the employers in such occupation, of an equal number of representatives of the employees in such occupation, of not more than three disinterested persons representing the public, and of one or more members of the Board. The Board shall name and appoint all the members of the conference and designate the chairman thereof. Two-thirds of the members of the conference shall constitute a quorum, and the decision or recommendation or report of the conference on any subject submitted shall require a vote of not less than a majority of all its members.

The Board shall present to the conference all the information and evidence in its possession or control relating to the subject of the inquiry by the conference, and shall cause to be brought before the conference any witnesses whose testimony the Board deems material. [40 Stat. L. 962.]

**SEC. 11. [Recommendations and reports of conference.]** That after completing its consideration of and inquiry into the subject submitted to it by the Board, the conference shall make and transmit to the Board a report containing its findings and recommendations on such subject, including recommendations as to standards of minimum wages for women workers in the occupation under inquiry and as to what wages are inadequate to supply the necessary cost of living to women workers in such occupation and to maintain them in health and to protect their morals.

In its recommendations on a question of wages the conference (1) shall, where it appears that any substantial number of women workers in the occupation under inquiry are being paid by piece rates as distinguished from time rate, recommend minimum piece rates as well as minimum time rate and recommend such minimum piece rates as will, in its judgment, be adequate to supply the necessary cost of living to women workers in such occupation of average ordinary ability and to maintain them in health and protect their morals; and (2) shall, when it appears proper or necessary, recommend suitable minimum wages for learners and apprentices in such occupation and the maximum length of time any woman worker may be kept at such wages as a learner or apprentice, which wages shall be less than the regular minimum wages recommended for the regular women workers in such occupation. [40 Stat. L. 963.]

**SEC. 12. [Consideration of conference reports by Board — enforcement of recommendations.]** That, upon receipt of any report from any conference, the Board shall consider and review the recommendations, and may approve or disapprove any or all of such recommendations, and may resubmit to the same conference, or a new conference, any subject covered by any recommendations so disapproved.

If the Board approves any recommendations contained in any report from any conference, it shall publish a notice, once a week, for four successive weeks in a newspaper of general circulation printed in the District of Columbia, that it will, on a date and at a place named in the notice, hold a public hearing at which all persons in favor of or opposed to such recommendations will be heard.

After such hearing the Board may, in its discretion, make and render such an order as may be proper or necessary to adopt such recommendations and carry them into effect, requiring all employers in the occupation affected thereby to observe and comply with such order. Such order shall become effective sixty days after it is made. After such order becomes effective, and while it is effective, it shall be unlawful for any employer to violate or disregard any of its terms or provisions, or to employ any woman worker in any occupation covered by such order at lower wages than are authorized or permitted therein.

The Board shall, as far as is practicable, mail a copy of such order to every employer affected thereby; and every employer affected by any such order shall keep a copy thereof posted in a conspicuous place in each room in his establishment in which women workers are employed. [40 Stat. L. 963.]

**SEC. 13. [Physical capacity of worker impaired by age — wages.]** That for any occupation in which only a minimum time-rate wage has been established, the Board may issue to a woman whose earning capacity has been impaired by age or otherwise, a special license authorizing her employment at such wage less than such minimum time-rate wage as shall be fixed by the Board and stated in the license. [40 Stat. L. 963.]

**SEC. 14. [Inquiry into wages of minors — orders affecting — enforcement.]** That the Board may at any time inquire into wages of minors employed in any occupation in the District of Columbia, and determine suitable wages for them. When the Board has made such determination it may make such an order as may be proper or necessary to carry such determination into effect. Such order shall become effective sixty days after it is made; and after such order becomes effective and while it is effective it shall be unlawful for any employer in such

occupation to employ a minor at less wages than are specified or required in or by such order. [40 Stat. L. 963.]

**SEC. 15. [Separate inquiries by conference.]** That any conference may make a separate inquiry into and report on any branch of any occupation, and the Board may make a separate order affecting any branch of any occupation. [40 Stat. L. 964.]

**SEC. 16. [Reports of violations of Act.]** That the Board shall from time to time investigate and ascertain whether or not employers in the District of Columbia are observing and complying with its orders, and shall report to the corporation counsel of the District of Columbia all violations of this Act. [40 Stat. L. 964.]

**SEC. 17. [Questions of fact — determination by Board — appeals.]** That all questions of fact arising under the foregoing provisions of this Act shall, except as otherwise herein provided, be determined by the Board, and there shall be no appeal from the decision of the Board on any such question of fact; but there shall be a right of appeal from the Board to the Supreme Court of the District of Columbia from any ruling or holding on a question of law included or embodied in any decision or order of the Board; and, on the same question of law, from such court to the Court of Appeals of the District of Columbia. In all such appeals the corporation counsel shall appear for and represent the Board. [40 Stat. L. 964.]

**SEC. 18. [Violations of Act — punishment.]** That whoever violates this Act, whether an employer or his agent, or the director, officer, or agent of any corporation, shall be deemed guilty of a misdemeanor; and, upon conviction thereof, shall be punished by a fine of not less than \$25 nor more than \$100, or by imprisonment not less than ten days nor more than three months, or by both such fine and imprisonment. [40 Stat. L. 964.]

**SEC. 19. [Discharge of or discrimination against employees by employers — penalties.]** That any employer and his agent, or the director, officer, or agent of any corporation, who discharges or in any other manner discriminates against any employee because such employee has served or is about to serve on any conference, or has testified or is about to testify, or because such employer believes that said employee may serve on any conference or may testify in any investigation or proceedings under or relative to this Act, shall be deemed guilty of a misdemeanor; and, upon conviction thereof, shall be punished by a fine of not less than \$25 nor more than \$100. [40 Stat. L. 964.]

**SEC. 20. [Violations by agents of employers — liability of employers.]** That any act which, if done or omitted to be done by any agent or officer or director acting for such employer, would constitute a violation of this Act, shall also be held to be a violation by the employer and subject such employer to the liability provided for by this Act. [40 Stat. L. 964.]

**SEC. 21. [Prosecutions for violations — venue — procedure.]** That prosecutions for violations of this Act shall be on information filed in the police court of the District of Columbia by the corporation counsel. [40 Stat. L. 964.]

**SEC. 22. [Failure of employer to pay minimum wage — penalty.]** That if any woman worker is paid by her employer less than the minimum wage to which she is entitled under or by virtue of an order of the Board, she may recover in a civil action the full amount of such minimum wage, less any amount actually paid to her by the employer, together with such reasonable attorney's fees as may be allowed by the court; and any agreement for her to work for less than such minimum wage shall be no defense to such action. [40 Stat. L. 964.]

**SEC. 23. [Name of Act — purpose.]** That this Act shall be known as the "District of Columbia minimum-wage law." The purposes of the Act are to protect the women and minors of the District from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living; and the Act in each of its provisions and in its entirety shall be interpreted to effectuate these purposes. [40 Stat. L. 964.]

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**An Act Providing for the transportation from the District of Columbia of governmental employees whose services no longer are required.**

[Act of Jan. 7, 1919, ch. 4, 40 Stat. L. 1052.]

**[SEC. 1.] [Discharged governmental employees — war work — free transportation from District of Columbia.]** That the heads of the several executive departments and other governmental establishments in the District of Columbia are authorized to furnish to such civilian employees, receiving compensation, exclusive of the additional \$120, at the rate of not more than \$1,400 per annum or less than \$100 per annum, under their respective jurisdiction as have come to the District of Columbia since April sixth, nineteen hundred and seventeen, whose services are no longer required and whose employment has been or may be terminated by the Government without delinquency or misconduct on their part during the period from November eleventh, nineteen hundred and eighteen, to February twentieth, nineteen hundred and nineteen, inclusive, their actual railroad transportation, including sleeping-car accommodations, from the District of Columbia to the place from which they accepted employment or to their legal residence, or to such other place not a greater distance as the employee may elect. [40 Stat. L. 1052.]

**SEC. 2. [Application for transportation — time.]** That such transportation must be applied for within ten days after the termination of service and shall be used within five days after issuance unless an extension of time on account of illness be granted by the proper authority: *Provided*, That as to the employees whose services have been terminated during the period between November eleventh, nineteen hundred and eighteen, and the date of the passage of this Act, inclusive, the time within which transportation shall be applied for shall be twenty days from the date of the passage of this Act. Any person who shall sell, exchange, or transfer such transportation for the use of another shall be punished by a fine of not more than \$100. [40 Stat. L. 1052.]

**SEC. 3. [Appropriations for meeting expenses.]** That the expenses authorized by this Act shall be paid from the following appropriations for the fiscal year nineteen hundred and nineteen, which hereby are made available therefor:

For the War Department, from "Transportation of the Army and its supplies."

For the Navy Department, from "Pay, miscellaneous."

For all other executive departments and independent establishments, from the appropriations for the support of the services in which such persons are employed. [40 Stat. L. 1053.]

**SEC. 4. [Employees leaving before passage of Act — refund of cost of transportation.]** That any employee who would be entitled to transportation, including sleeping-car accommodation under this Act and who has left the District of Columbia prior to the passage of this Act, but not before December tenth, nineteen hundred and eighteen, upon application and presentation within sixty days after the passage of this Act of proper proof shall have refunded the cost of actual railroad transportation, including sleeping-car accommodation, from the District of Columbia to the place from which employment was accepted, or to their legal residence, or to such other place not a greater distance to which the employee may have gone: *Provided*, That payment to any employee for leave of absence not earned in proportion to the term of employment shall be deducted from the refund authorized in this section. [40 Stat. L. 1053.]

**SEC. 5. [Transportation as affected by various services rendered.]** That the provision made in this Act for the transportation of employees shall not be supplemented in any manner by the various services in which they are employed. [40 Stat. L. 1053.]

**SEC. 6. [Employees affected by Act.]** That the provisions made in this Act for the transportation of employees shall not apply to those who enter such service after the passage of this Act. [40 Stat. L. 1053.]

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**SEC. 11. [Compensation for injuries to government employees — District of Columbia.]** That all of the provisions of the Act of Congress approved September 7, 1916, entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," are hereby extended to employees of the government of the District of Columbia so far as they may be applicable, except to those members of the police and fire departments of the District of Columbia who are pensioned or pensionable under the provisions of the District of Columbia Appropriation Act approved September 1, 1916. Such compensation as the commission provided for in said Act may award to employees of the government of the District of Columbia shall be paid in the manner provided by law for the payment of the general expenses of the Government of the District of Columbia. For carrying out the provisions of this section, there is appropriated \$5,000; and the Commissioners of the District of Columbia shall submit annually to Congress, through the Secretary of the Treasury, estimates of appropriations necessary for the foregoing purpose. [41 Stat. L. 104.]

This is from the District of Columbia Appropriation Act of July 11, 1919, ch. 7.

For Act of Sept. 7, 1916, affected by this section, see 1918 Supp. Fed. Stat. Ann. 429.

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[SEC. 1.] \* \* \* [Housing for war needs — authority of President how long effective — disposition of property.] Section 5 of the Act entitled "An Act to authorize the President to provide housing for war needs," approved May 16, 1918, is hereby amended to read as follows:

"SEC. 5. That the power and authority granted herein shall cease with the termination of the present war as formally proclaimed by the President, except the power and authority to care for, rent, operate, and sell such property as remains undisposed of; to conclude and execute contracts or other obligations made or incurred during the war or in carrying out the provisions of this section; to collect the principal and interest of loans made or other sums due under obligations entered into under this Act; and to take such other steps as are necessary to protect the interests of the Government and to fulfill the obligations duly incurred in carrying out the powers granted by said Act. All property shall be sold at its fair market value as soon as can be advantageously done, and a reasonable effort shall be made to sell the houses direct to prospective individual home owners for their own occupancy before they are offered for sale in bulk or to speculative investors. Full power and authority is hereby given to sell and convey all such property remaining undisposed of after the termination of the present war. All deeds, contracts, or other instruments of conveyance executed by the United States Housing Corporation by its duly authorized officer or officers where the legal title to the property in question is in the name of said corporation, and by the United States of America by the Secretary of Labor where the title to the property in question is in the name of the United States of America, shall be conclusive evidence of the transfer of title to the property in question according to the purport of such deeds, contracts, or other instruments of conveyance, and in no case shall any purchaser or grantee thereunder be required to see to the application of any purchase money: *Provided, however,* That no sale or conveyance shall be made hereunder on credit without reserving a first lien on such property for the unpaid purchase money: *Provided further,* That in no case shall any such property be given away; nor shall rents be furnished free, but the rental charges shall be reasonable and just as between the tenants and the Government. The United States Housing Corporation (a corporation organized by authority of the President of the United States, pursuant to the provisions of an Act approved May 16, 1918, entitled 'An Act to authorize the President to provide housing for war needs,' and an Act approved June 4, 1918, entitled 'An Act making appropriations to supply additional urgent deficiencies in appropriations for the fiscal year ending June 30, 1918, on account of war expenses, and for other purposes') shall wind up its affairs and dissolve as soon as it has disposed of said property and performed the duties and obligations herein set forth: *Provided,* That the corporation shall report to Congress on December 31, 1919, and on June 30, 1920, all sales made and the amounts received therefrom together with a detailed statement of receipts and expenditures on account of the other activities authorized by law."

[41 Stat. L. 224.]

This is from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

For Act of May 16, 1918, sec. 5, here amended, see 1918 Supp. Fed. Stat. Ann. 444.

For Act of June 4, 1918, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 446.

[Compensation for injuries to Government employees — appropriation — claims of Shipping Board employees.] For the payment of compensation provided by "An Act to provide compensation for employees of the United States

suffering injuries while in the performance of their duties, and for other purposes," approved September 7, 1916, including medical, surgical, and hospital services, and supplies provided by section 9, and the transportation and burial expenses provided by sections 9 and 11, \$1,100,000, to remain available until expended: *Provided*, That the compensation heretofore or hereafter paid by the United States Shipping Board Emergency Fleet Corporation to or on account of employees for disability or death resulting from personal injuries sustained while in the performance of their duties shall be in full satisfaction of the claims of such employees or their legal representatives against the United States. [— *Stat. L.* —.]

This is from the Act of Dec. 24, 1919, ch. —, entitled "An Act Making appropriations to supply urgent deficiencies in appropriations for the Employees' Compensation Commission, the Bureau of War Risk Insurance, and the Public Health Service for the fiscal year ending June 30, 1920."

For Act of Sept. 7, 1916, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 429.

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## LABOR DEPARTMENT

*Act of March 1, 1919, ch. 86, 242.*

*Sec. 1. Purchases or Services Rendered for Department of Labor—Advertisements for Proposals—R. S. Sec. 3709 Construed, 242.*

[SEC. 1.] \* \* \* [Purchases or services rendered for Department of Labor—advertisements for proposals—R. S., sec. 3709 construed.] Hereafter section 3709 of the Revised Statutes of the United States shall not be construed to apply to any purchase or service rendered for the Department of Labor when the aggregate amount involved does not exceed the sum of \$25. [40 *Stat. L.* 1264.]

This is from the Legislative, Executive and Judicial Appropriation Act of March 1, 1919, ch. 86.

For R. S. sec. 3709, mentioned in the text, see 8 Fed. Stat. Ann. (2d ed.) 336; 6 Fed. Stat. Ann. (1st ed.) 93.

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## LANDLORD AND TENANT

See DISTRICT OF COLUMBIA

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## LEGAL TENDER

*Act of Dec. 24, 1919, ch. —, 242.*

*Sec. 1. Gold Certificates, 242.*

*2. Repeal of Conflicting Provisions, 242.*

**An Act To make gold certificates of the United States payable to bearer on demand legal tender.**

[*Act of Dec. 24, 1919, ch. —, — Stat. L. —.*]

[SEC. 1.] [Gold certificates.] That gold certificates of the United States payable to bearer on demand shall be and are hereby made legal tender in payment of all debts and dues, public and private. [— *Stat. L.* —.]

SEC. 2. [Repeal of conflicting provisions.] That all Acts or parts of Acts which are inconsistent with this Act are hereby repealed. [— *Stat. L.* —.]

**LIBERTY LOAN**See PUBLIC DEBT

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**LIBRARY**See EDUCATION

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**LIGHTS AND BUOYS***Act of Nov. 4, 1918, ch. 201, 243.**Sec. 1. Officers and Employees — Retirement Provisions and Pay, 243.*

[SEC. 1.] \* \* \* [Officers and employees — retirement provisions and pay.] Retired pay: For retired pay of officers and employees engaged in the field service or on vessels of the Lighthouse Service, except persons continuously employed in district offices and shops, \$30,000: *Provided*, That the retirement provisions and pay shall not apply to persons in the field service of the Lighthouse Service whose duties do not require substantially all their time. [40 *Stat. L. 1036.*]

This is from the "First Deficiency Appropriation Act, 1919," approved Nov. 4, 1918, ch. 201.

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**MAIL MATTER**See POSTAL SERVICE

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**MARINE CORPS**See CIVIL SERVICE; NAVY

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**MARSHALS**See JUDICIAL OFFICERS

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**MASTER AND SERVANT**See LABOR

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**MEDALS**See NAVY

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## MILITARY ACADEMY

*Act of March 4, 1919, ch. 124, 244.*

*Regimental Sergeant Major, 244.*

*Assistant Civilian Instructors in Gymnastics, etc., 244.*

*Technical and Scientific Supplies — Purchase, 244.*

*Sale of Unnecessary Materials, 244.*

**An Act Making appropriations for the support of the Military Academy for the fiscal year ending June 30, 1920, and for other purposes.**

*[Act of March 4, 1919, ch. 124, 40 Stat. L. 1336.]*

\* \* \* **[Regimental sergeant major.]** For pay of one regimental sergeant major, Infantry, \$864: *Provided*, That the enlisted man in the headquarters United States Corps of Cadets, performing that duty has the rank, pay, and allowances of that grade. *[40 Stat. L. 1339.]*

\* \* \* **[Assistant civilian instructors in gymnastics, etc.]** For pay of two expert assistant civilian instructors in military gymnastics, fencing, boxing, wrestling, and swimming, \$4,000: *Provided*, That these civilian instructors employed in the department of modern languages and the department of tactics shall be entitled to public quarters and to the same allowances with respect to fuel and light as those of a first lieutenant when occupying public quarters. *[40 Stat. L. 1339.]*

\* \* \* **[Technical and scientific supplies — purchase.]** That all technical and scientific supplies for the departments of instruction of the Military Academy shall be purchased by contract or otherwise as the Secretary of War may deem best. *[40 Stat. L. 1344.]*

\* \* \* **[Sale of unnecessary materials.]** That hereafter, when any machinery, apparatus implements, supplies, or materials which have been heretofore or may hereafter be purchased or acquired from appropriations made for the support of the United States Military Academy are no longer needed or are no longer serviceable, they may be sold in such manner as the superintendent may direct; and that the proceeds shall be turned into the Treasury as miscellaneous receipts. *[40 Stat. L. 1347.]*

## MILITIA

*Act of July 11, 1919, ch. 8, 245.*

*Clothing and Equipment Material — Issuance by Secretary of War, 245.*

*Number of the National Guard — Limitation on Increments, 245.*

*Enlistments in the National Guard, 245.*

*National Guard of District Columbia — Officers — Qualifications — Retirement — Vacancies, 246.*

## CROSS-REFERENCES

See also NAVY; WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

\* \* \* **[Clothing and equipment material — issuance by Secretary of War.]** The Secretary of War is hereby authorized to issue from stores now on hand and purchased for the United States Army such articles of clothing and equipment material as may be needed by the National Guard organized under the provisions of the Act entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," approved June 3, 1916. This issue shall be made without charge against militia appropriations and shall be reimbursed in kind for all Federal property brought into service by State troops. \* \* \* *[41 Stat. L. 126.]*

This and the three paragraphs which follow are from the Army Appropriation Act of July 11, 1919, ch. 8.

For the section of the Act of June 3, 1916, mentioned in the text, which had to do with the National Guard, see 6 Fed. Stat. Ann. (2d ed.) 427 et seq.; 1918 Supp. Fed. Stat. Ann. (1st ed.) 456.

\* \* \* **[Number of the National Guard — limitation on increments.]** That the provisions of section 62 of the Act entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," approved June 3, 1916, shall be considered fulfilled if the first strength mentioned therein be attained by June 30, 1920, and the other increments provided therein be attained by successive years thereafter: *Provided further*, That this shall not prevent any State from compliance with the provisions of section 62. *[41 Stat. L. 127.]*

This is from the Army Appropriation Act of July 11, 1919, ch. 8.

For Act of June 3, 1916, sec. 62, mentioned in the text, see 6 Fed. Stat. Ann. (2d ed.) 438; 1918 Supp. Fed. Stat. Ann. (1st ed.) 458b.

\* \* \* **[Enlistments in the National Guard.]** That section 69 of the Act entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," approved June 3, 1916, be, and is hereby, amended to read as follows:

"SEC. 69. Enlistments in the National Guard: Hereafter the period of enlistment in the National Guard shall be the same as is, or may be, prescribed, for the Regular Army: *Provided*, That all persons who have served as enlisted men in the Army of the United States, or the Organized Militia of the several States, subsequent to April 6, 1917, and who have been honorably discharged from such service, may within six months after such discharge or within six months after the passage of this Act, enlist in the National Guard for a period of one year and may reenlist for like periods, and that such enlistments shall

not be counted in computing the proportion authorized to be enlisted for one year to conform to the period of enlistment prescribed for the Regular Army: *Provided further*, That enlisted men in the National Guard of the several States now serving under contracts providing for a six-year period of enlistment—three years in an active organization and the remaining three years in the National Guard Reserve—shall be afforded an opportunity to enlist for the periods specified above, and upon entering into a new contract of enlistment for a period of three years under this authority shall be given credit for the period served under the old enlistment contract and the previous enlistment shall in such cases and with the consent of the enlisted man be canceled.” [41 Stat. L. 127.]

This is from the Army Appropriation Act of July 11, 1919, ch. 8.

For Act of June 3, 1916, sec. 69, see 6 Fed. Stat. Ann. (2d ed.) 439; 1918 Supp. Fed. Stat. Ann. (1st ed.) 458f.

\* \* \* [National Guard of District of Columbia — officers — qualifications — retirement — vacancies.] That to comply with the provisions of section 110, of the Act entitled “An Act for making further and more effectual provision for the national defense, and for other purposes,” approved June 3, 1916, it is hereby provided that staff officers, including officers of the Pay, Inspection, Subsistence, and Medical Departments, appointed in the National Guard of the District of Columbia shall have had previous military experience and shall hold their positions until they shall have reached the age of sixty-four years, unless retired prior to that time by reason of resignation, disability, or for cause to be determined by a court-martial legally convened for that purpose, and that vacancies among said officers shall be filled by appointment from the officers of the National Guard of the District of Columbia. [41 Stat. L. 127.]

This is from the Army Appropriation Act of July 11, 1919, ch. 8.

For Act of June 3, 1916, sec. 110, mentioned in the text, see 6 Fed. Stat. Ann. (2d ed.) 443; 1918 Supp. Fed. Stat. Ann. (1st ed.) 458r.

## MINERAL LANDS, MINES AND MINING

*Act of Oct. 5, 1918, ch. 181, 247.*

- Sec. 1. Act Affecting Production, Conservation and Distribution of Minerals — National Security and Defense, 247.*
- 2. Authority of President — Purchases — Importations, 248.*
- 3. Requisition of Mines and Minerals — Compensation — Statements — Rules, 248.*
- 4. Violation of Act, 249.*
- 5. Appropriation to Meet Expenses, 249.*
- 6. Revolving Fund, 249.*
- 7. Delegation by President of Authority Conferred — Salaries and Compensation, 250.*
- 8. Persons Pecuniarily Interested in Transactions — Eligibility for Office, 250.*
- 9. Creation of Corporations to Carry Out Purposes of Act, 250.*
- 10. Effect of Proclamation of Peace — Termination of Transactions, 251.*
- 11. Employment under Act — Exemption from Military Service, 251.*
- 12. Invalidity of Part of Act — Effect on Remainder, 251.*

*Res. of Jan. 25, 1919, No. 49, ch. 12, 251.*

*Mining Claims — Time for Filing Notices — Alaska, 251.*

*Act of Feb. 25, 1919, ch. 23, 252.*

- Sec. 1. Lignite Coals and Peat — Experiments and Investigations, 252.*
- 2. Disposal of Property Used for Purpose of Making Investigations — Report to Congress, 252.*

*Res. of Feb. 28, 1919, No. 55, ch. 85, 252.*

*Mining Claims — Assessment Work — Suspension — Alaska, 252.*

*Act of July 19, 1919, ch. 24, 253.*

- Dec. 1, Bureau of Mines — Employees — Detail — Expenses or Per Diem, 253.*
- Bureau of Mines — Headquarters of Mine Rescue Cars — Site of Experimental Mine — Plant for Studying Explosives, 253.*

*Res. of Aug. 15, 1919, No. 10, ch. 49, 253.*

- Sec. 1. Mining Claims — Assessment Work — Suspension, 253.*
- 2. Previous Legislation How Affected, 254.*

*Res. of Nov. 13, 1919, No. 20, ch. 106, 254.*

*Mining Claims — Annual Assessment Work — Suspension, 254.*

### CROSS-REFERENCES

See also **AGRICULTURE; INDIANS; PUBLIC CONTRACTS; WATERS.**

**An Act To provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of those ores, metals, and minerals which have formerly been largely imported, or of which there is or may be an inadequate supply.**

[*Act of Oct. 5, 1918, ch. 181, 40 Stat. L. 1009.*]

[**SEC. 1.**] [**Act affecting production, conservation and distribution of minerals — national security and defense.**] That by reason of the existence of a state of war, it is essential to the national security and defense, and to the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to provide for an adequate and increased supply, to facilitate the production, and to provide for an equitable, economical, and better distribution of

the following-named mineral substances and ores, minerals, intermediate metallurgical products, metals, alloys, and chemical compounds thereof, to wit: Antimony, arsenic, ball clay, bismuth, bromine, cerium, chalk, chromium, cobalt, corundum, emery, fluorspar, ferrosilicon, fullers' earth, graphite, grinding pebbles, iridium, kaolin, magnesite, manganese, mercury, mica, molybdenum, osmium, sodium, platinum, palladium, paper clay, phosphorus, potassium, pyrites, radium, sulphur, thorium, tin, titanium, tungsten, uranium, vanadium, and zirconium, as the President may, from time to time, determine to be necessary for the purposes aforesaid, and as to which there is at the time of such determination, a present or prospective inadequacy of supply. The aforesaid substances mentioned in any such determination are hereinafter referred to as necessities. [40 Stat. L. 1009.]

**SEC. 2. [Authority of President — purchases — importations.]** That the President is authorized from time to time to purchase such necessities and to enter into, to accept, to transfer, and to assign contracts for the production or purchase of same, to provide storage facilities for and store the same, to provide or improve transportation facilities, and to use, distribute, or allocate said necessities, or to sell the same at reasonable prices, but such sales made during the war shall not be at a price less than the purchase or cost of production thereof: *Provided*, That no such contract of purchase shall cover a period longer than two years after the termination of the war.

The President is further authorized, upon finding that importation into the United States of any of the necessities covered by this Act is likely to result in a loss to the United States on any necessities which it may have acquired hereunder, to ascertain, fix, and proclaim such rate of duty upon such imported necessities as shall be sufficient to adequately protect the United States from any such loss.

The funds provided by section six hereof shall be used in carrying out the powers granted by this section, and all moneys received by the United States from or in connection with the disposal of such necessities, shall be used as a revolving fund for further carrying out the purposes of this Act. Any balance of such moneys remaining when the object of this Act has been accomplished, shall, as collected, received, and on hand and available, be covered into the Treasury as miscellaneous receipts. [40 Stat. L. 1009.]

**SEC. 3. [Requisition of mines and minerals — compensation — statements — rules.]** That the President is authorized to requisition and take over any of said necessities and to use, distribute, allocate, or sell the same; and also to requisition and take over any undeveloped or insufficiently developed or operated idle land, deposit, or mine, and any idle or partially operated smelter, or plant, or part thereof, producing or, in his judgment, capable of producing said necessities, or either of them, and to develop and operate such mine or deposit or such smelter or plant, either through the agencies hereinafter mentioned, or under lease or royalty agreement, or in any other manner, and to store, use, distribute, allocate, or sell the products thereof: *Provided*, That no ores or metals, the principal money value of which consists in metals or minerals other than those specifically enumerated in section one hereof, shall be subject to requisition under the provisions of this Act. Whenever the President shall determine that the further use or operation by the Government of any such land, deposit, mine, smelter, or plant, or part thereof, so acquired, is no longer essential for the objects aforesaid,



the same shall be returned to the person, firm, or corporation entitled thereto. The United States shall make just compensation, determined by the President, for the taking over, use, occupation, or operation by the Government of any such necessities, or any such land, deposit, mine, smelter, or plant, or part thereof. If the compensation so determined be unsatisfactory to the person, firm, or corporation entitled thereto, such person, firm, or corporation shall be paid seventy-five per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as added to said seventy-five per centum will make up such amount as will be just compensation, in the manner provided by section twenty-four, paragraph twenty, and section one hundred and forty-five, of the Judicial Code.

The President is authorized to require statements and reports, to examine books and papers, and to prescribe such rules and regulations as he may deem appropriate for carrying out the purposes of this Act. The fund provided by section six hereof may be used in carrying out the purposes of this Act, and all moneys received by the United States from or in connection with the use, operation, or disposal of any such necessities, land, deposit, mine, smelter, or plant, or part thereof, shall be used as a revolving fund for further carrying out the purposes of this Act. Any balance of such moneys remaining when the objects of this Act have been accomplished, shall, as collected, received, and on hand and available, be covered into the Treasury as miscellaneous receipts. [40 Stat. L. 1010.]

For Jud. Code, sec. 24, par. 20, see 4 Fed. Stat. Ann. (2d ed.) 1059; 1912 Supp. Fed. Stat. Ann. 140.

For Jud. Code, sec. 145, see 5 Fed. Stat. Ann. (2d ed.) 649; 1912 Supp. Fed. Stat. Ann. 200.

**SEC. 4. [Violation of Act.]** That any person who shall neglect or refuse to comply with any order or requisition made by the President pursuant to the provisions of this Act, or who shall obstruct or attempt to obstruct the enforcement of or the compliance with any such requisition or order, or who shall violate any of the provisions of this Act, or any rule or regulation adopted hereunder, shall, upon conviction, be fined not exceeding \$5,000, or be imprisoned for not more than two years, or both. [40 Stat. L. 1010.]

**SEC. 5. [Appropriation to meet expenses.]** That the sum of \$500,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be available until June thirtieth, nineteen hundred and nineteen, for the payment of all administrative expenses under this Act, including personal services, traveling and subsistence expenses, the payment of rent, the purchase of equipment, supplies, postage, printing, publications, and such other articles, both in the District of Columbia and elsewhere, as the President may deem essential and proper. [40 Stat. L. 1010.]

**SEC. 6. [Revolving fund.]** That the sum of \$50,000,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, which, together with all moneys received from time to time under the provisions of this Act, all of which shall be credited to said appropriation, shall be used as a revolving fund for carrying out the objects of this Act, and for the purpose of making all payments and disbursements, including just compensation under section three, by this Act authorized: *Provided*, That no part of this appropriation shall be

expended for the purposes described in the last preceding section: *Provided further*, That a detailed report of all operations under this Act, including all receipts and disbursements, shall be filed with the Secretary of the Senate and Clerk of the House of Representatives on or before the twenty-fifth day of each month, covering the preceding month's operation. Any balance of said revolving fund remaining when the objects of this Act have been accomplished, shall, as collected, received, and on hand and available, be covered into the Treasury as miscellaneous receipts. [40 Stat. L. 1010.]

**SEC. 7. [Delegation by President of authority conferred — salaries and compensation.]** That the President is authorized to exercise each, every, or any power and authority hereby vested in him, and to expend the moneys herein appropriated or provided for, or any part or parts thereof, by and through such officer or officers, department or departments, board or boards, agent, agents, or agencies as he shall create or designate, from time to time, for the purpose. He may fix the reasonable compensation for the performance of such services, but no official or employee of the United States shall receive any additional compensation for such services except as now permitted by law: *Provided*, That no person employed under the provisions of this Act shall be paid any salary or compensation in excess of that paid for similar or like services rendered in executive departments of the Government. [40 Stat. L. 1011.]

**SEC. 8. [Persons pecuniarily interested in transactions — eligibility for office.]** No person having a pecuniary interest in any transaction in pursuance of this Act shall have any official connection under this Act with such transaction. Any person violating this provision shall forfeit to the Government all proceeds which he shall have received from such transaction, and upon due conviction of such violation shall be fined not exceeding \$10,000 or imprisoned not exceeding ten years. [40 Stat. L. 1011.]

**SEC. 9. [Creation of corporations to carry out purposes of Act.]** That the President is authorized, if in his judgment such action be necessary or useful for the objects of this Act, to form one or more corporations under the laws of any State, Territory, District, or possession of the United States, for the purpose of carrying out the powers or any of the powers hereby authorized. The capital stock of any such corporation shall be such as the President may determine, but the total capital stock for all corporations so formed shall not exceed in the aggregate the appropriation of \$50,000,000, made by section six hereof. Said appropriation, or any part thereof, may be used by the President in subscribing on behalf of the United States, through such person or persons as he may designate, to the capital stock of such corporation or corporations, and the capital and assets of any such corporation or corporations, together with all additions thereto under sections two and three hereof, may be used in carrying out the objects of this Act. The directorate and organization of such corporation or corporations shall be such as the President may prescribe, and such corporation or corporations shall have all such charter powers as may be deemed necessary or desirable by the President to enable it or them to accomplish the objects of this Act. The capital stock of any such corporation or corporations shall be held and voted for the exclusive benefit of the United States, through such person or persons as the President may designate. [40 Stat. L. 1011.]

**SEC. 10. [Effect of proclamation of peace — termination of transactions.]** Upon the proclamation of peace the President shall proceed as rapidly as possible to wind up and terminate all transactions under this Act, and to dispose as fast as practicable of all property acquired thereunder, and after said proclamation of peace no contracts shall be made, property acquired, or other transaction performed under this Act except such as shall be necessary for the purpose of this section and incidental thereto, and two years after such proclamation of peace this Act shall cease to have effect and all powers conferred thereby shall end: *Provided*, That the termination of this Act shall not prevent the subsequent collection of any moneys due the United States, nor shall it affect any act done or any right or obligation accrued or accruing, or any suit or proceeding had or commenced before such termination, but all such collections, rights, obligations, suits and proceedings shall continue as if this Act had not terminated, and any offense committed or liability incurred prior thereto shall be prosecuted in the same manner and with the same punishment and effect as if this Act had not terminated. [40 Stat. L. 1011.]

**SEC. 11. [Employment under Act — exemption from military service.]** That employment under the provisions of this Act shall not exempt any person from military service under the provisions of the selective draft law approved May eighteenth, nineteen hundred and seventeen, or any Act amendatory thereto. [40 Stat. L. 1012.]

For Act of May 18, 1917, see 9 Fed. Stat. Ann. (2d ed.) 1136.

**SEC. 12. [Invalidity of part of Act — effect on remainder.]** That if any section or provision of this Act shall be declared invalid for any reason whatsoever, such invalidity shall not be construed to affect the validity of any other section or provision hereof. [40 Stat. L. 1012.]

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**Joint Resolution To amend Senate joint resolution numbered seventy-eight, approved October fifth, nineteen hundred and seventeen, entitled "Joint resolution to suspend requirements of the annual assessment work on mining claims during the year nineteen hundred and seventeen and nineteen hundred and eighteen."**

[Res. of Jan. 25, 1919, No. 49, ch. 12, 40 Stat. L. 1055.]

**[Mining claims — time for filing notices — Alaska.]** That the provisions of Senate joint resolution, approved October fifth, nineteen hundred and seventeen, be amended so as to provide that the time for filing notices to hold said mining claims in the Territory of Alaska, under the said resolution, be, and the same is hereby, extended to the first day of April, nineteen hundred and nineteen. [40 Stat. L. 1055.]

For Res. of Oct. 5, 1917, here amended, see 1918 Supp. Fed. Stat. Ann. 461.

**An Act Authorizing the Secretary of the Interior to make investigations, through the Bureau of Mines, of lignite coals and peat, to determine the practicability of their utilization as a fuel and in producing commercial products.**

[*Act of Feb. 25, 1919, ch. 23, 40 Stat. L. 1154.*]

[**SEC. 1. [Lignite coals and peat — experiments and investigations.]** That the Secretary of the Interior is hereby authorized and directed to make experiments and investigations, through the Bureau of Mines, of lignite coals and peat, to determine the commercial and economic practicability of their utilization in producing fuel oil, gasoline substitutes, ammonia, tar, solid fuels, gas for power and other purposes; and there is hereby appropriated, out of the funds in the Treasury not otherwise appropriated, the sum of \$100,000, or so much thereof as may be needed, to conduct such experiments and investigations, including personal services in the District of Columbia and elsewhere, and including supplies, equipment, expenses of traveling and subsistence, and for every other expense incident to this work. [*40 Stat. L. 1154.*]

**SEC. 2. [Disposal of property used for purpose of making investigations — report to Congress.]** The Secretary of the Interior is authorized and directed to sell or otherwise dispose of any property, plant, or machinery purchased or acquired under the provisions of this Act, as soon as the experiments and investigations hereby authorized have been concluded, and report the results of such experiments and investigations to Congress. [*40 Stat. L. 1154.*]

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**Joint Resolution To suspend the legal requirements of assessment work on mining claims in Alaska for the years nineteen hundred and seventeen, nineteen hundred and eighteen, and nineteen hundred and nineteen, and extending to that Territory the provisions of public resolution numbered ten, Sixty-fifth Congress, approved July seventeenth, nineteen hundred and seventeen, and public resolution numbered twelve, Sixty-fifth Congress, approved October fifth, nineteen hundred and seventeen, as amended, and for other purposes.**

[*Res. of Feb. 28, 1919, No. 55, ch. 85, 40 Stat. L. 1213.*]

[**Mining claims — assessment work — suspension — Alaska.**] That the provisions of public resolution numbered ten, Sixty-fifth Congress, approved July seventeenth, nineteen hundred and seventeen, and the provisions of public resolution numbered twelve, Sixty-fifth Congress, approved October fifth, nineteen hundred and seventeen, and amendments thereto, be, and they are hereby, extended to the Territory of Alaska. The laws requiring assessment work to be made upon mining claims in the Territory of Alaska for the years nineteen hundred and seventeen, nineteen hundred and eighteen, and nineteen hundred and nineteen, are hereby suspended for such period; and no forfeiture or relocation of any mining claim or mining location in said Territory shall be permitted or adjudged for failure to do or have done the annual assessment work thereon for either of said years; and no mining claim or location therein shall be held to be forfeited or subject to relocation for any failure to have done the annual assessment work thereon where the owner or anyone for him complied

with the provisions of public resolution numbered ten, Sixty-fifth Congress, approved July seventeenth, nineteen hundred and seventeen, or public resolution numbered twelve, Sixty-fifth Congress, approved October fifth, nineteen hundred and seventeen, and amendments thereto. [40 Stat. L. 1213.]

For Res. of July 17, 1917, here extended to Alaska, see 1918 Supp. Fed. Stat. Ann. 460.

For Res. of Oct. 5, 1917, see 1918 Supp. Fed. Stat. Ann. 461.

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[SEC. 1.] \* \* \* [Bureau of mines — employees — detail — expenses or per diem.] Persons employed during the fiscal year 1920 in field work, outside of the District of Columbia, under the Bureau of Mines, may be detailed temporarily for service in the District of Columbia, for purposes of preparing results of their field work; all persons so detailed shall be paid in addition to their regular compensation only their actual traveling expenses or per diem in lieu of subsistence in going to and returning therefrom: *Provided*, That nothing herein shall prevent the payment to employees of the Bureau of Mines their necessary expenses or per diem, in lieu of subsistence while on temporary detail in the District of Columbia, for purposes only of consultation or investigations on behalf of the United States. All details made hereunder, and the purposes of each, during the preceding fiscal year, shall be reported in the annual estimates of appropriations to Congress at the beginning of each regular session thereof. [41 Stat. L. 199.]

This and the following paragraph are from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

\* \* \* [Bureau of Mines — headquarters of mine rescue cars — site of experimental mine — plant for studying explosives.] For purchase or lease of necessary land, where and under such conditions as the Secretary of the Interior may direct, for headquarters of mine rescue cars and construction of necessary railway sidings and housing for the same, or as the site of an experimental mine and a plant for studying explosives, \$1,000: *Provided*, That the Secretary of the Interior is authorized to accept any suitable land or lands, buildings, or improvements, that may be donated for said purpose and to enter into leases for periods not exceeding ten years, subject to annual appropriations by Congress. [41 Stat. L. 199.]

This is from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

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**Joint Resolution To suspend the requirements of annual assessment work on certain mining claims during the year 1919.**

[Res. of Aug. 15, 1919, No. 10, ch. 49, 41 Stat. L. 279.]

[SEC. 1.] [Mining claims — assessment work — suspension.] That the provision of section 2324 of the Revised Statutes of the United States which requires on each mining claim located, and until a patent has been issued therefor, not less than \$100 worth of labor to be performed or improvements aggregating such amount to be made during each year, be, and the same is hereby, suspended during the calendar year 1919: *Provided*, That no such suspension shall be granted to any one claimant for more than five claims: *Provided*, That

every claimant of any such mining claim in order to obtain the benefits of this resolution shall file or cause to be filed in the office where the location notice or certificate is recorded, on or before December 31, 1919, a notice of his desire to hold said mining claim under this resolution. [41 Stat. L. 279.]

For R. S. sec. 2324, mentioned in the text, see 6 Fed. Stat. Ann. (2d ed.) 533; 5 Fed. Stat. Ann. (1st ed.) 19.

**SEC. 2. [Previous legislation how affected.]** That this resolution shall not be construed to alter, modify, amend, or repeal the public resolution entitled "Joint resolution to relieve the owners of mining claims who have been mustered into the military or naval service of the United States as officers or enlisted men from performing assessment work during the term of such service," approved July 17, 1917. [41 Stat. L. 280.]

For Res. of July 17, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 461.

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**Joint Resolution To suspend the requirements of annual assessment work on mining claims during the year 1919.**

[Res. of Nov. 13, 1919, No. 20, ch. 106, 41 Stat. L. 354.]

**[Mining claims — annual assessment work — suspension.]** That the provision of section 2324 of the Revised Statutes of the United States, which requires on each mining claim located and until a patent has been issued therefor, not less than \$100 worth of labor to be performed, or improvements aggregating such amount to be made each year, be, and the same is hereby suspended as to all mining claims in the United States, including Alaska, during the calendar year 1919: *Provided*, That every claimant of any such mining claim in order to obtain the benefits of this resolution shall file or cause to be filed in the office where the location notice or certificate is recorded on or before December 31, 1919, a notice of his desire to hold said mining claim under this resolution. [41 Stat. L. 354.]

For R. S. sec. 2324, mentioned in the text, see 6 Fed. Stat. Ann. (2d ed.) 533; 5 Fed. Stat. Ann. (1st ed.) 19.

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## MINIMUM WAGE

See LABOR.

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## MORATORIUM

See SOLDIERS' AND SAILORS' CIVIL RELIEF.

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## MOTOR VEHICLES

See CRIMINAL LAW.

## NATIONAL BANKS

*Act of Sept. 26, 1918, ch., 177, 256.*

*Sec. 1. Federal Reserve Act — Directors of Class A and Class B — How Chosen — Sec. 4 Amended, 256.*

*2. Powers of Federal Reserve Board — Permit to National Banks to Act as Trustees, etc.— Authority Granted Banks How Exercised — Sec. 11 (k) Amended, 257.*

*3. Note Issues — Regulations — Printing — Sec. 16 Amended, 258.*

*4. Reserves Required by Member Banks — Sec. 19 Amended, 259.*

*5. Bank Examiners, Officers, Directors and Employees — Fees and Gratuities — Dealings between Banks and Directors — Sec. 22 Amended, 259.*

*7. Falsely Certifying Checks — Embezzlement, etc.— R. S. Secs. 5208, 5209 Amended, 261.*

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*Sec. 1. Consolidation of National Banking Associations — Terms and Conditions — Rights of Shareholders, 262.*

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*Sec. 1. Comptroller's Office — Chief of Examining Division — National Bank Examiner, 263.*

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*3. Federal Reserve Banks — Discounts for Member Banks — Amount — Security — Sec. 11 Amended, 264.*

*4. Circulating Bank Notes — Printing — Denominations — Contents — R. S. Sec. 5172 Amended, 265.*

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*Sec. 1. Limit to Liabilities Which May Be Incurred by Any One Person, etc.— R. S. Sec. 5200 Amended, 266.*

*2. Limit upon Indebtedness to Be Incurred — R. S. Sec. 5202 Amended, 267.*

*Act of Dec. 24, 1919, ch. —, 268.*

*Federal Reserve Act — New Section — Corporations to Do Foreign Banking Business — Creation — Powers — Rights and Liabilities of Officers and Stockholders, 268.*

**An Act To amend and reenact sections four, eleven, sixteen, nineteen, and twenty-two of the Act approved December twenty-third, nineteen hundred and thirteen, and known as the Federal reserve Act, and sections fifty-two hundred and eight and fifty-two hundred and nine, Revised Statutes.<sup>1</sup>**

*[Act of Sept. 26, 1918, ch. 177, 40 Stat. L. 967.]*

[SEC. 1.] **[Federal Reserve Act — directors of Class A and Class B — how chosen — sec. 4 amended.]** That section four of the Act approved December twenty-third, nineteen hundred and thirteen, known as the Federal reserve Act, be amended and reenacted by striking out that part of such section which reads as follows:

“Directors of Class A and Class B shall be chosen in the following manner:

“The chairman of the board of directors of the Federal reserve bank of the district in which the bank is situated or, pending the appointment of such chairman, the organization committee shall classify the member banks of the district into three general groups or divisions. Each group shall contain as nearly as may be one-third of the aggregate number of the member banks of the district, and shall consist, as nearly as may be, of banks of similar capitalization. The groups shall be designated by number by the chairman.

“At a regularly called meeting of the board of directors of each member bank in the district it shall elect by ballot a district reserve elector and shall certify his name to the chairman of the board of directors of the Federal reserve bank of the district. The chairman shall make lists of the district reserve electors thus named by banks in each of the aforesaid three groups and shall transmit one list to each elector in each group.

“Each member bank shall be permitted to nominate to the chairman one candidate for director of Class A and one candidate for director of Class B. The candidates so nominated shall be listed by the chairman, indicating by whom nominated, and a copy of said list shall, within fifteen days after its completion, be furnished by the chairman to each elector.

“Every director shall, within fifteen days after the receipt of the said list, certify to the chairman his first, second, and other choices of a director of Class A and Class B, respectively, upon a preferential ballot, on a form furnished by the chairman of the board of directors of the Federal reserve bank of the district. Each elector shall make a cross opposite the name of the first, second, and other choices for a director of Class A and for a director of Class B, but shall not vote more than one choice for any one candidate,” and by substituting therefor the following:

“Directors of Class A and Class B shall be chosen in the following manner:

“The Federal Reserve Board shall classify the member banks of the district into three general groups or divisions, designating each group by number. Each group shall consist as nearly as may be of banks of similar capitalization. Each member bank shall be permitted to nominate to the chairman of the board of directors of the Federal reserve bank of the district one candidate for director of Class A and one candidate for director of Class B. The candidates so nominated shall be listed by the chairman, indicating by whom nominated, and a copy of said list shall, within fifteen days after its completion, be furnished

<sup>1</sup> For Act of Dec. 23, 1913, see 6 Fed. Stat. Ann. (2d ed.) 817; 1914 Supp. Fed. Stat. Ann. 260.

For R. S. secs. 5208, 5209, here amended, see 6 Fed. Stat. Ann. (2d ed.) 769, 779; 5 Fed. Stat. Ann. (1st ed.) 144, 145.



by the chairman to each member bank. Each member bank by a resolution of the board or by an amendment to its by-laws shall authorize its president, cashier, or some other officer to cast the vote of the member bank in the elections of Class A and Class B directors.

“Within fifteen days after receipt of the list of candidates the duly authorized officer of a member bank shall certify to the chairman his first, second, and other choices for director of Class A and Class B, respectively, upon a preferential ballot upon a form furnished by the chairman of the board of directors of the Federal reserve bank of the district. Each such officer shall make a cross opposite the name of the first, second, and other choices for a director of Class A and for a director of Class B, but shall not vote more than one choice for any one candidate. No officer or director of a member bank shall be eligible to serve as a Class A director unless nominated and elected by banks which are members of the same group as the member bank of which he is an officer or director.

“Any person who is an officer or director of more than one member bank shall not be eligible for nomination as a Class A director except by banks in the same group as the bank having the largest aggregate resources of any of those of which such person is an officer or director.” [40 Stat. L. 967.]

For Federal Reserve Act, sec. 4, as originally enacted, see 6 Fed. Stat. Ann. (2d ed.) 820; 1914 Supp. Fed. Stat. Ann. 263.

**SEC. 2. [Powers of Federal Reserve Board — permit to national banks to act as trustees, etc.— authority granted banks how exercised — sec. 11(k) amended.]** That section eleven (k) of the Federal reserve Act be amended and reenacted to read as follows:

“(k) To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

“Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this Act.

“National banks exercising any or all of the powers enumerated in this subsection shall segregate all assets held in any fiduciary capacity from the general assets of the bank and shall keep a separate set of books and records showing in proper detail all transactions engaged in under authority of this subsection. Such books and records shall be open to inspection by the State authorities to the same extent as the books and records of corporations organized under State law which exercise fiduciary powers, but nothing in this Act shall be construed as authorizing the State authorities to examine the books, records, and assets of the national bank which are not held in trust under authority of this subsection.

“No national bank shall receive in its trust department deposits of current funds subject to check or the deposit of checks, drafts, bills of exchange, or other items for collection or exchange purposes. Funds deposited or held in trust by

the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Federal Reserve Board.

"In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank.

"Whenever the laws of a State require corporations acting in a fiduciary capacity, to deposit securities with the State authorities for the protection of private or court trust, national banks so acting shall be required to make similar deposits and securities so deposited shall be held for the protection of private or court trusts, as provided by the State law.

"National banks in such cases shall not be required to execute the bond usually required of individuals if State corporations under similar circumstances are exempt from this requirement.

"National banks shall have power to execute such bond when so required by the laws of the State.

"In any case in which the laws of a State require that a corporation acting as trustee, executor, administrator, or in any capacity specified in this section, shall take an oath or make an affidavit, the president, vice president, cashier, or trust officer of such national bank may take the necessary oath or execute the necessary affidavit.

"It shall be unlawful for any national banking association to lend any officer, director, or employee any funds held in trust under the powers conferred by this section. Any officer, director, or employee making such loan, or to whom such loan is made, may be fined not more than \$5,000, or imprisoned not more than five years, or may be both fined and imprisoned, in the discretion of the court.

"In passing upon applications for permission to exercise the powers enumerated in this subsection, the Federal Reserve Board may take into consideration the amount of capital and surplus of the applying bank, whether or not such capital and surplus is sufficient under the circumstances of the case, the needs of the community to be served, and any other facts and circumstances that seem to it proper, and may grant or refuse the application accordingly: *Provided*, That no permit shall be issued to any national banking association having a capital and surplus less than the capital and surplus required by State law of State banks, trust companies, and corporations exercising such powers." [40 Stat. L. 968.]

For Federal Reserve Act, sec. 11 (k), as originally enacted, see 6 Fed. Stat. Ann. (2d ed.) 828; 1914 Supp. Fed. Stat. Ann. 272.

SEC. 3. [Note issues — regulations — printing — sec. 16 amended.] That the ninth paragraph of section sixteen of the Federal reserve Act, as amended by the Acts approved September seventh, nineteen hundred and sixteen, and June twenty-first, nineteen hundred and seventeen, be further amended and reenacted so as to read as follows:

"In order to furnish suitable notes for circulation as Federal reserve notes, the Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, cause plates and dies to be engraved in the best manner to guard against counterfeits and fraudulent alterations, and shall have printed therefrom and numbered such quantities of such notes of the denominations

of \$5, \$10, \$20, \$50, \$100, \$500, \$1,000, \$5,000, \$10,000 as may be required to supply the Federal reserve banks. "Such notes shall be in form and tenor as directed by the Secretary of the Treasury under the provisions of this Act and shall bear the distinctive numbers of the several Federal reserve banks through which they are issued." [40 Stat. L. 969.]

For Federal Reserve Act, sec. 16, as originally enacted, see 6 Fed. Stat. Ann. (2d ed.) 833; 1914 Supp. Fed. Stat. Ann. 275.

For Act of Sept. 7, 1916, amending this section, see 1918 Supp. Fed. Stat. Ann. 472.

For Act of June 21, 1917, amending this section, see 1918 Supp. Fed. Stat. Ann. 480.

**SEC. 4. [Reserves required by member banks — sec. 19 amended.]** That paragraphs (b) and (c) of section nineteen of the Federal reserve Act, as amended by the Acts approved August fifteenth, nineteen hundred and fourteen, and June twenty-first, nineteen hundred and seventeen, be further amended and reenacted to read as follows:

"(b) If in a reserve city, as now or hereafter defined, it shall hold and maintain with the Federal reserve bank of its district an actual net balance equal to not less than ten per centum of the aggregate amount of its demand deposits and three per centum of its time deposits: *Provided, however,* That if located in the outlying districts of a reserve city or in territory added to such a city by the extension of its corporate charter, it may, upon the affirmative vote of five members of the Federal Reserve Board, hold and maintain the reserve balances specified in paragraph (a) hereof.

"(c) If in a central reserve city, as now or hereafter defined, it shall hold and maintain with the Federal reserve bank of its district an actual net balance equal to not less than thirteen per centum of the aggregate amount of its demand deposits and three per centum of its time deposits: *Provided, however,* That if located in the outlying districts of a central reserve city or in territory added to such city by the extension of its corporate charter, it may, upon the affirmative vote of five members of the Federal Reserve Board, hold and maintain the reserve balances specified in paragraphs (a) or (b) thereof." [40 Stat. L. 970.]

For Federal Reserve Act, sec. 19, as originally enacted, see 9 Fed. Stat. Ann. (2d ed.) 840; 1914 Supp. Fed. Stat. Ann. 279.

**SEC. 5. [Bank examiners, officers, directors and employees—fees and gratuities — dealings between banks and directors—sec. 22 amended.]** That section twenty-two of the Federal Reserve Act, as amended by the Act of June twenty-first, nineteen hundred and seventeen, be further amended and reenacted to read as follows:

"(a) No member bank and no officer, director, or employee thereof shall hereafter make any loan or grant any gratuity to any bank examiner. Any bank officer, director, or employee violating this provision shall be deemed guilty of a misdemeanor and shall be imprisoned not exceeding one year or fined not more than \$5,000, or both; and may be fined a further sum equal to the money so loaned or gratuity given.

"Any examiner accepting a loan or gratuity from any bank examined by him or from an officer, director, or employee thereof shall be deemed guilty of a misdemeanor and shall be imprisoned one year or fined not more than \$5,000, or both, and may be fined a further sum equal to the money so loaned or gratuity given, and shall forever thereafter be disqualified from holding office as a national bank examiner.

“(b) No national bank examiner shall perform any other service for compensation while holding such office for any bank or officer, director, or employee thereof.

“No examiner, public or private, shall disclose the names of borrowers or the collateral for loans of a member bank to other than the proper officers of such bank without first having obtained the express permission in writing from the Comptroller of the Currency, or from the board of directors of such bank, except when ordered to do so by a court of competent jurisdiction, or by direction of the Congress of the United States, or of either House thereof, or any committee of Congress, or of either House duly authorized. Any bank examiner violating the provisions of this subsection shall be imprisoned not more than one year or fined not more than \$5,000, or both.

“(c) Except as herein provided, any officer, director, employee, or attorney of a member bank who stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, any loan from or the purchase or discount of any paper, note, draft, check, or bill of exchange by such member bank shall be deemed guilty of a misdemeanor and shall be imprisoned not more than one year or fined not more than \$5,000, or both.

“(d) Any member bank may contract for, or purchase from, any of its directors or from any firm of which any of its directors is a member, any securities or other property, when (and not otherwise) such purchase is made in the regular course of business upon terms not less favorable to the bank than those offered to others, or when such purchase is authorized by a majority of the board of directors not interested in the sale of such securities or property, such authority to be evidenced by the affirmative vote or written assent of such directors: *Provided, however,* That when any director, or firm of which any director is a member, acting for or on behalf of others, sells securities or other property to a member bank, the Federal Reserve Board by regulation may, in any or all cases, require a full disclosure to be made, on forms to be prescribed by it, of all commissions or other considerations received, and whenever such director or firm, acting in his or its own behalf, sells securities or other property to the bank the Federal Reserve Board, by regulation, may require a full disclosure of all profit realized from such sale.

“Any member bank may sell securities or other property to any of its directors, or to a firm of which any of its directors is a member, in the regular course of business on terms not more favorable to such director or firm than those offered to others, or when such sale is authorized by a majority of the board of directors of a member bank to be evidenced by their affirmative vote or written assent: *Provided, however,* That nothing in this subsection contained shall be construed as authorizing member banks to purchase or sell securities or other property which such banks are not otherwise authorized by law to purchase or sell.

“(e) No member bank shall pay to any director, officer, attorney, or employee a greater rate of interest on the deposits of such director, officer, attorney, or employee than that paid to other depositors on similar deposits with such member bank.

“(f) If the directors or officers of any member bank shall knowingly violate or permit any of the agents, officers, or directors of any member bank to violate

any of the provisions of this section or regulations of the board made under authority thereof, every director and officer participating in or assenting to such violation shall be held liable in his personal and individual capacity for all damages which the member bank, its shareholders, or any other persons shall have sustained in consequence of such violation." [40 Stat. L. 970.]

For Federal Reserve Act, sec. 22, here amended, see 6 Fed. Stat. Ann. (2d ed.) 926; 1914 Supp. Fed. Stat. Ann. 282.

For Act of June 21, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 485.

**SEC. 7. [Falsely certifying checks — embezzlement, etc.— R. S. secs. 5208, 5209 amended.]** That section fifty-two hundred and eight of the Revised Statutes as amended by the Act of July twelfth, eighteen hundred and eighty-two, and section fifty-two hundred and nine of the Revised Statutes as amended by the Acts of April sixth, eighteen hundred and sixty-nine, and July eighth, eighteen hundred and seventy, be, and the same are hereby, amended and reenacted to read as follows:

"**Sec. 5208.** It shall be unlawful for any officer, director, agent, or employee of any Federal reserve bank, or of any member bank as defined in the Act of December twenty-third, nineteen hundred and thirteen, known as the Federal reserve Act, to certify any check drawn upon such Federal reserve bank or member bank unless the person, firm, or corporation drawing the check has on deposit with such Federal reserve bank or member bank, at the times such check is certified, an amount of money not less than the amount specified in such check. Any check so certified by a duly authorized officer, director, agent, or employee shall be a good and valid obligation against such Federal reserve bank or member bank; but the act of any officer, director, agent, or employee of any such Federal reserve bank or member bank in violation of this section shall, in the discretion of the Federal Reserve Board, subject such Federal reserve bank to the penalties imposed by section eleven, subsection (h), of the Federal reserve Act, and shall subject such member bank if a national bank to the liabilities and proceedings on the part of the Comptroller of the Currency provided for in section fifty-two hundred and thirty-four, Revised Statutes, and shall, in the discretion of the Federal Reserve Board, subject any other member bank to the penalties imposed by section nine of said Federal reserve Act for the violation of any of the provisions of said Act. Any officer, director, agent, or employee of any Federal reserve bank or member bank who shall willfully violate the provisions of this section, or who shall resort to any device, or receive any fictitious obligation, directly or collaterally, in order to evade the provisions thereof, or who shall certify a check before the amount thereof shall have been regularly entered to the credit of the drawer upon the books of the bank, shall be deemed guilty of a misdemeanor and shall, on conviction thereof in any district court of the United States, be fined not more than \$5,000, or shall be imprisoned for not more than five years, or both, in the discretion of the court.

"**Sec. 5209.** Any officer, director, agent, or employee of any Federal reserve bank, or of any member bank as defined in the Act of December twenty-third, nineteen hundred and thirteen, known as the Federal reserve Act, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of such Federal reserve bank or member bank, or who, without authority from the directors of such Federal reserve bank or member bank, issues or puts in circulation any of the notes of such Federal reserve bank or member bank, or who,

without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree, or who makes any false entry in any book, report, or statement of such Federal reserve bank or member bank, with intent in any case to injure or defraud such Federal reserve bank or member bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such Federal reserve bank or member bank, or the Comptroller of the Currency, or any agent or examiner appointed to examine the affairs of such Federal reserve bank or member bank, or the Federal Reserve Board; and every receiver of a national banking association who, with like intent to defraud or injure, embezzles, abstracts, purloins, or willfully misapplies any of the moneys, funds, or assets of his trust, and every person who, with like intent, aids or abets any officer, director, agent, employee, or receiver in any violation of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court of the United States shall be fined not more than \$5,000 or shall be imprisoned for not more than five years, or both, in the discretion of the court.

“Any Federal reserve agent, or any agent or employee of such Federal reserve agent, or of the Federal Reserve Board, who embezzles, abstracts, or willfully misapplies any moneys, funds, or securities intrusted to his care, or without complying with or in violation of the provisions of the Federal reserve Act, issues or puts in circulation any Federal reserve notes shall be guilty of a misdemeanor and upon conviction in any district court of the United States shall be fined not more than \$5,000 or imprisoned for not more than five years, or both, in the discretion of the court.” [40 Stat. L. 971.]

For R. S. secs. 5208, 5209, as they read before the above amendment, see 6 Fed. Stat. Ann. (2d ed.) 769, 770; 5 Fed. Stat. Ann. (1st ed.) 144, 145.

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### **An Act To provide for the consolidation of national banking associations.**

[Act of Nov. 7, 1918, ch. 209, 40 Stat. L. 1043.]

[SEC. 1.] [Consolidation of national banking associations — terms and conditions — rights of shareholders.] That any two or more national banking associations located within the same county, city, town, or village may, with the approval of the Comptroller of the Currency, consolidate into one association under the charter of either existing banks, on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association proposing to consolidate, and be ratified and confirmed by the affirmative vote of the shareholders of each such association owning at least two-thirds of its capital stock outstanding, at a meeting to be held on the call of the directors after publishing notice of the time, place, and object of the meeting for four consecutive weeks in some newspaper published in the place where the said association is located, and if no newspaper is published in the place, then in a paper published nearest thereto, and after sending such notice to each shareholder of record by registered mail at least ten days prior to said meeting: *Provided*, That the capital stock of such consolidated association shall not be less than that required under existing law for the organization of a national bank in the place in which it is located: *And provided further*, That when such consolidation shall have been effected and approved by the comptroller any

shareholder of either of the associations so consolidated who has not voted for such consolidation may give notice to the directors of the association in which he is interested within twenty days from the date of the certificate of approval of the comptroller that he dissents from the plan of consolidation as adopted and approved, whereupon he shall be entitled to receive the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by the shareholder, one by the directors, and the third by the two so chosen; and in case the value so fixed shall not be satisfactory to the shareholder he may within five days after being notified of the appraisal appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said reappraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of the reappraisal; otherwise the appellant shall pay said expenses, and the value so ascertained and determined shall be deemed to be a debt due and be forthwith paid to said shareholder from said bank, and the share so paid shall be surrendered and after due notice sold at public auction within thirty days after the final appraisement provided for in this Act. [40 Stat. L. 1043.]

**SEC. 2. [Status of consolidated association — outstanding circulation — rights, franchises, and interests.]** That associations consolidating with another association under the provisions of this Act shall not be required to deposit lawful money for their outstanding circulation, but their assets and liabilities shall be reported by the association with which they have consolidated. And all the rights, franchises, and interests of the said national bank so consolidated in and to every species of property, personal and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national bank into which it is consolidated without any deed or other transfer, and the said consolidated national bank shall hold and enjoy the same and all rights of property, franchises, and interests in the same manner and to the same extent as was held and enjoyed by the national bank so consolidated therewith. [40 Stat. L. 1044.]

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[SEC. 1.] \* \* \* **[Comptroller's office — chief of examining division — national bank examiner.]** That the comptroller may designate a national bank examiner to act as chief of the examining division in his office. [40 Stat. L. 1230.]

This is from the Legislative, Executive and Judicial Appropriation Act of March 1, 1919, ch. 86.

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**An Act To amend sections seven, ten, and eleven of the Federal reserve Act, and section fifty-one hundred and seventy-two, Revised Statutes of the United States.**

[Act of March 3, 1919, ch. 101, 40 Stat. L. 1314.]

**[SEC. 1.] [Federal Reserve Act — Federal Reserve Banks — net earnings — disposition — sec. 7 amended.]** That that part of the first paragraph of section seven of the Federal reserve Act which reads as follows: "After the aforesaid dividend claims have been fully met, all the net earnings shall be paid to the United States as a franchise tax except that one-half of such net earnings shall

be paid into a surplus fund until it shall amount to forty per centum of the paid-in capital stock of such bank," be amended to read as follows:

"After the aforesaid dividend claims have been fully met, the net earnings shall be paid to the United States as a franchise tax except that the whole of such net earnings, including those for the year ending December thirty-first, nineteen hundred and eighteen, shall be paid into a surplus fund until it shall amount to one hundred per centum of the subscribed capital stock of such bank, and that thereafter ten per centum of such net earnings shall be paid into the surplus." [40 Stat. L. 1314.]

For Federal Reserve Act, sec. 7, here amended, see 6 Fed. Stat. Ann. (2d ed.) 825; 1914 Supp. Fed. Stat. Ann. 267.

**SEC. 2. [Federal Reserve Board—ineligibility for service in member banks—sec. 10 amended.]** That that part of section ten of the Federal reserve Act which reads as follows: "The members of said board, the Secretary of the Treasury, the Assistant Secretaries of the Treasury, and the Comptroller of the Currency, shall be ineligible during the time they are in office and for two years thereafter to hold any office, position, or employment in any member bank," be amended to read as follows:

"The Secretary of the Treasury and the Comptroller of the Currency shall be ineligible during the time they are in office and for two years thereafter to hold any office, position, or employment in any member bank. The appointive members of the Federal Reserve Board shall be ineligible during the time they are in office and for two years thereafter to hold any office, position, or employment in any member bank, except that this restriction shall not apply to a member who has served the full term for which he was appointed." [40 Stat. L. 1315.]

For Federal Reserve Act, sec. 10, see 6 Fed. Stat. Ann. (2d ed.) 826; 1914 Supp. Fed. Stat. Ann. 269.

**SEC. 3. [Federal Reserve Banks—discounts for member banks—amount—security—sec. 11 amended.]** That section eleven of the Federal reserve Act as amended by the Act of September seventh, nineteen hundred and sixteen, be further amended by striking out the whole of subsection (m) and by substituting therefor a subsection to read as follows:

"(m) Upon the affirmative vote of not less than five of its members, the Federal Reserve Board shall have power to permit Federal reserve banks to discount for any member bank notes, drafts, or bills of exchange bearing the signature or endorsement of any one borrower in excess of the amount permitted by section nine and section thirteen of this Act, but in no case to exceed twenty per centum of the member bank's capital and surplus: *Provided, however,* That all such notes, drafts, or bills of exchange discounted for any member bank in excess of the amount permitted under such sections shall be secured by not less than a like face amount of bonds or notes of the United States issued since April twenty-fourth, nineteen hundred and seventeen, or certificates of indebtedness of the United States: *Provided further,* That the provisions of this subsection (m) shall not be operative after December thirty-first, nineteen hundred and twenty." [40 Stat. L. 1315.]

For Federal Reserve Act, sec. 11, as amended before the amendment here given, see 1918 Supp. Fed. Stat. Ann. 470.



**SEC. 4. [Circulating bank notes — printing — denominations — contents — R. S., sec. 5172 amended.]** That section fifty-one hundred and seventy-two, Revised Statutes of the United States, be amended to read as follows:

**"Sec. 5172.** That in order to furnish suitable notes for circulation, the Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, cause plates and dies to be engraved, in the best manner to guard against counterfeiting and fraudulent alterations, and shall have printed therefrom and numbered such quantity of circulating notes in blank, or bearing engraved signatures of officers as herein provided, of the denominations of \$1, \$2, \$5, \$10, \$20, \$50, \$100, \$500, and \$1,000, as may be required to supply the associations entitled to receive the same. Such notes shall express upon their face that they are secured by United States bonds deposited with the Treasurer of the United States, by the written or engraved signatures of the Treasurer and Register, and by the imprint of the seal of the Treasury; and shall also express upon their face the promise of the association receiving the same to pay on demand, attested by the written or engraved signatures of the president or vice president and cashier; and shall bear such devices and such other statements and shall be in such form as the Secretary of the Treasury shall, by regulation, direct." [40 *Stat. L. 1315.*]

For R. S. sec. 5172, here amended, see 5 Fed. Stat. Ann. (1st ed.) 118; 6 Fed. Stat. Ann. (2d ed.) 731.

**An Act Amending section 25 of the Act approved December 23, 1913, known as the Federal Reserve Act, as amended by the Act approved September 7, 1916.**

[*Act of Sept. 17, 1919, ch. 60, 41 Stat. L. 285.*]

**[SEC. 1.] [Federal Reserve Act — amendment of section 25 — investment by banks in stock of corporation interested in facilitating exports.]** That section 25 of the Act approved December 23, 1913, known as the Federal Reserve Act, as amended by the Act approved September 7, 1916, be further amended by the addition of the following paragraph at the end of subparagraph 2 of the first paragraph, after the word "possessions":

"Until January 1, 1921, any national banking association, without regard to the amount of its capital and surplus, may file application with the Federal Reserve Board for permission, upon such conditions and under such regulations as may be prescribed by said board, to invest an amount not exceeding in the aggregate 5 per centum of its paid-in capital and surplus in the stock of one or more corporations chartered or incorporated under the laws of the United States or of any State thereof and, regardless of its location, principally engaged in such phases of international or foreign financial operations as may be necessary to facilitate the export of goods, wares, or merchandise from the United States or any of its dependencies or insular possessions to any foreign country: *Provided, however,* That in no event shall the total investments authorized by this section by any one national bank exceed 10 per centum of its capital and surplus." [41 *Stat. L. 285.*]

For section 25 of the Federal Reserve Act as amended by Act of Sept. 7, 1916, see 1918 Supp. Fed. Stat. Ann. 473.

**SEC. 2. [Application for establishment of foreign branches, etc.]** That paragraph 2 of said section be amended by adding after the word "banking," in line three, the words "or financial," so that the sentence will read: "Such

application shall specify the name and capital of the banking association filing it, the powers applied for, and the place or places where the banking or financial operations proposed are to be carried on." [41 Stat. L. 286.]

SEC. 3. [Information furnished of condition of foreign branches, etc.] That paragraph 3 of said section be amended by striking out the words "subparagraph 2 of the first paragraph of this section" and inserting in lieu thereof the word "above," so that the paragraph will read:

"Every national banking association operating foreign branches shall be required to furnish information concerning the condition of such branches to the Comptroller of the Currency upon demand, and every member bank investing in the capital stock of banks or corporations described above shall be required to furnish information concerning the condition of such banks or corporations to the Federal Reserve Board upon demand, and the Federal Reserve Board may order special examinations of the said branches, banks, or corporations at such time or times as it may deem best." [41 Stat. L. 286.]

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**An Act To amend sections 5200 and 5202 of the Revised Statutes of the United States as amended by Acts of June 22, 1906, and September 24, 1918.**

[Act of Oct. 22, 1919, ch. 79, 41 Stat. L. 296.]

[SEC. 1.] [Limit to liabilities which may be incurred by any one person, etc.—R. S. sec. 5200 amended.] That section 5200 of the Revised Statutes of the United States as amended by the Acts of June 22, 1906, and September 24, 1918, be further amended to read as follows:

"Sec. 5200. The total liabilities to any association of any person or of any company, corporation, or firm for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed 10 per centum of the amount of the capital stock of such association, actually paid in and unimpaired, and 10 per centum of its unimpaired surplus fund: *Provided, however,* That (1) the discount of bills of exchange drawn in good faith against actually existing values, including drafts and bills of exchange secured by shipping documents conveying or securing title to goods shipped, and including demand obligations when secured by documents covering commodities in actual process of shipment, and also including bankers' acceptances of the kinds described in section 13 of the Federal Reserve Act, (2) the discount of commercial or business paper actually owned by the person, company, corporation, or firm negotiating the same, (3) the discount of notes secured by shipping documents, warehouse receipts, or other such documents conveying or securing title covering readily marketable nonperishable staples, including live stock, when the actual market value of the property securing the obligation is not at any time less than 115 per centum of the face amount of the notes secured by such documents and when such property is fully covered by insurance, and (4) the discount of any note or notes secured by not less than a like face amount of bonds or notes of the United States issued since April 24, 1917, or certificates of indebtedness of the United States, shall not be considered as money borrowed within the meaning of this section. The total liabilities to any association, of any person or of any corporation, or firm, or company, or the several members thereof upon any note or notes purchased or

discounted by such association and secured by bonds, notes, or certificates of indebtedness as described in (4) hereof shall not exceed (except to the extent permitted by rules and regulations prescribed by the Comptroller of the Currency, with the approval of the Secretary of the Treasury) 10 per centum of such capital stock and surplus fund of such association and the total liabilities to any association of any person or of any corporation, or firm, or company, or the several members thereof for money borrowed, including the liabilities upon notes secured in the manner described under (3) hereof, except transactions (1), (2), and (4), shall not at any time exceed 25 per centum of the amount of the association's paid-in and unimpaired capital stock and surplus. The exception made under (3) hereof shall not apply to the notes of any one person, corporation or firm or company, or the several members thereof for more than six months in any consecutive twelve months." [41 Stat. L. 296.]

For R. S. sec. 5200 as amended by Act of June 22, 1906, see 6 Fed. Stat. Ann. (2d ed.) 761; 1909 Supp. Fed. Stat. Ann. 353.

For section 13 of the Federal Reserve Act mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 470.

R. S. sec. 5200 as amended by Act of Sept. 24, 1918, read as follows: "The total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed 10 per centum of the amount of the capital stock of such association, actually paid in and unimpaired, and 10 per centum of its unimpaired surplus fund: *Provided, however,* That (1) the discount of bills of exchange drawn in good faith against actually existing values, (2) the discount of commercial or business paper actually owned by the person, company, corporation, or firm, negotiating the same and (3) the purchase or discount of any note or notes secured by not less than a like face amount of bonds of the United States issued since April 24, 1917, or certificates of indebtedness of the United States, shall not be considered as money borrowed within the meaning of this section; but the total liabilities to any association, of any person or of any company, corporation, or firm, upon any note or notes purchased or discounted by such association and secured by such bonds or certificates of indebtedness, shall not exceed (except to the extent permitted by rules and regulations prescribed by the Comptroller of the Currency, with the approval of the Secretary of the Treasury) 10 per centum of such capital stock and surplus fund of such association."

**SEC. 2. [Limit upon indebtedness to be incurred — R. S. sec. 5202 amended.]** That section 5202 of the Revised Statutes of the United States as amended by section 20, Title I, of the Act approved April 5, 1918, be further amended so as to read as follows:

"**Sec. 5202.** No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

"Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act.

"Seventh. Liabilities created by the indorsement of accepted bills of exchange payable abroad actually owned by the indorsing bank and discounted at home or abroad." [41 Stat. L. 297.]

For R. S. sec. 5202 as amended by the Act of April 5, 1918, see 1918 Supp. Fed. Stat. Ann. 468.

**An Act To amend the Act approved December 23, 1913, known as the Federal Reserve Act.**

[*Act of Dec. 24, 1919, ch. —, — Stat. L. —.*]

[**Federal Reserve Act — new section — corporations to do foreign banking business — creation — powers — rights and liabilities of officers and stockholders.**] That the Act approved December 23, 1913, known as the Federal Reserve Act, as amended, be further amended by adding a new section as follows:

**“ BANKING CORPORATIONS AUTHORIZED TO DO FOREIGN BANKING BUSINESS.**

“ SEC. 25 (a). Corporations to be organized for the purpose of engaging in international or foreign banking or other international or foreign financial operations, or in banking or other financial operations in a dependency or insular possession of the United States, either directly or through the agency, ownership, or control of local institutions in foreign countries, or in such dependencies or insular possessions as provided by this section, and to act when required by the Secretary of the Treasury as fiscal agents of the United States, may be formed by any number of natural persons, not less in any case than five.

“ Such persons shall enter into articles of association which shall specify in general terms the objects for which the association is formed and may contain any other provisions not inconsistent with law which the association may see fit to adopt for the regulation of its business and the conduct of its affairs.

“ Such articles of association shall be signed by all of the persons intending to participate in the organization of the corporation and, thereafter, shall be forwarded to the Federal Reserve Board and shall be filed and preserved in its office. The persons signing the said articles of association shall, under their hands, make an organization certificate which shall specifically state:

“ First. The name assumed by such corporation, which shall be subject to the approval of the Federal Reserve Board.

“ Second. The place or places where its operations are to be carried on.

“ Third. The place in the United States where its home office is to be located.

“ Fourth. The amount of its capital stock and the number of shares into which the same shall be divided.

“ Fifth. The names and places of business or residence of the persons executing the certificate and the number of shares to which each has subscribed.

“ Sixth. The fact that the certificate is made to enable the persons subscribing the same, and all other persons, firms, companies, and corporations, who or which may thereafter subscribe to or purchase shares of the capital stock of such corporation, to avail themselves of the advantages of this section.

“ The persons signing the organization certificate shall duly acknowledge the execution thereof before a judge of some court of record or notary public, who shall certify thereto under the seal of such court or notary, and thereafter the certificate shall be forwarded to the Federal Reserve Board to be filed and preserved in its office. Upon duly making and filing articles of association and an organization certificate, and after the Federal Reserve Board has approved the same and issued a permit to begin business, the association shall become and be a body corporate, and as such and in the name designated therein shall have power to adopt and use a corporate seal, which may be changed at the pleasure of its board of directors; to have succession for a period of twenty

years unless sooner dissolved by the act of the shareholders owning two-thirds of the stock or by an Act of Congress or unless its franchises become forfeited by some violation of law; to make contracts; to sue and be sued, complain, and defend in any court of law or equity; to elect or appoint directors, all of whom shall be citizens of the United States; and, by its board of directors, to appoint such officers and employees as may be deemed proper, define their authority and duties, require bonds of them, and fix the penalty thereof, dismiss such officers or employees, or any thereof, at pleasure and appoint others to fill their places; to prescribe, by its board of directors, by-laws not inconsistent with law or with the regulations of the Federal Reserve Board regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers and employees appointed, its property transferred, and the privileges granted to it by law exercised and enjoyed.

"Each corporation so organized shall have power, under such rules and regulations as the Federal Reserve Board may prescribe:

"(a) To purchase, sell, discount, and negotiate, with or without its indorsement or guaranty, notes, drafts, checks, bills of exchange, acceptances, including bankers' acceptances, cable transfers, and other evidences of indebtedness; to purchase and sell, with or without its indorsement or guaranty, securities, including the obligations of the United States or of any State thereof but not including shares of stock in any corporation except as herein provided; to accept bills or drafts drawn upon it subject to such limitations and restrictions as the Federal Reserve Board may impose; to issue letters of credit; to purchase and sell coin, bullion, and exchange; to borrow and to lend money; to issue debentures, bonds, and promissory notes under such general conditions as to security and such limitations as the Federal Reserve Board may prescribe, but in no event having liabilities outstanding thereon at any one time exceeding ten times its capital stock and surplus; to receive deposits outside of the United States and to receive only such deposits within the United States as may be incidental to or for the purpose of carrying out transactions in foreign countries or dependencies or insular possessions of the United States; and generally to exercise such powers as are incidental to the powers conferred by this Act or as may be usual, in the determination of the Federal Reserve Board, in connection with the transaction of the business of banking or other financial operations in the countries, colonies, dependencies, or possessions in which it shall transact business and not inconsistent with the powers specifically granted herein. Nothing contained in this section shall be construed to prohibit the Federal Reserve Board, under its power to prescribe rules and regulations, from limiting the aggregate amount of liabilities of any or all classes incurred by the corporation and outstanding at any one time. Whenever a corporation organized under this section receives deposits in the United States authorized by this section it shall carry reserves in such amounts as the Federal Reserve Board may prescribe, but in no event less than 10 per centum of its deposits.

"(b) To establish and maintain for the transaction of its business branches or agencies in foreign countries, their dependencies or colonies, and in the dependencies or insular possessions of the United States, at such places as may be approved by the Federal Reserve Board and under such rules and regulations as it may prescribe, including countries or dependencies not specified in the original organization certificate.

"(c) With the consent of the Federal Reserve Board to purchase and hold stock or other certificates of ownership in any other corporation organized

under the provisions of this section, or under the laws of any foreign country or a colony or dependency thereof, or under the laws of any State, dependency, or insular possession of the United States but not engaged in the general business of buying or selling goods, wares, merchandise or commodities in the United States, and not transacting any business in the United States except such as in the judgment of the Federal Reserve Board may be incidental to its international or foreign business: *Provided, however,* That, except with the approval of the Federal Reserve Board, no corporation organized hereunder shall invest in any one corporation an amount in excess of 10 per centum of its own capital and surplus, except in a corporation engaged in the business of banking, when 15 per centum of its capital and surplus may be so invested: *Provided further,* That no corporation organized hereunder shall purchase, own, or hold stock or certificates of ownership in any other corporation organized hereunder or under the laws of any State which is in substantial competition therewith, or which holds stock or certificates of ownership in corporations which are in substantial competition with the purchasing corporation.

"Nothing contained herein shall prevent corporations organized hereunder from purchasing and holding stock in any corporation where such purchase shall be necessary to prevent a loss upon a debt previously contracted in good faith; and stock so purchased or acquired in corporations organized under this section shall within six months from such purchase be sold or disposed of at public or private sale unless the time to so dispose of same is extended by the Federal Reserve Board.

"No corporation organized under this section shall carry on any part of its business in the United States except such as, in the judgment of the Federal Reserve Board, shall be incidental to its international or foreign business: *And provided further,* That except such as is incidental and preliminary to its organization no such corporation shall exercise any of the powers conferred by this section until it has been duly authorized by the Federal Reserve Board to commence business as a corporation organized under the provisions of this section.

"No corporation organized under this section shall engage in commerce or trade in commodities except as specifically provided in this section, nor shall it either directly or indirectly control or fix or attempt to control or fix the price of any such commodities. The charter of any corporation violating this provision shall be subject to forfeiture in the manner hereinafter provided in this section. It shall be unlawful for any director, officer, agent, or employee of any such corporation to use or to conspire to use the credit, the funds, or the power of the corporation to fix or control the price of any such commodities, and any such person violating this provision shall be liable to a fine of not less than \$1,000 and not exceeding \$5,000 or imprisonment not less than one year and not exceeding five years, or both, in the discretion of the court.

"No corporation shall be organized under the provisions of this section with a capital stock of less than \$2,000,000, one-quarter of which must be paid in before the corporation may be authorized to begin business, and the remainder of the capital stock of such corporation shall be paid in installments of at least 10 per centum on the whole amount to which the corporation shall be limited as frequently as one installment at the end of each succeeding two months from the time of the commencement of its business operations until the whole of the capital stock shall be paid in. The capital stock of any such corporation may be increased at any time, with the approval of the Federal Reserve Board,

by a vote of two-thirds of its shareholders or by unanimous consent in writing of the shareholders without a meeting and without a formal vote, but any such increase of capital shall be fully paid in within ninety days after such approval; and may be reduced in like manner, provided that in no event shall it be less than \$2,000,000. No corporation, except as herein provided, shall during the time it shall continue its operations withdraw or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. Any national banking association may invest in the stock of any corporation organized under the provisions of this section, but the aggregate amount of stock held in all corporations engaged in business of the kind described in this section and in section 25 of the Federal Reserve Act as amended shall not exceed 10 per centum of the subscribing bank's capital and surplus.

"A majority of the shares of the capital stock of any such corporation shall at all times be held and owned by citizens of the United States, by corporations the controlling interest in which is owned by citizens of the United States, chartered under the laws of the United States or of a State of the United States, or by firms or companies, the controlling interest in which is owned by citizens of the United States. The provisions of section 8 of the act approved October 15, 1914, entitled 'An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' as amended by the acts of May 15, 1916, and September 7, 1916, shall be construed to apply to the directors, other officers, agents, or employees of corporations organized under the provisions of this section: *Provided, however,* That nothing herein contained shall (1) prohibit any director or other officer, agent or employee of any member bank, who has procured the approval of the Federal Reserve Board from serving at the same time as a director or other officer, agent or employee of any corporation organized under the provisions of this section in whose capital stock such member bank shall have invested; or (2) prohibit any director or other officer, agent, or employee of any corporation organized under the provisions of this section, who has procured the approval of the Federal Reserve Board, from serving at the same time as a director or other officer, agent or employee of any other corporation in whose capital stock such first-mentioned corporation shall have invested under the provisions of this section.

"No member of the Federal Reserve Board shall be an officer or director of any corporation organized under the provisions of this section, or of any corporation engaged in similar business organized under the laws of any State, nor hold stock in any such corporation, and before entering upon his duties as a member of the Federal Reserve Board he shall certify under oath to the Secretary of the Treasury that he has complied with this requirement.

"Shareholders in any corporation organized under the provisions of this section shall be liable for the amount of their unpaid stock subscriptions. No such corporation shall become a member of any Federal reserve bank.

"Should any corporation organized hereunder violate or fail to comply with any of the provisions of this section, all of its rights, privileges, and franchises derived herefrom may thereby be forfeited. Before any such corporation shall be declared dissolved, or its rights, privileges, and franchises forfeited, any noncompliance with, or violation of such laws shall, however, be determined and adjudged by a court of the United States of competent jurisdiction, in a suit brought for that purpose in the district or territory in which the home office of such corporation is located, which suit shall be brought by the United States at the instance of the Federal Reserve Board or the Attorney General.

Upon adjudication of such noncompliance or violation, each director and officer who participated in, or assented to, the illegal act or acts, shall be liable in his personal or individual capacity for all damages which the said corporation shall have sustained in consequence thereof. No dissolution shall take away or impair any remedy against the corporation, its stockholders, or officers for any liability or penalty previously incurred.

" Any such corporation may go into voluntary liquidation and be closed by a vote of its shareholders owning two-thirds of its stock.

" Whenever the Federal Reserve Board shall become satisfied of the insolvency of any such corporation, it may appoint a receiver who shall take possession of all of the property and assets of the corporation and exercise the same rights, privileges, powers, and authority with respect thereto as are now exercised by receivers of national banks appointed by the Comptroller of the Currency of the United States: *Provided, however,* That the assets of the corporation subject to the laws of other countries or jurisdictions shall be dealt with in accordance with the terms of such laws.

" Every corporation organized under the provisions of this section shall hold a meeting of its stockholders annually upon a date fixed in its by-laws, such meeting to be held at its home office in the United States. Every such corporation shall keep at its home office books containing the names of all stockholders thereof, and the names and addresses of the members of its board of directors, together with copies of all reports made by it to the Federal Reserve Board. Every such corporation shall make reports to the Federal Reserve Board at such times and in such form as it may require; and shall be subject to examination once a year and at such other times as may be deemed necessary by the Federal Reserve Board by examiners appointed by the Federal Reserve Board, the cost of such examinations, including the compensation of the examiners, to be fixed by the Federal Reserve Board and to be paid by the corporation examined.

" The directors of any corporation organized under the provisions of this section may, semiannually, declare a dividend of so much of the net profits of the corporation as they shall judge expedient; but each corporation shall, before the declaration of a dividend, carry one-tenth of its net profits of the preceding half year to its surplus fund until the same shall amount to 20 per centum of its capital stock.

" Any corporation organized under the provisions of this section shall be subject to tax by the State within which its home office is located in the same manner and to the same extent as other corporations organized under the laws of that State which are transacting a similar character of business. The shares of stock in such corporation shall also be subject to tax as the personal property of the owners or holders thereof in the same manner and to the same extent as the shares of stock in similar State corporations.

" Any corporation organized under the provisions of this section may at any time within the two years next previous to the date of the expiration of its corporate existence, by a vote of the shareholders owning two-thirds of its stock, apply to the Federal Reserve Board for its approval to extend the period of its corporate existence for a term of not more than twenty years, and upon certified approval of the Federal Reserve Board such corporation shall have its corporate existence for such extended period unless sooner dissolved by the act of the shareholders owning two-thirds of its stock, or by an Act of Congress or unless its franchise becomes forfeited by some violation of law.



" Any bank or banking institution, principally engaged in foreign business, incorporated by special law of any State or of the United States or organized under the general laws of any State or of the United States and having an unimpaired capital sufficient to entitle it to become a corporation under the provisions of this section may, by the vote of the shareholders owning not less than two-thirds of the capital stock of such bank or banking association, with the approval of the Federal Reserve Board, be converted into a Federal corporation of the kind authorized by this section with any name approved by the Federal Reserve Board: *Provided, however,* That said conversion shall not be in contravention of the State law. In such case the articles of association and organization certificate may be executed by a majority of the directors of the bank or banking institution, and the certificate shall declare that the owners of at least two-thirds of the capital stock have authorized the directors to make such certificate and to change or convert the bank or banking institution into a Federal corporation. A majority of the directors, after executing the articles of association and the organization certificate, shall have power to execute all other papers and to do whatever may be required to make its organization perfect and complete as a Federal corporation. The shares of any such corporation may continue to be for the same amount each as they were before the conversion, and the directors may continue to be directors of the corporation until others are elected or appointed in accordance with the provisions of this section. When the Federal Reserve Board has given to such corporation a certificate that the provisions of this section have been complied with, such corporation and all its stockholders, officers, and employees, shall have the same powers and privileges, and shall be subject to the same duties, liabilities, and regulations, in all respects, as shall have been prescribed by this section for corporations originally organized hereunder.

" Every officer, director, clerk, employee, or agent of any corporation organized under this section who embezzles, abstracts, or willfully misapplies any of the moneys, funds, credits, securities, evidences of indebtedness or assets of any character of such corporation; or who, without authority from the directors, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, debenture, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of such corporation with intent, in either case, to injure or defraud such corporation or any other company, body politic or corporate, or any individual person, or to deceive any officer of such corporation, the Federal Reserve Board, or any agent or examiner appointed to examine the affairs of any such corporation; and every receiver of any such corporation and every clerk or employee of such receiver who shall embezzle, abstract, or willfully misapply or wrongfully convert to his own use any moneys, funds, credits, or assets of any character which may come into his possession or under his control in the execution of his trust or the performance of the duties of his employment; and every such receiver or clerk or employee of such receiver who shall, with intent to injure or defraud any person, body politic or corporate, or to deceive or mislead the Federal Reserve Board, or any agent or examiner appointed to examine the affairs of such receiver, shall make any false entry in any book, report, or record of any matter connected with the duties of such receiver; and every person who with like intent aids or abets any officer, director, clerk, employee, or agent of any corporation organized under this section, or receiver or clerk or employee of such receiver as aforesaid in any

violation of this section, shall upon conviction thereof be imprisoned for not less than two years nor more than ten years, and may also be fined not more than \$5,000, in the discretion of the court.

“Whoever being connected in any capacity with any corporation organized under this section represents in any way that the United States is liable for the payment of any bond or other obligation, or the interest thereon, issued or incurred by any corporation organized hereunder, or that the United States incurs any liability in respect of any act or omission of the corporation, shall be punished by a fine or [of] not more than \$10,000 and by imprisonment for not more than five years.” [— *Stat. L.* —.]

This is popularly known as the Edge Act.

For Act of Dec. 23, 1913, amended by this act, see 6 Fed. Stat. Ann. (2d ed.) 817; 1914 Supp. Fed. Stat. Ann. 260.

For Act of Oct. 15, 1914, sec. 8, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 730; 1916 Supp. Fed. Stat. Ann. 267.

For Act of May 15, 1916, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 844.

For Act of Sept. 7, 1916, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 470, the amendatory clause being on page 474.

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## NATIONAL GUARD

See MILITIA.

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## NATIONAL PARKS

See PUBLIC PARKS

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## NATURALIZATION

*Act of July 19, 1919, ch. 24, 274.*

*Sec. 1. Persons in Military or Naval Service and Honorably Discharged, 274.*

*Act of Nov. 6, 1919, ch. 95, 275.*

*Indians Serving in Great War — Citizenship How Obtained and Effect of, 275.*

[SEC. 1.] \* \* \* [Persons in military or naval service and honorably discharged.] Any person of foreign birth who served in the military or naval forces of the United States during the present war, after final examination and acceptance by the said military or naval authorities, and shall have been honorably discharged after such acceptance and service, shall have the benefits of the seventh subdivision of section 4 of the Act of June 29, 1906, Thirty-fourth Statutes at Large, part 1, page 596, as amended, and shall not be required to pay any fee therefor; and this provision shall continue for the period of one year after all of the American troops are returned to the United States. [41 Stat. L. 222.]

This is from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

For Act of June 29, 1906, sec. 4, subd. 7, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 488.

**An Act Granting citizenship to certain Indians.***[Act of Nov. 6, 1919, ch. 95, 41 Stat. L. 350.]***[Indians serving in great war — citizenship how obtained and effect of.]**

That every American Indian who served in the Military or Naval Establishments of the United States during the war against the Imperial German Government, and who has received or who shall hereafter receive an honorable discharge, if not now a citizen and if he so desires, shall, on proof of such discharge and after proper identification before a court of competent jurisdiction, and without other examination except as prescribed by said court, be granted full citizenship with all the privileges pertaining thereto, without in any manner impairing or otherwise affecting the property rights, individual or tribal, of any such Indian or his interest in tribal or other Indian property. *[41 Stat. L. 350.]*

This act became a law without the approval of the President by lapse of time.

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**NAVAL ACADEMY**

*Act of Jan. 12, 1919, ch. 8, 275.*

*Uniforms, Accouterments, and Equipment — Furnishing by Government at cost, 275.*

*Act of July 11, 1919, ch. 9, 275.*

*Naval Academy Band, 275.*

*Midshipmen — Increase of Number, 276.*

**An Act Providing for the purchase of uniforms, accouterments, and equipment by officers of the Navy, Marine Corps, and Coast Guard, and midshipmen at the Naval Academy from the Government at cost.**

*[Act of Jan. 12, 1919, ch. 8, 40 Stat. L. 1054.]*

**[Uniforms, accouterments, and equipment — furnishing by government at cost.]** That hereafter uniforms, accouterments, and equipment shall, upon the request of \* \* \* any midshipman at the Naval Academy \* \* \*, be furnished by the Government at cost, subject to such restrictions and regulations as the Secretary of the Navy may prescribe. *[40 Stat. L. 1054.]*

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**\* \* \* Naval Academy Band:** The Naval Academy Band shall hereafter consist of one leader, with pay and allowances of first lieutenant in the Marine Corps; one second leader, with a base pay of \$81 per month; forty-five musicians, first class, with a base pay of \$51 per month; twenty-seven musicians, second class, with a base pay of \$44 per month; one drum major, with a base pay of \$57.20 per month; and the said leader of the band, second leader of the band, drum major of the band, and the enlisted musicians of the band shall be entitled to the same benefits in respect to pay, emoluments, and retirement arising from longevity, reenlistment, and length of service as are or may hereafter become applicable to other officers or enlisted men of the Navy. *[41 Stat. L. 152.]*

This and the following paragraph are from the Navy Appropriation Act of July 11, 1919, ch. 9.

\* \* \* **[Midshipmen — increase of number.]** Section 1 of the Act entitled “An Act to increase the number of midshipmen at the United States Naval Academy,” approved December 20, 1917, is hereby amended so as to read as follows: That hereafter there shall be allowed at the United States Naval Academy five midshipmen for each Senator, Representative, Delegate in Congress, and Resident Commissioner from Porto Rico, and five for the District of Columbia, fifteen appointed each year at large, and one hundred appointed annually from enlisted men of the Navy, and members of the Naval Reserve Force on active duty, as now authorized by law. [*41 Stat. L. 140.*]

This is from the Navy Appropriation Act of July 11, 1919, ch. 9.

For Act of Dec. 20, 1917, sec. 1, amended by the text, see 1918 Supp. Fed. Stat. Ann. 498.

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#### CROSS-REFERENCES

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**An Act Providing for the purchase of uniforms, accouterments, and equipment by officers of the Navy, Marine Corps, and Coast Guard, and midshipmen at the Naval Academy from the Government at cost.**

[*Act of Jan. 12, 1919, ch. 8, 40 Stat. L. 1054.*]

[**Officers' uniforms, accouterments, and equipment — furnishing by government at cost.**] That hereafter uniforms, accouterments, and equipment shall, upon the request of any officer of the Navy or any officer of the Marine Corps or any officer of the Coast Guard while operating with the Navy or any midshipman at the Naval Academy or cadets at the Coast Guard Academy, be furnished by the Government at cost, subject to such restrictions and regulations as the Secretary of the Navy may prescribe. [*40 Stat. L. 1054.*]

**An Act To provide for the temporary promotion of commissioned officers of the Marine Corps serving with the Army.**

[*Act of Jan. 12, 1919, ch. 7, 40 Stat. L. 1054.*]

**[Marine Corps — commissioned officers serving with army — temporary promotions — vacancies in Corps how filled.]** That commissioned officers of the Marine Corps, detached for duty with the Army under the provisions of section sixteen hundred and twenty-one, Revised Statutes, shall be eligible, in the same manner as officers of the Regular Army, for temporary promotion to higher grades in any of the forces provided by the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen: *Provided*, That officers of the Marine Corps temporarily promoted to higher grades in any of the forces of the Army under the provisions of this Act shall not thereby vacate their permanent appointments or commissions, or be prejudiced in their relative lineal standing in the Marine Corps: *Provided further*, That temporary vacancies in the Marine Corps caused by the appointment of officers to higher grades in the Army shall be temporarily filled in the same manner as is now prescribed by law: *And provided further*, That the temporary promotions herein authorized shall continue only while such officers are detached for duty with the Army. [40 Stat. L. 1054.]

For R. S. sec. 1621, mentioned in the text, see 6 Fed. Stat. Ann. (2d ed.) 1221; 5 Fed. Stat. Ann. (1st ed.) 350.

For Act of May 18, 1917, also mentioned above, see 1918 Supp. Fed. Stat. Ann. 1010.

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**An Act To provide for the Award of medals of honor, distinguished-service medals, and Navy crosses, and for other purposes.**

[*Act of Feb. 4, 1919, ch. 14, 40 Stat. L. 1056.*]

**[SEC. 1.] [Medals of honor — presentation by President — grounds.]** That the President of the United States be, and he is hereby, authorized to present, in the name of Congress, a medal of honor to any person who, while in the naval service of the United States, shall, in action involving actual conflict with the enemy, distinguish himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty and without detriment to the mission of his command or the command to which attached. [40 Stat. L. 1056.]

**SEC. 2. [Distinguished service medals — presentation by President — grounds.]** That the President be, and he hereby is, further authorized to present, but not in the name of Congress, a distinguished-service medal of appropriate design and a ribbon, together with a rosette or other device to be worn in lieu thereof, to any person who, while in the naval service of the United States, since the sixth day of April, nineteen hundred and seventeen, has distinguished, or who hereafter shall distinguish, himself by exceptionally meritorious service to the Government in a duty of great responsibility. [40 Stat. L. 1056.]

**SEC. 3. [Navy cross — presentation by President — grounds.]** That the President be, and he hereby is, further authorized to present, but not in the name of Congress, a Navy cross of appropriate design and a ribbon, together with a rosette or other device to be worn in lieu thereof, to any person who, while in the

naval service of the United States, since the sixth day of April, nineteen hundred and seventeen, has distinguished, or who shall hereafter distinguish, himself by extraordinary heroism or distinguished service in the line of his profession, such heroism or service not being sufficient to justify the award of a medal of honor or a distinguished-service medal. [40 Stat. L. 1056.]

SEC. 4. [Additional pay for honor men.] That each enlisted or enrolled person of the naval service to whom is awarded a medal of honor, distinguished-service medal, or a Navy cross shall, for each such award, be entitled to additional pay at the rate of \$2 per month from the date of the distinguished act or service on which the award is based, and each bar, or other suitable emblem or insignia, in lieu of a medal of honor, distinguished-service medal, or Navy cross, as hereinafter provided for, shall entitle him to further additional pay at the rate of \$2 per month from the date of the distinguished act or service for which the bar is awarded, and such additional pay shall continue throughout his active service, whether such service shall or shall not be continuous. [40 Stat. L. 1056.]

SEC. 5. [Number of medals awarded one person — successive acts of valor.] That no more than one medal of honor or one distinguished-service medal or one Navy cross shall be issued to any one person; but for each succeeding deed or service sufficient to justify the award of a medal of honor or a distinguished-service medal or Navy cross, respectively, the President may award a suitable bar, or other suitable emblem or insignia, to be worn with the decoration and the corresponding rosette or other device. [40 Stat. L. 1056.]

SEC. 6. [Cost of medals — appropriation — replacement of medals.] That the Secretary of the Navy is hereby authorized to expend from the appropriation "Pay of the Navy" of the Navy Department so much as may be necessary to defray the cost of the medals of honor, distinguished-service medals, and Navy crosses, and bars, emblems, or insignia herein provided for, and so much as may be necessary to replace any medals, crosses, bars, emblems, or insignia as are herein or may heretofore have been provided for: *Provided*, That such replacement shall be made only in those cases where the medal of honor, distinguished-service medal, or Navy cross, or bar, emblem, or insignia presented under the provisions of this or any other Act shall have been lost, destroyed, or rendered unfit for use without fault or neglect on the part of the person to whom it was awarded, and shall be made without charge therefor. [40 Stat. L. 1056.]

SEC. 7. [Limitation of time for issuance of medals.] That, except as otherwise prescribed herein, no medal of honor, distinguished-service medal, Navy cross, or bar or other suitable emblem or insignia in lieu of either of said medals or of said cross, shall be issued to any person after more than five years from the date of the act or service justifying the award thereof, nor unless a specific statement or report distinctly setting forth the act or distinguished service and suggesting or recommending official recognition thereof shall have been made by his naval superior through official channels at the time of the act or service or within three years thereafter. [40 Stat. L. 1057.]

SEC. 8. [Award of medals to representatives of deceased persons — subsequent good conduct as prerequisite to award of medals — time of performance of distinguished service when immaterial to award.] That in case an individual



who shall distinguish himself dies before the making of the award to which he may be entitled the award may nevertheless be made and the medal or cross or the bar or other emblem or insignia presented within five years from the date of the act or service justifying the award thereof to such representative of the deceased as the President may designate: *Provided*, That no medal or cross or no bar or other emblem or insignia shall be awarded or presented to any individual or to the representative of any individual whose entire service subsequent to the time he distinguished himself shall not have been honorable: *Provided further*, That in cases of persons now in the naval service for whom the award of the medal of honor has been recommended in full compliance with then existing regulations, but on account of services which, though insufficient fully to justify the award of the medal of honor, appears to have been such as to justify the award of the distinguished-service medal or Navy cross hereinbefore provided for, such cases may be considered and acted upon under the provisions of this Act authorizing the award of the distinguished-service medal and Navy cross notwithstanding that said services may have been rendered more than five years before said cases shall have been considered as authorized by this proviso, but all consideration or any action upon any of said cases shall be based exclusively upon official records now on file in the Navy Department. [40 Stat. L. 1057.]

**SEC. 9. [Delegation of President's power to award Navy cross — rules and regulations for making Act effective.]** That the President be, and he hereby is, authorized to delegate, under such conditions, regulations, and limitations as he shall prescribe, to flag officers who are commanders in chief or commanding on important independent duty the power conferred upon him by this Act to award the Navy cross; and he is further authorized to make from time to time any and all rules, regulations, and orders which he shall deem necessary to carry into effect the provisions of this Act and to execute the full purpose and intention thereof. [40 Stat. L. 1057.]

\* \* \* **[Marine Corps — military supplies — requisition from war department.]** That the Secretary of War is authorized and directed to transfer to the Secretary of the Navy for the use of the Marine Corps without payment therefor, such reserve stock of clothing, arms, and equipment, and other necessary military supplies, inventoried at the cost to the Army and not to exceed in the aggregate \$7,000,000, as the same from time to time may be requisitioned. [40 Stat. L. 1174.]

This is from the Deficiency Appropriation Act of Feb. 25, 1919, ch. 39.

**[Sec. 1.] \* \* \* [Bureau of Steam Engineering — technical services.]** The services of draftsmen and such other technical services as the Secretary of the Navy may deem necessary may be employed only in the Bureau of Steam Engineering and at rates of compensation not exceeding those paid hereunder prior to January 1, 1918, to carry into effect the various appropriations for "Increase of the Navy" and "Engineering," to be paid from the appropriation "Engineering": *Provided*, That the expenditures on this account for the fiscal year 1920 shall not exceed \$230,055. A statement of the persons employed hereunder,

their duties, and the compensation paid to each shall be made to Congress each year in the annual estimates. [40 Stat. L. 1244.]

This and the three paragraphs which follow are from the Legislative, Executive and Judicial Appropriation Act of March 1, 1919, ch. 86.

\* \* \* [Bureau of Construction and Repair—technical services.] The services of draftsmen and such other technical services as the Secretary of the Navy may deem necessary may be employed only in the Bureau of Construction and Repair and at rates of compensation not exceeding those paid hereunder prior to January 1, 1918, to carry into effect the various appropriations for "Increase of the Navy," and "Construction and Repair," to be paid from the appropriation "Construction and Repair": *Provided*, That the expenditures on this account for the fiscal year 1920 shall not exceed \$350,000. A statement of the persons employed hereunder, their duties, and the compensation paid to each shall be made to Congress each year in the annual estimates. [40 Stat. L. 1245.]

See the note to preceding paragraph.

\* \* \* [Bureau of Ordnance—technical services.] The services of draftsmen and such other technical services as the Secretary of the Navy may deem necessary may be employed only in the Bureau of Ordnance, and at rates of compensation not exceeding those paid hereunder prior to January 1, 1918, to carry into effect the various appropriations for "Increase of the Navy," and "Ordnance and ordnance stores," to be paid from the appropriation "Ordnance and ordnance stores": *Provided*, That the expenditures on this account for the fiscal year 1920 shall not exceed \$100,000. A statement of the persons employed hereunder; their duties, and the compensation paid to each, shall be made to Congress each year in the annual estimates. [40 Stat. L. 1245.]

See the note to second preceding paragraph.

\* \* \* [Bureau of Yards and Docks—technical services.] The services of skilled draftsmen and such other technical services as the Secretary of the Navy may deem necessary may be employed only in the Bureau of Yards and Docks to carry into effect the various appropriations and allotments thereunder and be paid from such appropriations and allotments: *Provided*, That the expenditures on this account for the fiscal year 1920 shall not exceed \$250,000. A statement of the persons employed hereunder, their duties, and the compensation paid to each shall be made to Congress each year in the annual estimates. [40 Stat. L. 1245.]

See the note to third preceding paragraph.

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### **An Act Making appropriations for the naval service for the fiscal year ending June 30, 1920, and for other purposes.**

[Act of July 11, 1919, ch. 9, 41 Stat. L. 132.]

\* \* \* [Claims—privately owned property damaged during world war by men in naval service or marine corps.] That the Secretary of the Navy is authorized to consider, ascertain, adjust, determine, and pay the amounts due in all claims for damages (other than such as are occasioned by vessels of the

Navy), to and loss of privately owned property, occurring subsequent to April 6, 1917, where the amount of the claim does not exceed \$500, for which damage or loss men in the naval service or Marine Corps are found to be responsible, all payments in settlement of said claims to be made out of the appropriation "Pay, miscellaneous": *Provided further*, That all claims adjusted under this authority during any fiscal year shall be reported in detail to the Congress by the Secretary of the Navy. [41 Stat. L. 132.]

\* \* \* [Disbursing officers — losses or deficiencies — relief.] The accounting officers of the Treasury shall relieve any disbursing officer of the Navy charged with responsibility on account of loss or deficiency while in the line of his duty, of Government funds, vouchers, records, or papers, in his charge, where such loss or deficiency occurred without fault or negligence on the part of said officer: *Provided*, That the Secretary of the Navy shall have determined that the officer was in the line of his duty, and the loss or deficiency occurred without fault or negligence on his part: *Provided further*, That the determination by the Secretary of the Navy of the aforesaid questions shall be conclusive upon the accounting officers of the Treasury: *Provided further*, That all cases of relief granted under this authority during any fiscal year shall be reported in detail to the Congress by the Secretary of the Navy. [41 Stat. L. 132.]

\* \* \* [Military stores, supplies and equipment — interchange between Army and Navy.] The interchange without compensation therefor, of military stores, supplies, and equipment of every character, including real estate owned by the Government, is hereby authorized between the Army and the Navy upon the request of the head of one service and with the approval of the head of the other service. [41 Stat. L. 132.]

\* \* \* [Enlistments — period.] Until June 30, 1920, enlistments in the Navy may be for terms of two, three or four years, and all laws now applicable to four year enlistments shall apply, under such regulations as may be prescribed by the Secretary of the Navy, to enlistments for a shorter period with proportionate benefits upon discharge and reenlistment. [41 Stat. L. 134.]

\* \* \* [Naval Reserve Force — gratuities for former Naval Volunteers.] Officers of the United States Naval Reserve Force who were transferred from the National Naval Volunteers under the provisions of the Act of July 1, 1918, shall be paid the same uniform gratuity as other officers of the Naval Reserve Force: *Provided*, That they shall not have received from any State such gratuity. [41 Stat. L. 135.]

For Act of July 1, 1918, mentioned in the text, see 1918 Supp. Fed. Ann. 553.

\* \* \* [Naval Reserve Force — active duty on shore.] Members of the Naval Reserve Force shall not hereafter be ordered to perform active duty on shore of a kind which is ordinarily performed by civilians, and all reservists now performing such duty shall be relieved from such duty within thirty days after the date of approval of this Act. [41 Stat. L. 138.]

\* \* \* [Enlisted strength of active list of Navy — temporary increase.] The total authorized enlisted strength of the active list of the Navy is hereby

temporarily increased from 131,485 during the period from July 1, 1919, to September 30, 1919, to 241,000 men, and from October 1, 1919, to December 31, 1919, to 191,000 men, and from January 1, 1920, to June 30, 1920, to 170,000 men and the President is hereby authorized, whenever in his judgment a sufficient national emergency exists, to increase the authorized enlisted strength of the Navy to 191,000 men, and the Secretary of the Navy is hereby authorized to call to or continue on active service on strictly naval duties, with their consent, such numbers of the male members and nurses of the Naval Reserve Force in enlisted ratings as may be necessary to supply deficiencies to maintain the total authorized strength for the periods herein authorized. The foregoing total authorized strength shall include the hospital corps, apprentice seamen, those sentenced by court-martial to discharge, enlisted men of the Flying Corps, those under instruction in trade schools, and members of the Naval Reserve Force so serving. That during the fiscal year ending June 30, 1920, no member of the Naval Reserve Force shall be recalled to active duty for training or any other purpose except as hereinbefore provided: *Provided*, That the average number of commissioned officers of the line, permanent, temporary, and reserves on active duty, shall not exceed during the periods aforesaid, 4 per centum of the total temporary authorized enlisted strength of the Regular and Temporary Navy, and members of the Naval Reserve Force in enlisted ratings on active duty, and the number of staff officers shall be in the same proportion as provided under existing law: *Provided further*, That nothing herein shall be construed as affecting the permanent, commissioned, or enlisted strength of the Regular Navy as authorized by existing law. [41 Stat. L. 137.]

\* \* \* [Naval Reserve Force and Marine Corps Reserve — female members.] Female members, except nurses, of the Naval Reserve Force and the Marine Corps Reserve shall, as soon as practicable and in no event later than thirty days after the date of approval of this Act, be placed on inactive duty. [41 Stat. L. 138.]

\* \* \* [Naval Reserve Force and Marine Corps Reserve — civil appointments for members.] Members of the Naval Reserve Force and Marine Corps Reserve whose conduct, services and efficiency have demonstrated the desirability of their retention may, in the discretion of the Secretary of the Navy, be given temporary civil appointments in the Navy Department or Naval Establishment at the ordinary and usual rates of pay accorded employees performing a similar character of work, provided such services are necessary.

Members of the Naval Reserve Force and Marine Corps Reserve who accept such temporary civil appointments shall be given an opportunity to qualify by a civil service examination for certification in accordance with civil service rules to fill such vacancies as may occur, in cases where they are not already eligible for appointment or reinstatement. All temporary appointments made hereunder shall terminate not later than June 30, 1920. For pay of reservists so transferred to the civil establishment, or civil service employees appointed in lieu thereof, \$8,613,220, their pay prior to transfer to be charged to the appropriation "Pay of the Navy," and the Secretary of the Navy shall submit to Congress on the first day of the next regular session a statement showing the number and designation of the persons employed hereunder and the rate of compensation paid to each: *Provided*, That no employee paid under the provisions of this paragraph, except expert technicians, shall receive annual

compensation in excess of \$2,000 for services rendered in the Navy Department, Washington, District of Columbia: *Provided further*, That not more than twenty-four employees shall be so appointed at a compensation exceeding \$2,000 per annum, and that in no case shall the compensation exceed \$4,000 per annum. [41 Stat. L. 138.]

• • • [Secretary of Navy — time for making computations and convening promotion boards — recommendations by boards.] The provision of existing law which requires the Secretary of the Navy to make computations semiannually as of July 1 and January 1 of each year and to convene the boards to select officers of the line and of the staff corps for promotion is hereby amended so that said computations shall be made and said boards shall be convened at least once each year and at such times as the Secretary of the Navy may direct, and the boards shall recommend for promotion such number of officers as may be necessary to fill vacancies then existing and which may occur during the next period of time. [41 Stat. L. 139.]

• • • [Pay and allowances of officers and men — effect of this Act.] That nothing contained in this Act shall be construed to reduce the pay or allowances of any commissioned, warrant, or appointed officer or any enlisted man as authorized by law for such officer or enlisted man in his present permanent status in the Regular Navy. [41 Stat. L. 139.]

• • • [Enrolled men of Naval Reserve Force and Marine Corps Reserve — transfer to regular Navy and Marine Corps.] Enrolled men of the Naval Reserve Force and of the Marine Corps Reserve, other than commissioned and warrant officers, who have performed active duty during the war, may, upon their own application, be transferred to the regular Navy and Marine Corps, respectively, to serve the unexpired term of their enrollment in such rating or rank as they may be found qualified under such regulations as the Secretary of the Navy may prescribe: *Provided*, That men so transferred shall have at least one year to serve in the regular Navy or the Marine Corps before the expiration of their current enlistment: *Provided further*, That such transfers may not be made in excess of the authorized enlisted strength of the Navy or Marine Corps: *Provided further*, That enrolled men so transferred shall be entitled to and receive the same pay, rights, privileges, and allowances in all respects as now provided by existing law for men regularly discharged and reenlisted immediately upon expiration of their full four-year enlistment in the Regular Navy or Marine Corps. [41 Stat. L. 139.]

• • • [Enlisted men of Navy and Coast Guard serving in world war — discharge — transportation and subsistence.] All enlisted men of the Navy and Coast Guard who have served in the war with the German Government and who may hereafter be discharged or who have been discharged from the service since November 11, 1918, and before the expiration of their full enlistment shall receive, under such rules and regulations as the Secretary of the Navy may prescribe, an honorable discharge and shall receive 5 cents per mile from the place of his discharge to his actual bona fide home or residence, or original muster into the service at his option: *Provided*, That for sea travel on discharge, transportation and subsistence only shall be furnished to enlisted men: *Provided*, That the records of such men warrant such honorable discharge. [41 Stat. L. 139.]

\* \* \* **[Enlisted men of Navy, Marine Corps or Coast Guard — honorable discharge before expiration of term of enlistment — reenlistments — gratuity pay — extension of enlistments.]** Any enlisted man of the Navy, Marine Corps, or Coast Guard, who, since February 3, 1917, and before November 11, 1918, enlisted for the period of four years shall upon his application made to the Secretary of the Navy on or before September 1, 1919, be held and construed to have enlisted for the duration of the war and shall when discharged be granted an honorable discharge, and upon the taking effect of this Act shall be notified by the Secretary of the Navy of his right to file such application: *Provided*, That said enlisted man is otherwise entitled to an honorable discharge: *Provided further*, That the return home of the American Expeditionary Forces shall not be thereby delayed: *Provided further*, That any enlisted man who takes advantage of the provisions of this paragraph to secure a discharge from the Navy, Marine Corps, or Coast Guard, and thereafter reenlists within four months in the Navy or in the Marine Corps, under conditions as now prescribed by law, for a period of four years, shall be entitled to receive the benefits of the gratuity pay provided by existing law for reenlistments.

Enlisted men of the Navy, Marine Corps, and Coast Guard, who enlisted for the period of the war or enlisted for a period of four years between February 3, 1917, and November 11, 1918, and have their status changed to that of men who enlisted for the period of the war if otherwise entitled to an honorable discharge, may, under such regulations as the Secretary of the Navy may prescribe, extend their enlistments for a period of one, two, three, or four full years, and shall be entitled to and receive the same rights, privileges, pay, and allowances in all respects as now provided by law for men who extend enlistment on completion of terms of enlistment, except as to gratuity pay: *Provided*, That as, to gratuity pay, such enlisted men who extend their enlistment as before provided shall be entitled to receive an allowance of one month's pay for extending their enlistment for one year, two months' pay for extending their enlistment for two years, three months' pay for extending their enlistment for three years, and in the Navy four months' pay for extending their enlistment for four years. [41 Stat. L. 139.]

\* \* \* **[Officers of Navy and Marine Corps — quarters and commutation.]**

See Res. of Dec. 24, 1919, set out infra, this title, p. 290. That act repeals a paragraph relating to the quarters and commutation of officers of the navy and marine corps which was contained in this Act.

\* \* \* **[Enlisted men of Navy — increases of pay.]** The rates of pay prescribed in section 15 of an Act entitled "An Act to temporarily increase the commissioned and warrant and enlisted strength of the Navy and Marine Corps, and for other purposes," approved May 22, 1917, are hereby made the permanent rates of pay of the enlisted men of the Navy during their present current enlistment and for those who enlist or reenlist prior to July 1, 1920, for the term of such enlistment or reenlistment. [41 Stat. L. 140.]

For Act of May 22, 1917, sec. 15, see 1918 Supp. Fed. Stat. Ann: 528.

\* \* \* **[Officers serving in temporary grade or rank — promotion to same permanent grade.]** That officers of the permanent Navy who have served satisfactorily during the war with the German Government in a temporary grade or rank shall be eligible under the provision of existing law for selection

for promotion and for promotion to the same permanent grade or rank until July 1, 1920, without regard to statutory requirements other than professional and physical examinations: *Provided*, That the age and grade requirement prescribed by the Act approved August 29, 1916, in the rank of commander, is hereby extended from June 30, 1920, to June 30, 1921. [41 Stat. L. 140.]

For Act of Aug. 29, 1916, mentioned in the text, see 1916 Supp. Fed. Stat. Ann. 514.

**\* \* \* [Rear admiral serving as chief of a bureau — credit for services.]**

Any officer with the permanent rank of rear admiral who has heretofore served a full term and is now serving as chief of any bureau of the Navy Department shall be credited with service for all purposes as provided by section 1486 of the Revised Statutes, and nothing herein contained shall operate to increase the rank or pay of any such officer as now authorized by law. [41 Stat. L. 140.]

For R. S. sec. 1486, mentioned in the text, see 6 Fed. Stat. Ann. (2d ed.) 1139; 5 Fed. Stat. Ann. (1st ed.) 293.

**\* \* \* [Warrant officers — pay for foreign shore duty.]** Warrant officers of the Navy on shore duty beyond the continental limits of the United States shall, while so serving and from the time of departure from and until the time of return to said limits under orders to or from such foreign-shore duty, receive the same pay as is now or may be authorized by law for warrant officers on sea duty: *Provided*, That this paragraph shall be effective from April 6, 1917. [41 Stat. L. 140.]

**\* \* \* [Enlisted men of Navy or Marine Corps accepting temporary service in reserve forces — effect as to retirement, rank and pay — credit for service rendered.]** Any enlisted man of the Navy or Marine Corps who has been or may be discharged to enable him to accept appointment as a commissioned or warrant officer in the Navy Reserve Force or Marine Corps Reserve, and who reenlists in the Navy or Marine Corps after the termination of his reserve service, shall be entitled, in computing service for retirement, to credit for all active reserve service; and if he reenlists in the Navy or Marine Corps within four or three months, respectively, from the date of the termination of his service as an officer of the Reserve he shall be restored to the grade or rank held by him before being discharged to accept such commission or warrant, and his service in the Regular Navy or Marine Corps, including his active service in the Naval Reserve Force or Marine Corps Reserve, shall be regarded as continuous for purposes of continuous-service pay. [41 Stat. L. 141.]

**\* \* \* [Warrant officers and pay clerks — Navy and Marine Corps — temporary services in reserve forces — effect on former status — longevity pay and retirement.]** That any warrant officer in the Navy or Marine Corps and any pay clerk in the Marine Corps who has accepted or who may hereafter accept appointment as a commissioned officer in the Naval Reserve Force or Marine Corps Reserve shall be entitled, upon the termination of his appointment as a commissioned officer in the Reserve, to revert to his former status as a warrant officer in the Navy or Marine Corps, or as a pay clerk in the Marine Corps, and shall be entitled to count all active reserve service for purposes of longevity pay and retirement. [41 Stat. L. 141.]

\* \* \* **[Naval Militia — effect of transfer of National Naval Volunteers to Naval Reserve Force.]** That no part or parts of any existing laws shall be construed as having discharged from the Naval Militia of any State, Territory, or the District of Columbia, those members of the National Naval Volunteers who were transferred to the Naval Reserve Force by authority of the Act of Congress making appropriations for the Naval Service which became a law on July 1, 1918; nor to prevent members of the Naval Reserve Force from being or becoming members of the Naval Militia of any State, Territory, or the District of Columbia: *Provided*, That such membership in the Naval Militia shall not interfere with the discharge of duties by such members thereof who are in the Naval Reserve Force. [41 Stat. L. 141.]

For Act of July 1, 1918, see 1918 Supp. Fed. Stat. Ann. 553.

\* \* \* **[Pay Corps — change of name.]** That hereafter the Pay Corps shall be called the Supply Corps. [41 Stat. L. 141.]

\* \* \* **[Captains — promotion — physical defects.]** That the provisions of the Act of August 29, 1916, regarding the promotion of captains in the line of the permanent Navy shall not restrict the promotion of such captains as may have been wounded in line of duty and who are now on the active list, and such captains shall be entitled to the benefits of the provisions of section 1494, Revised Statutes of the United States, and also to the benefits of the Act of March 4, 1911. [41 Stat. L. 147.]

For Act of Aug. 29, 1916, see 1918 Supp. Fed. Stat. Ann. 517.

For R. S. sec. 1494, mentioned in the text, see 6 Fed. Stat. Ann. (2d ed.) 1141; 5 Fed. Stat. Ann. (1st ed.) 295.

For Act of March 4, 1911, mentioned in the text, see 6 Fed. Stat. Ann. (2d ed.) 1131; 1912 Supp. Fed. Stat. Ann. 283.

\* \* \* **[Courts-martial prisoners — commutation of rations.]** That the Secretary of the Navy is authorized to commute rations for such general courts-martial prisoners [Navy and Marine Corps general courts-martial prisoners undergoing imprisonment with sentences of dishonorable discharge from the service at the expiration of such confinement] in such amounts as seem to him proper, which may vary in accordance with the location of the naval prison, but which shall in no case exceed 30 cents per diem for each ration so commuted. [41 Stat. L. 147.]

\* \* \* **[Vessels obtained from United States Shipping Board — charter hire.]** That the United States Shipping Board shall not require payment from the Navy Department for the charter hire of vessels furnished or to be furnished from July 1, 1918, to June 30, 1920, inclusive, for the use of that department when such vessels are owned by the United States Government. [41 Stat. L. 148.]

\* \* \* **[“ Enlisted men ” as including women.]** That the words “ enlisted men,” as contained in prior appropriation Acts, shall not be construed to deprive women, enlisted or enrolled in the naval service, of the pay, allowances, gratuities, and other benefits granted by law to the enlisted personnel of the Navy and Marine Corps. [41 Stat. L. 152.]

\* \* \* **[Marine Corps — enlisted strength — increase.]** The authorized enlisted strength of the active list of the Marine Corps is hereby temporarily



increased to 27,400, plus such number of men as may be serving with the American Expeditionary Forces abroad: *Provided*, That the average number of enlisted men of the Marine Corps on active duty during the fiscal year ending June 30, 1920, shall not exceed 27,400, distribution in the various grades to be made in the same proportion as provided under existing law. [41 Stat. L. 152.]

• • • [Officers — temporary appointments — reductions — lower grades.] That in making reductions required by this Act, officers holding temporary appointments may be given temporary appointments in lower grades, and officers so appointed shall take precedence from the dates of their original appointments in such lower grades. [41 Stat. L. 153.]

• • • [Retired enlisted men — Navy or Marine Corps — active duty — promotions.] That so much of the Act of July 1, 1918 (Public Numbered 182), as authorizes the promotion of retired enlisted men of the Navy and Marine Corps ordered to active duty shall not be so construed as to make illegal promotions of such men as have heretofore been made to warrant grades or as to deprive them of any of the pay, allowances, or other benefits accruing under such promotion. [41 Stat. L. 153.]

For Act of July 1, 1918, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 539.

• • • [Settlement of accounts of disbursing officers — period of world war — credits.] That the accounting officers of the Treasury Department are hereby authorized and directed to allow, in the settlement of the accounts of disbursing officers of the Navy and Marine Corps covering the period of the present emergency, such credits for payments to officers and enlisted men not ordinarily allowable under the statutes, as are certified to them by the Secretary of the Navy as having been incurred under military necessity, or as having been occasioned by accidental circumstances or conditions over which such disbursing officers had no control and for which they were not justly responsible: *Provided*, That the period of the present emergency as contemplated by this paragraph shall be regarded as beginning on the 6th day of April, 1917, and as terminating six months after the expiration of the quarter in which peace is declared. And that nothing herein shall be construed to include payments under contracts for supplies or services. [41 Stat. L. 153.]

• • • [Marine Corps — enlisted men — allowance for rations.] That hereafter, except when detached by the President of the United States for duty with the Army, enlisted men of the Marine Corps shall be entitled to the same allowance for rations as are enlisted men of the Navy, under such rules and regulations as may be prescribed by the Secretary of the Navy. [41 Stat. L. 154.]

• • • [Post laundries — cost of operation — how defrayed.] That hereafter the funds received in payment for laundry work performed by post laundries shall be used to defray the cost of operation of such laundries and the receipts and expenditures shall be accounted for in accordance with the methods prescribed by law and any sums remaining at the end of the fiscal year after such cost of maintenance and operation have been defrayed shall be deposited in the Treasury to the credit of the appropriation from which the cost of operation of such plants is paid. [41 Stat. L. 155.]

**Joint Resolution Continuing temporarily certain allowances to officers of the Navy and Marine Corps.**

[*Res. of Dec. 24, 1919, No. 26, ch. 41, Stat. L. —.*]

**[Officers of Navy and Marine Corps — quarters and commutation.]**

Whereas since it now appears that peace has not been declared by October 1, 1919, on which date officers of the Navy, by operation of law, will cease to receive the benefits prescribed in the Act of April 16, 1918 (Public, Numbered 129), and

Whereas said benefits will accrue to officers of the Army until peace shall have been declared: Therefore be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the paragraph in the Act of July 11, 1919 (Public, Numbered 8), which reads as follows:

“ The Act of April 16, 1918 (Public, Numbered 129), granting under certain conditions to every commissioned officer of the Army the right to quarters in kind for their dependents or the authorized commutation therefor, including the allowances for heat and light, shall hereafter be construed to apply to officers of the Navy and Marine Corps only during the period of the war and in no event beyond October 1, 1919,” be, and the same is hereby, repealed: *Provided*, That officers of the Navy and Marine Corps shall be entitled to all the rights and benefits under said Act of April 16, 1918 (Public, Numbered 129), from and after October 1, 1919, and during the present emergency. [*41 Stat. L. —.*]

For Act of April 16, 1918, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1202; 1918 Supp. Fed. Stat. Ann. (1st ed.) 1036.

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## NURSES

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

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## OFFICERS

See JUDICIAL OFFICERS; PUBLIC OFFICERS AND EMPLOYEES

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## PARKS

See PUBLIC PARKS

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## PASSPORTS

See IMMIGRATION

## PATENTS

*Act of Nov. 4, 1919, ch. 93, 291.*

*Sec. 1. Specifications and Drawings — Copies — Fee, 291.*

[SEC. 1. ] \* \* \* [Specifications and drawings — copies — fee.] That hereafter 10 cents per copy shall be charged for uncertified printed copies of specifications and drawings of patents. [41 Stat. L. 335.]

This is from the "First Deficiency Appropriation Act, fiscal year 1920," of Nov. 4, 1919, ch. 93.

## PENAL LAWS

*Act of Oct. 23, 1918, ch. 194, 291.*

*Making or Presenting False Claims — Receiving Military or Naval Property Unlawfully — Sec. 35 of Crim. Code Amended, 291.*

**An Act To amend section thirty-five of the Criminal Code of the United States.**

[*Act of Oct. 23, 1918, ch. 194, 40 Stat. L. 1015.*]

[**Making or presenting false claims — receiving military or naval property unlawfully — sec. 35 of Crim. Code amended.**] That section thirty-five of the Criminal Code of the United States be, and the same hereby is, amended to read as follows:

"SEC. 35. Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry; or whoever shall take and carry away or take for his own use, or for the use of another, with intent to steal or purloin, any personal property of the United States, or any branch or department thereof, or any corporation in which the United States of America is a stockholder; or whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim; and whoever, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, with intent to defraud the

United States, or any department thereof, or any corporation in which the United States of America is a stockholder, or willfully to conceal such money or other property, shall deliver or cause to be delivered to any person having authority to receive the same any amount of such money or other property less than that for which he received a certificate or took a receipt; or whoever, being authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, shall make or deliver the same to any other person without a full knowledge of the truth of the facts stated therein and with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both. And whoever shall purchase, or receive in pledge, from any person any arms, equipment, ammunition, clothing, military stores, or other property furnished by the United States, under a clothing allowance or otherwise, to any soldier, sailor, officer, cadet, or midshipman in the military or naval service of the United States or of the National Guard or Naval Militia, or to any person accompanying, serving, or retained with the land or naval forces and subject to military or naval law, having knowledge or reason to believe that the property has been taken from the possession of the United States or furnished by the United States under such allowance, shall be fined not more than \$500 or imprisoned not more than two years, or both." [40 Stat. L. 1015.]

For sec. 35 of the Penal Laws, as originally enacted, see 7 Fed. Stat. Ann. (2d ed.) 523; 1909 Supp. Fed. Stat. Ann. 414.

**Effect of Ninety-fourth Article of War.**—The subject-matter of this act amending section 35 of the Criminal Code is the same as that set forth in the ninety-fourth Article of War. The punishment however is different. The act does not in any manner refer to or amend or repeal the ninety-fourth Article of War, and does not deprive courts-martial of their jurisdiction in respect of

persons in the military and naval service. It is merely the latest legislation logically carrying down to date statutes which have permitted the trial of civilians and members of the military and naval forces in the civil courts, and does not in any manner interfere with a trial by court-martial as provided in the Articles of War. *U. S. v. Barry*, (S. D. N. Y. 1919) 260 Fed. 291.

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## PENSIONS

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

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## PHILIPPINE ISLANDS

See PUBLIC OFFICERS AND EMPLOYEES

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## PHOTOGRAPHS

See AGRICULTURE

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## PORTO RICO

See POSTAL SERVICE

## POSTAL SERVICE

*Act of Feb. 24, 1919, ch. 18, 293.*

*Sec. 1401. Postal Rates — First class Mail Matter — Soldiers' and Sailors' Mail — Payments by Postmaster General — Laws Repealed, 293.*

*Act of Feb. 28, 1919, ch. 69, 294.*

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*3. Effect of Increases or Advancing Post Office to Higher Class, 302.*

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*Act of Nov. 19, 1919, ch. 119, 303.*

*Second, Third and Fourth Class Mail Matter — Forwarding to Addressee — Returning to Sender, 303.*

### CROSS-REFERENCE

See also *INTOXICATING LIQUORS.*

**Sec. 1401. [Postal rates — first class mail matter — soldiers' and sailors' mail — payments by Postmaster General — laws repealed.]** That section 1100 of the Revenue Act of 1917 is hereby repealed, to take effect on July 1, 1919, and thereafter the rate of postage on all mail matter of the first class shall be the same as the rate in force on October 2, 1917: *Provided*, That letters written and mailed by soldiers, sailors, and marines assigned to duty in a foreign country engaged in the present war may be mailed free of postage, subject to such rules and regulations as may be prescribed by the Postmaster General.

Section 1107 of such Act is hereby repealed, to take effect July 11, 1919. [40 Stat. L. 1150.]

This section is from the "Revenue Act of 1918" set out ante, p. 90. It was enacted Feb. 24, 1919.

For Act of Oct. 3, 1917, secs. 1100, 1107, see 1918 Supp. Fed. Stat. Ann. 658, 660.

**An Act Making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1920, and for other purposes.**

[Act of Feb. 28, 1919, ch. 69, 40 Stat. L. 1189.]

[SEC. 1.] \* \* \* [Inspectors — per diem allowances.] For per diem allowance of inspectors in the field while actually traveling on official business away from their homes, their official domiciles, and their headquarters, at a rate to be fixed by the Postmaster General, not to exceed \$4 per day: *Provided*, That the Postmaster General may, in his discretion, allow inspectors per diem while temporarily located at any place on business away from their homes or their designated domiciles for a period not exceeding twenty consecutive days at any one place, and make rules and regulations governing the foregoing provisions relating to per diem: *And provided further*, That no per diem shall be paid to inspectors receiving annual salaries of \$2,000 or more, except the thirty-two inspectors receiving \$2,100 each, \$350,000. [40 Stat. L. 1189.]

\* \* \* [Postmasters — readjustment of salaries.] That the Postmaster General is hereby authorized to readjust the salaries of postmasters at offices of the first, second, and third class, effective July 1, 1919, in accordance with the law in effect prior to the war: *And provided further*, That in making such adjustment no allowance shall be made for the revenue derived from increased rates on first-class mail. [40 Stat. L. 1190.]

\* \* \* [First-class post offices — foremen — stenographers.] That there may also be employed at first-class post offices foremen and stenographers at a salary of \$1,300 or more per annum. [40 Stat. L. 1192.]

\* \* \* [Clerks — appointment and assignment — vacations — substitutes.] That hereafter the appointment and assignment of clerks hereunder shall be so made during each fiscal year as not to involve a greater aggregate expenditure than the sum appropriated; and to enable the Postmaster General to carry out the provisions of this Act he may hereafter exceed the number of clerks appropriated for for particular grades: *Provided further*, That hereafter the fifteen days' annual vacation allowed by law to clerks and other employees in first and second class offices shall be credited at the rate of one and one-quarter days for each month of actual service: *Provided further*, That hereafter whenever practicable in case of emergency or otherwise a substitute is available the postmaster is prohibited from employing a regular clerk overtime. [40 Stat. L. 1192.]

\* \* \* [Third-class post offices — clerical services — allowances.] That hereafter no allowance in excess of \$450 shall be made where the salary of the postmaster is \$1,000, \$1,100, or \$1,200; nor in excess of \$600 where the salary of the postmaster is \$1,300, \$1,400, or \$1,500; and that no allowance in excess of

\$750 shall be made where the salary of the postmaster is \$1,600 or \$1,700; nor in excess of \$1,200 where the salary of the postmaster is \$1,800 or \$1,900. [40 Stat. L. 1193.]

\* \* \* [Work days — holidays.] That hereafter all days, other than the holidays enumerated in the Act of July 28, 1916, making appropriations for the Postal Service for the fiscal year ending June 30, 1917, set aside by the President of the United States as holidays to be observed by the other departments of the Government throughout the United States shall be construed as applicable to the Postal Service in the same manner and to the same extent as the executive departments. [40 Stat. L. 1193.]

For Act of July 28, 1916, see 1918 Supp. Fed. Stat. Ann. 644.

\* \* \* [Aeroplane mail service.] That out of this appropriation the Postmaster General is authorized to expend not exceeding \$850,500 for the purchase of aeroplanes and the operation and maintenance of aeroplane mail service between such points, including service to and between points in Alaska, as he may determine. The Postmaster General in expending this appropriation shall purchase, as far as practicable, such available and suitable equipment and supplies for the aeroplane mail service as may be owned by or under construction for the War Department or the Navy Department when no longer required because of the cessation of war activities, and it shall be his duty to first ascertain if such articles of the character described may be secured from the War Department or the Navy Department before purchasing such equipment or supplies elsewhere. If such equipment or supplies, other than emergency supplies, are purchased elsewhere than from the War Department or the Navy Department, the Postmaster General shall report such action to Congress, together with the reasons for such purchases. All articles purchased from either of said departments shall be paid for at a reasonable price considering wear and tear and general condition. Said departments are authorized to sell such equipment and supplies to the Post Office Department under the conditions specified, and the proceeds of such sales shall be covered into the Treasury as miscellaneous receipts: *Provided further*, That the Secretary of War and the Secretary of the Navy are hereby authorized and directed to deliver immediately to the Postmaster General, as he may request, and as hereinbefore provided, such aeroplane machines, supplies, equipment, and parts as may be serviceable and available for the aeroplane mail service, the same to be out of any equipment that the War Department or the Navy Department has on hand or under construction, the War Department and the Navy Department appropriations to be credited with the equipment turned over to the Post Office Department: *And provided further*, That separate accounts be kept of the amount expended for aeroplane mail service. [40 Stat. L. 1194.]

\* \* \* [Railway postal clerks — deadheading — full time.] That railway and substitute railway postal clerks shall be credited with full time when deadheading under orders of the department. [40 Stat. L. 1195.]

\* \* \* [Railway postal clerks — travel allowances — former act amended.] That the Act of August 24, 1912 (Thirty-seventh Statutes, page 548), amended by the Act approved March 3, 1917, be further amended to read as follows:

"That hereafter, in addition to the salaries provided by law, the Postmaster General is hereby authorized to make travel allowances in lieu of actual expenses, at fixed rates per annum, not exceeding in the aggregate the sum annually appropriated, to railway postal clerks, acting railway postal clerks, and substitute railway postal clerks, including substitute railway postal clerks for railway postal clerks granted leave with pay on account of sickness, assigned to duty in railway post office cars, while on duty, after ten hours from the time of beginning their initial run, under such regulations as he may prescribe, and in no case shall such an allowance exceed \$2 per day." [40 Stat. L. 1195.]

For Act of March 3, 1917, amending Act of Aug. 24, 1912, see 1918 Supp. Fed. Stat. Ann. 656.

\* \* \* [Transportation of mail by electric and cable cars—rate of compensation.] That the rate of compensation to be paid per mile shall not exceed the rate now paid to companies performing such service, except that the Postmaster General, in cases where the quantity of mail is large and the number of exchange points numerous, may, in his discretion, authorize payment for closed-pouch service at a rate per mile not to exceed one-third above the rate per mile now paid for closed-pouch service; and for mail cars and apartments carrying the mails, not to exceed the rate of 1 cent per linear foot per car-mile of travel: *Provided further*, That the rates for electric car service on routes over twenty miles in length outside of cities shall not exceed the rates paid for service on steam railroads. [40 Stat. L. 1195.]

\* \* \* [Rural carriers—compensation.] That hereafter rural carriers assigned to horse-drawn vehicle routes on which daily service is performed shall receive \$24 per mile per annum for each mile said routes are in excess of twenty-four miles or major fraction thereof, based on actual mileage, and rural carriers assigned to horse-drawn vehicle routes on which triweekly service is performed shall receive \$12 per mile per annum for each mile said routes are in excess of twenty-four miles or major fraction thereof, based on actual mileage: *Provided further*, That during the fiscal year nineteen hundred and twenty the pay of carriers who furnish and maintain their own motor vehicles and who serve routes not less than fifty miles in length may be fixed at not exceeding \$2,250 per annum. [40 Stat. L. 1197.]

\* \* \* [Transportation of food products—motor truck routes—establishment.] That to promote the conservation of food products and to facilitate the collection and delivery thereof from producer to consumer and the delivery to producers of articles necessary in the production of such food products, the Postmaster General is hereby authorized to conduct experiments in the operation of motor vehicle truck routes, to be selected by him. The Postmaster General is further authorized to conduct experiments in the operation of country motor express routes, which shall be primarily operated as a means of expediting the transportation of fourth-class mail between producing and consuming localities and shall not displace or supplant any existing methods of mail transportation or delivery. These two classes of experiments shall be conducted under such rules and regulations, including modifications in rates of postage and in packing and wrapping requirements, as the Postmaster General may prescribe, and to defray the cost thereof the sum of \$300,000 is hereby appropriated: *Provided*, That mail other than that of the fourth class shall not be dispatched on experi-



mental motor vehicle truck routes or on experimental country motor express routes unless the same can be expedited thereby in delivery at destination: *Provided further*, That separate accounts shall be kept of the amount of all the mail of all classes carried on such routes. The Postmaster General shall report to Congress the result of such experiments at the beginning of the next regular session. [40 Stat. L. 1198.]

**SEC. 2. [Pay of post office employees — grades — promotions.]** That during the fiscal year ending June thirty, nineteen hundred and twenty, clerks in first and second class post offices and letter carriers in the City Delivery Service shall be divided into six grades as follows: First grade, salary \$1,000; second grade, salary \$1,100; third grade, salary \$1,200; fourth grade, salary \$1,300; fifth grade, salary \$1,400; sixth grade, salary \$1,500: *Provided*, That clerks in first and second class post offices and letter carriers in the City Delivery Service shall be promoted successively after one year's satisfactory service in each grade to the next higher grade until they reach the sixth grade. All promotions shall be made at the beginning of the quarter following one year's satisfactory service in the grade: *Provided further*, That clerks in first and second class post offices and letter carriers in the City Delivery Service who have served satisfactorily for one year in grades one, two, three, four, and five, respectively, under the Act approved July two, nineteen hundred and eighteen, shall be promoted to the next higher grade: *Provided further*, That the salaries of railway postal clerks shall be graded as follows: Grade one, at \$1,100; grade two, at \$1,200; grade three, at \$1,300; grade four, at \$1,400; grade five, at \$1,500; grade six, at \$1,600; grade seven, at \$1,700; grade eight, at \$1,800; grade nine, at \$1,900; grade ten, at \$2,000.

The Postmaster General shall classify and fix the salaries of railway postal clerks, under such regulations as he may prescribe, in the grades provided by law; and for the purpose of organization and establishing maximum grades to which promotions may be made successively, as hereinafter provided, he shall classify railway post offices, terminal railway post offices, and transfer offices with reference to their character and importance in three classes, with salary grades as follows: Class A, \$1,100 to \$1,500; class B, \$1,100 to \$1,600; class C, \$1,100 to \$1,800. He may assign to the offices of division superintendents and chief clerks such railway postal clerks as may be necessary and fix their salaries within the grades provided by law without regard to the classification of railway post offices.

Clerks in class A shall be promoted successively to grade three, clerks in class B shall be promoted successively to grade four, and clerks in class C shall be promoted successively to grade five, at the beginning of the quarter following the expiration of a year's satisfactory service in the next lower grade. Promotions above these grades within the maximum grades of the classification may be made in the discretion of the Postmaster General for meritorious service. No promotion shall be made except upon evidence satisfactory to the Post Office Department of the efficiency and faithfulness of the employee during the preceding year: *Provided further*, That clerks assigned as clerks in charge of crews consisting of more than one clerk shall be clerks of grades six to ten, inclusive, and may be promoted one grade only after three years' satisfactory and faithful service in such capacity: *Provided further*, That during the fiscal year ending June 30, 1920, the compensation of each rural letter carrier for serving a rural route of twenty-four miles, six days in the week, shall be \$1,500; on routes

twenty-two miles and less than twenty-four miles, \$1,440; on routes twenty miles and less than twenty-two miles, \$1,350; on routes eighteen miles and less than twenty miles, \$1,200; on routes sixteen miles and less than eighteen miles, \$1,050; on routes fourteen miles and less than sixteen miles, \$900; on routes twelve miles and less than fourteen miles, \$840; on routes ten miles and less than twelve miles, \$780; on routes eight miles and less than ten miles, \$720; on routes six miles and less than eight miles, \$660; on routes four miles and less than six miles, \$600. A rural letter carrier serving one triweekly route shall be paid on the basis for a route one-half the length of the route served by him, and a carrier serving two triweekly routes shall be paid on the basis for a route one-half of the combined length of the two routes: *Provided further*, That during the fiscal year ending June 30, 1920, postmasters of the fourth class shall receive the same compensation as now provided by law, except that they shall receive 100 per centum of the cancellations of the first \$100 or less per quarter: *Provided further*, That if the compensation does not exceed \$75 for any one quarter, fourth-class postmasters shall be allowed an increase of 20 per centum of the compensation allowed under existing law: *Provided further*, That no office shall be advanced to third class by reason of the temporary increases herein provided: *Provided further*, That during the fiscal year ending June 30, 1920, the increased compensation provided in section 2 of the Act approved July 2, 1918, making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1919, and for other purposes, shall remain the same for employees other than those mentioned herein: *Provided further*, That no assistant postmaster or supervisory official at offices of the first class shall receive a less salary than \$100 per annum in excess of the sixth-grade salary provided for clerks and carriers in the City Delivery Service, nor shall an assistant postmaster at any office of the second class be paid a less salary than that paid the highest-salaried clerk or letter carrier employed in such office: *Provided further*, That the provisions of this section shall not apply to employees who receive a part of their pay from any outside sources under cooperative arrangement with the Post Office Department, or to employees who serve voluntarily or receive only a nominal compensation: *And provided further*, That the increased compensation at the rate of 10 per centum, and 15 per centum for the fiscal year ending June 30, 1918, and the increased compensation for the fiscal year ending June 30, 1919, shall not be computed as salary in construing this section. So much as may be necessary for the increases provided for in this act is hereby appropriated. [40 Stat. L. 1198.]

For Act of July 2, 1918, sec. 2, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 664.

### SEC. 3. [Congressional committee to investigate salaries of postal employees.]

That a commission consisting of five members of the Committee on Post Offices and Post Roads of the United States Senate, to be appointed by the President of the Senate, and five members of the Committee on Post Offices and Post Roads of the House of Representatives, to be appointed by the Speaker of the House, is hereby authorized to investigate the salaries of postmasters and employees of the postal service with a view to the reclassification and readjustment of such salaries on an equitable basis. Vacancies occurring in the membership of the commission shall be filled in the same manner as the original appointments.

The commission is authorized to sit during the sessions or recess of Congress, to send for persons and papers, to administer oaths, to summon and compel the attendance of witnesses, and to employ such clerical and expert services and incur such expenses as may be necessary to carry out the purpose of this investigation.

The heads of the Post Office Department, postmasters, supervisory officials, and employees of the Postal Service shall furnish data and information, and make investigations upon request of the commission.

It shall be the duty of the commission to report by bill or otherwise, as soon as practicable, the results of its investigation and what reclassification and readjustment of compensation should be made. The expense of such investigation shall be paid from the unexpended balance of any appropriation for the Postal Service for the fiscal year ending June 30, 1919, or for the fiscal year ending June 30, 1920, and disbursed upon vouchers approved by the commission; which approval shall be conclusive upon the accounting officers of the Treasury Department. Funds necessary for the expenses of the commission shall become available upon the approval of this Act. [40 Stat. L. 1200.]

Sec. 4 is omitted because it contains nothing of permanent value.

**SEC. 5. [Rural post roads—definition of term—limitation of payments under federal aid—former act amended.]** That the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," approved July 11, 1916, is hereby amended to provide that the term "rural post roads," as used in section 2 of said Act, shall be construed to mean any public road a major portion of which is now used, or can be used, or forms a connecting link not to exceed ten miles in length of any road or roads now or hereafter used for the transportation of the United States mails, excluding every street and road in a place having a population, as shown by the latest available Federal census, of two thousand five hundred or more, except that portion of any such street or road along which the houses average more than two hundred feet apart: *Provided*, That section 6 of said Act be further amended so that the limitation of payments not to exceed \$10,000 per mile, exclusive of the cost of bridges of more than twenty feet clear span, which the Secretary of Agriculture may make, be, and the same is, increased to \$20,000 per mile. [40 Stat. L. 1200.]

For Act of July 11, 1916, see 1918 Supp. Fed. Stat. Ann. 639.

**SEC. 6. [Rural post roads—federal aid—appropriation—apportionment—preferences in employment of labor.]** That for the purpose of carrying out the provisions of said Act, as herein amended, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the following additional sums: The sum of \$50,000,000 for the fiscal year ending June 30, 1919, and available immediately; the sum of \$75,000,000 for the fiscal year ending June 30, 1920; and the sum of \$75,000,000 for the fiscal year ending June 30, 1921; said additional sums to be expended in accordance with the provisions of said Act: *Provided*, That where the constitution of any State prohibits the same from engaging upon internal improvements, or from contracting public debts for extraordinary purposes in an amount sufficient to meet the monetary requirements of the Act of July 11, 1916, or any Act amendatory thereof, or restricts annual tax levies for the purpose of constructing and improving roads and bridges, and where a constitutional alteration or amendment to overcome either or all of such prohibitions must be submitted to a referendum at a general election, the sum to which such State is entitled under the method of apportionment provided in the Act of July 11, 1916, or any Act amendatory thereof, shall be withdrawn by the Secretary of the Treasury from

the principal fund appropriated by the Act of July 11, 1916, or any Act amendatory thereof, upon receipt of the certification of the governor of such State to the existence of either or all of said prohibitions, and such sum shall be carried by the Secretary of the Treasury as a separate fund for future disbursement as hereinafter provided: *Provided further*, That when, by referendum, the constitutional alterations or amendments necessary to the enjoyment of the sum so withdrawn have been approved and ratified by any State, the Secretary of the Treasury, upon receipt of certification from the governor of such State to such effect, shall immediately make available to such State, for the purposes set forth in the Act of July 11, 1916, or any Act amendatory thereof, the sum withdrawn as hereinbefore provided: *Provided further*, That nothing herein shall be deemed to prevent any State from receiving such portion of said principal sum as is available under its existing constitution and laws: *Provided further*, That in the expenditure of this fund for labor preference shall be given, other conditions being equal, to honorably discharged soldiers, sailors, and marines, but any other preference or discrimination among citizens of the United States in connection with the expenditure of this appropriation is hereby declared to be unlawful. [40 Stat. L. 1201.]

For Act of July 11, 1916, see 1918 Supp. Fed. Stat. Ann. 639.

**SEC. 7. [Rural post roads — federal aid — use of supplies not needed by War Department.]** That the Secretary of War be, and he is hereby, authorized in his discretion to transfer to the Secretary of Agriculture all available war material, equipment, and supplies not needed for the purposes of the War Department, but suitable for use in the improvement of highways, and that the same be distributed among the highway departments of the several States to be used on roads constructed in whole or in part by Federal aid, such distribution to be made upon a value basis of distribution the same as provided by the Federal aid road Act, approved July 11, 1916: *Provided*, That the Secretary of Agriculture, at his discretion, may reserve from such distribution not to exceed 10 per centum of such material, equipment, and supplies for use in the construction of national forest roads or other roads constructed under his direct supervision. [40 Stat. L. 1201.]

For Act of July 11, 1916, see 1918 Supp. Fed. Stat. Ann. 639.

**SEC. 8. [See TIMBER LANDS AND FOREST RESERVES.]**

**SEC. 9. [Rural post roads — federal aid — employment of soldiers and sailors.]** That no officer or enlisted man of the Army, Navy, or Marine Corps shall be detailed for work on the roads which come within the provisions of this Act except by his own consent: *And provided further*, That the Secretary of Agriculture through the War Department shall ascertain the number of days any such soldiers, sailors, and marines have worked on the public roads in the several States (other than roads within the limits of cantonments or military reservations in the several States) during the existing war and also the location where they worked and their names and rank, and report to Congress at the beginning of its next regular session: *Provided further*, That when any officer or enlisted man in the Army, the Navy, or the Marine Corps shall have been or may be in the future detailed for labor in the building of roads or other highway construction or repair work (other than roads within the limits of cantonments or military reservations in the several States), during the existing war, the

pay of such officer or enlisted man shall be equalized to conform to the compensation paid to civilian employees in the same or like employment and the amount found to be due such officers, soldiers, sailors, and marines, less the amount of his pay as such officer, soldier, sailor, or marine, shall be paid to him from the 1920 appropriation herein allotted to the States wherein such highway construction or repair work was or will be performed. [40 Stat. L. 1202.]

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**An Act To improve the administration of the postal service in the Territory of Hawaii, in Porto Rico and the Virgin Islands.**

[Act of Oct. 28, 1919, ch. 86, 41 Stat. L. 323.]

**[Hawaii, Porto Rico and Virgin Islands — branch offices — salary of postmaster at Honolulu.]** That the Postmaster General is hereby directed to establish in the Islands of Hawaii, in Porto Rico and the Virgin Islands under appropriate regulations to be prescribed by him, such branch offices, nonaccounting offices, or stations of Honolulu, San Juan and Charlotte Amalie, respectively, as in his judgment may be necessary to improve the service and as may be required for the convenience of the public: *Provided, however,* That such branches, nonaccounting offices, and stations shall be conducted under the name of the existing post offices affected so as to maintain the identity of the offices concerned.

*Provided,* That the Postmaster General be authorized to fix the salary of the postmaster at Honolulu at not to exceed \$4,000 per annum. [41 Stat. L. 323.]

This Act became a law without the approval of the President by lapse of time.

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**Joint Resolution To provide additional compensation for employees of the Postal Service and making an appropriation therefor.**

[Res. of Nov. 7, 1919, No. 19, ch. 99, 41 Stat. L. 350.]

**[SEC. 1.] [Postmasters and other employees — additional compensation.]** That because of the unusual conditions which now exist, the compensation provided for in the Act entitled "An Act making appropriations for the Post Office Department for the fiscal year ending June 30, 1920," approved February 28, 1919, the following classes of employees shall be increased as follows for such fiscal year only:

(a) Postmasters at offices of the third class; assistant postmasters and clerks, including clerks at division headquarters of post-office inspectors, special clerks, finance clerks, bookkeepers, printers, mechanics, skilled laborers, watchmen, messengers, laborers, and other employees of offices of the first and second class; letter carriers in the City Delivery Service; employees in Government-owned automobile service; supervisory officials, inspectors, railway postal clerks, including substitutes, superintendents, requisition fillers, packers, and laborers; the agent in charge, clerks, and messengers at the United States Stamped Envelope Agency, Dayton, Ohio; and employees of the mail equipment shop who receive compensation at the rate per annum of—

(1) Not less than \$1,000 nor more than \$1,200, to be increased \$200.

(2) More than \$1,200 and not more than \$1,600, to be increased \$150.

(3) More than \$1,600 and not more than \$2,000, to be increased \$125.

(4) More than \$2,000 and not more than \$2,500, to be increased \$100.

*Provided*, That no third-class postmaster shall receive more than \$2,000 per annum.

(b) Carriers in the village delivery service, and other employees paid from lump-sum appropriations, receiving compensation at the rate of less than \$1,000 per annum, to be increased 20 per centum of their present compensation.

(c) Rural letter carriers on daily routes and rural letter carriers on two tri-weekly routes whose routes are—

(1) Eleven miles or less in length, to be increased \$75.

(2) Over eleven miles and under twenty miles in length, to be increased \$100.

(3) Twenty miles and under twenty-four miles in length, to be increased \$150.

(4) Twenty-four miles or over in length, to be increased \$200.

(d) Rural letter carriers on triweekly routes of—

(1) Eleven miles or less in length, to be increased \$37.50.

(2) Over eleven miles and under twenty miles in length, to be increased \$50.

(3) Twenty miles and under twenty-four miles in length, to be increased \$75.

(4) Twenty-four miles or over in length, to be increased \$100.

(e) Postmasters at offices of the fourth class to be increased by an amount equal to 15 per centum of their present compensation.

(f) Substitute, temporary, and auxiliary clerks at first and second class post offices, and substitute, temporary, and auxiliary letter carriers in the City Delivery Service, shall receive after the passage of this Act, for the remainder of the fiscal year ending June 30, 1920, in lieu of their present compensation, a compensation of 60 cents per hour for each hour of service performed. [41 Stat. L. 350.]

**SEC. 2. [Increases in compensation — certain employees not entitled — increases when effective.]** That the above-mentioned increases in compensation shall apply to officers and employees in the Postal Service at the time of the passage of this Act, and be effective as of July 1, 1919, or as of such subsequent date when such officers or employees entered the Postal Service: *Provided*, That as to substitute, temporary, and auxiliary employees and employees paid from lump-sum appropriations, the increases shall be effective from and after the date of the passage of this Act. *And provided further*, That none of the increases provided herein shall be applicable to officers and employees who have received an increase in their compensation of more than \$300 per annum during the current fiscal year. [41 Stat. L. 351.]

**SEC. 3. [Effect of increases or advancing post office to higher class.]** That no post office shall be advanced to the next higher class as a result of the increases in compensation of postmasters herein provided. [41 Stat. L. 351.]

**SEC. 4. [Appropriation.]** That in order to provide for the increased compensation herein authorized, so much as is necessary is hereby appropriated out of any money in the Treasury not otherwise appropriated, to supplement the amounts appropriated for the various classes of employees herein mentioned, in the Act entitled "An Act making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1920," approved February 28, 1919. [41 Stat. L. 351.]

This Act became a law without the approval of the President by lapse of time.

**An Act Authorizing the return to the sender or the forwarding of undeliverable second, third, and fourth class mail matter.**

[*Act of Nov. 19, 1919, ch. 119, 41 Stat. L. 360.*]

[Second, third and fourth class mail matter — forwarding to addressee — returning to sender.] That hereafter, under such regulations as the Postmaster General may prescribe, fourth-class matter of obvious value which is of a perishable nature may be forwarded to the addressee at another post office charged with the amount of the forwarding postage, and when such matter of a perishable nature is undeliverable to the addressee it may be returned to the sender charged with the return postage: *Provided*, That other undeliverable matter of the second, third, and fourth classes may be forwarded to the addressee or to such other person as the sender may direct, at another post office, charged with the amount of the forwarding postage, or it may be returned to the sender charged with the return postage, when it bears the sender's pledge that the postage for forwarding and return will be paid, such postage to be collected on delivery: *Provided further*, That when the sender refuses to furnish such postage in accordance with his pledge, the acceptance from him of further matter bearing such pledge may be refused. [41 Stat. L. 360.]

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## PRESIDENT

*Act of Dec. 17, 1919, ch. —, 303.*

*Sec. 1. International Conference Affecting International Communication — Authorization to Arrange, 303.*

*2. Appropriation, 303.*

### CROSS-REFERENCES

See also *IMMIGRATION; MINERAL LANDS, MINES AND MINING; PUBLIC DEBT; SHIPPING AND NAVIGATION.*

**An Act To authorize the President of the United States to arrange and participate in an international conference to consider questions relating to international communication.**

[*Act of Dec. 17, 1919, ch. —, 41 Stat. L. —.*]

[SEC. 1.] [International conference affecting international communication—authorization to arrange.] That the President of the United States be, and he is hereby, requested and authorized in the name of the Government of the United States to call, in his discretion, an international conference to assemble in Washington, and to appoint, by and with the advice and consent of the Senate, representatives to participate therein, to consider all international aspects of communication by telegraph, telephone, cable, wireless telephone, and wireless telegraphy, and to make recommendations with a view to providing the entire world with adequate facilities for international communication on a fair and equitable basis. [41 Stat. L. —.]

SEC. 2. [Appropriation.] That the sum of \$75,000, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated, the same to be disbursed under the direction and in the discretion of the Secretary of State for expenses incidental to the conference, including personal services in the District of Columbia notwithstanding the provisions of any other Act: *Provided*, That no part of said sum shall be used in entertainment or for the purchase of medals and badges. [41 Stat. L. —.]

## PRINTING

See EDUCATION; PUBLIC PRINTING

## PUBLIC CONTRACTS

*Act of March 2, 1919, ch. 94, 304.*

*Sec. 1. War Contracts — Adjustment — Profits — Time for Presenting Claims — Report to Congress — Review of Awards — Immunity from Criminal Prosecutions — Evidence, 304.*

*2. Jurisdiction of Court of Claims, 305.*

*3. Agreements with Foreign Governments — Adjustment, 305.*

*4. Protection of Subcontractors — Payment of Claims Against Prime Contractor — Liens, 305.*

*5. Net Losses Occurring in Production of Minerals — Adjustment, 306.*

*Act of Aug. 25, 1919, ch. 52, 307.*

*Work under Supervision of Treasury Department — Relief of Contractors, etc., 307.*

**An Act To provide relief in cases of contracts connected with the prosecution of the war, and for other purposes.**

[*Act of March 2, 1919, ch. 94, 40 Stat. L. 1272.*]

[SEC. 1.] [War contracts — adjustment — profits — time for presenting claims — report to Congress — review of awards — immunity from criminal prosecutions — evidence.] That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law: *Provided*, That in no case shall any award either by the Secretary of War, or the Court of Claims include prospective or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order: *Provided further*, That this Act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen: *And provided further*, That the Secretary of War shall report to Congress at the beginning of its next session following June thirtieth, nineteen hundred and nineteen, a detailed statement showing the nature, terms, and conditions of



every such agreement and the payment or adjustment thereof: *And provided further*, That no settlement of any claim arising under any such agreement shall bar the United States Government through any of its duly authorized agencies, or any committee of Congress hereafter duly appointed, from the right of review of such settlement, nor the right of recovery of any money paid by the Government to any party under any settlement entered into, or payment made under the provisions of this Act, if the Government has been defrauded, and the right of recovery in all such cases shall exist against the executors, administrators, heirs, successors, and assigns, of any party or parties: *And provided further*, That nothing in this Act shall be construed to relieve any officer or agent of the United States from criminal prosecution under the provisions of any statute of the United States for any fraud or criminal conduct: *And provided further*, That this Act shall in no way relieve or excuse any officer or his agent from such criminal prosecution because of any irregularity or illegality in the manner of the execution of such agreement: *And provided further*, That in all proceedings hereunder witnesses may be compelled to attend, appear, and testify, and produce books, papers and letters, or other documents; and the claim that any such testimony or evidence may tend to criminate the person giving the same shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person in the trial of any criminal proceeding. [40 Stat. L. 1272.]

**SEC. 2. [Jurisdiction of Court of Claims.]** That the Court of Claims is hereby given jurisdiction on petition of any individual, firm, company or corporation referred to in Section 1 hereof, to find and award fair and just compensation in the cases specified in said Section in the event that such individual, firm, company or corporation shall not be willing to accept the adjustment, payment or compensation offered by the Secretary of War as hereinbefore provided, or in the event that the Secretary of War shall fail or refuse to offer a satisfactory adjustment, payment or compensation as provided for in said Section. [40 Stat. L. 1273.]

**SEC. 3. [Agreements with foreign governments—adjustment.]** That the Secretary of War, through such agency as he may designate or establish is empowered, upon such terms as he or it may determine to be in the interest of the United States, to make equitable and fair adjustments and agreements, upon the termination or in settlement or readjustment of agreements or arrangements entered into with any foreign government or governments or nationals thereof, prior to November twelfth, nineteen hundred and eighteen, for the furnishing to the American Expeditionary Forces or otherwise for War purposes of supplies, materials, facilities, services or the use of property, or for the furnishing of any thereof by the United States to any foreign government or governments, whether or not such agreements or arrangements have been entered into in accordance with applicable statutory provisions; and the other provisions of this Act shall not be applicable to such adjustments. [40 Stat. L. 1273.]

**SEC. 4. [Protection of subcontractors—payment of claims against prime contractor—liens.]** That whenever, under the provisions of this Act, the Secretary of War shall make an award to any prime contractor with respect to any portion of his contract which he shall have sublet to any other person, firm, or corporation who has in good faith made expenditures, incurred obligations,

rendered service, or furnished material, equipment, or supplies to such prime contractor, with the knowledge and approval of any agent of the Secretary of War duly authorized thereunto, before payment of said award the Secretary of War shall require such prime contractor to present satisfactory evidence of having paid said subcontractor or of the consent of said subcontractor to look for his compensation to said prime contractor only; and in the case of the failure of said prime contractor to present such evidence or such consent, the Secretary of War shall pay directly to said subcontractor the amount found to be due under said award; and in case of the insolvency of any prime contractor the subcontractor of said prime contractor shall have a lien upon the funds arising from said award prior and superior to the lien of any general creditor of said prime contractor. [40 Stat. L. 1273.]

**SEC. 5. [Net losses occurring in production of minerals — adjustment.]** That the Secretary of the Interior be, and he hereby is, authorized to adjust, liquidate, and pay such net losses as have been suffered by any person, firm, or corporation, by reason of producing or preparing to produce, either manganese, chrome, pyrites, or tungsten in compliance with the request or demand of the Department of the Interior, the War Industries Board, the War Trade Board, the Shipping Board, or the Emergency Fleet Corporation to supply the urgent needs of the Nation in the prosecution of the war; said minerals being enumerated in the Act of Congress approved October fifth, nineteen hundred and eighteen, entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of those ores, metals, and minerals which have formerly been largely imported, or of which there is or may be an inadequate supply."

The said Secretary shall make such adjustments and payments in each case as he shall determine to be just and equitable; that the decision of said Secretary shall be conclusive and final, subject to the limitation hereinafter provided; that all payments and expenses incurred by said Secretary, including personal services, traveling and subsistence expenses, supplies, postage, printing, and all other expenses incident to the proper prosecution of this work, both in the District of Columbia and elsewhere, as the Secretary of the Interior may deem essential and proper, shall be paid from the funds appropriated by the said Act of October fifth, nineteen hundred and eighteen, and that said funds and appropriations shall continue to be available for said purpose until such time as the said Secretary shall have fully exercised the authority herein granted and performed and completed the duties hereby provided and imposed: *Provided, however,* That the payments and disbursements made under the provisions of this section for and in connection with the payments and settlements of the claims herein described, and the said expenses of administration shall in no event exceed the sum of \$8,500,000: *And provided further,* That said Secretary shall consider, approve, and dispose of only such claims as shall be made hereunder and filed with the Department of the Interior within three months from and after the approval of this Act: *And provided further,* That no claim shall be allowed or paid by said Secretary unless it shall appear to the satisfaction of the said Secretary that the expenditures so made or obligations so incurred by the claimant were made in good faith for or upon property which contained either manganese, chrome, pyrites, or tungsten in sufficient quantities to be of commercial importance: *And provided further,* That no claims shall be paid unless it shall appear to the satisfaction of said Secretary that moneys were invested

or obligations were incurred subsequent to April sixth, nineteen hundred and seventeen, and prior to November twelfth, nineteen hundred and eighteen, in a legitimate attempt to produce either manganese, chrome, pyrites, or tungsten for the needs of the Nation for the prosecution of the war, and that no profits of any kind shall be included in the allowance of any of said claims, and that no investment for merely speculative purposes shall be recognized in any manner by said Secretary: *And provided further*, That the settlement of any claim arising under the provisions of this section shall not bar the United States Government, through any of its duly authorized agencies, or any committee of Congress hereafter duly appointed, from the right of review of such settlement, nor the right to recover any money paid by the Government to any party under and by virtue of the provisions of this section, if the Government has been defrauded, and the right of recovery in all such cases shall extend to the executors, administrators, heirs, and assigns of any party.

That a report of all operations under this section, including receipts and disbursements, shall be made to Congress on or before the first Monday in December of each year.

That nothing in this section shall be construed to confer jurisdiction upon any court to entertain a suit against the United States: *Provided further*, That in determining the net losses of any claimant the Secretary of the Interior shall, among other things, take into consideration and charge to the claimant, the then market value of any ores or minerals on hand belonging to the claimant, and also the salvage or usable value of any machinery or other appliances which may be claimed was purchased to equip said mine for the purpose of complying with the request or demand of the agencies of the Government above mentioned in the manner aforesaid. [40 Stat. L. 1274.]

For Act of Oct. 5, 1918, mentioned in the text, see ante, p. 247.

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**An Act For the relief of contractors and subcontractors for the post offices and other buildings and work under the supervision of the Treasury Department, and for other purposes.**

[Act of Aug. 25, 1919, ch. 52, 41 Stat. L. 281.]

[Work under supervision of Treasury Department — relief of contractors, etc.] That the Secretary of the Treasury is hereby authorized and directed, under such regulations as he may prescribe, to receive fully itemized and verified claims and reimburse contractors and their subcontractors, including material men, for the construction, improvement, special repair, equipment, or furnishing of post offices and other buildings or work under the supervision of the Treasury Department (as well as the United States courthouse in the District of Columbia and the approaches and retaining wall to the Lincoln Memorial in the District of Columbia) whose contracts were awarded or whose bids as thereafter accepted were mailed or delivered to the proper governmental authority prior to the entrance of the United States into the war with Germany, to wit, April 6, 1917, and whose contracts have been or will be completed after said date, for loss due directly to increased costs thereafter arising, due either, first, to increased cost of labor or materials, or, second, to delay on account of the action of the United States Priority Board or other governmental activities, or, third, to commandeering by the United States Government of plants or

materials shown to the Secretary of the Treasury to have been sustained by them in the fulfillment of such contracts by reason of war conditions alone: *Provided*, That any subcontractor may submit his claim through the contractor or to the Secretary of the Treasury. And the Secretary of the Treasury is hereby directed to submit from time to time estimates for appropriations to carry out the provisions of this Act: *Provided further*, That no claims for such reimbursement shall be paid unless filed with the Treasury Department within three months after the passage of this Act: *And provided further*, That in no case shall the contractor or subcontractor be reimbursed to an extent greater than is sufficient to cover his actual increased cost in fulfilling his contract or subcontract, exclusive of any and all profits to such contractor or subcontractor; nor shall such reimbursement include any advances or payments made by the sureties of such contractor or subcontractor in executing the work, but the surety on any contract coming within the provisions of this Act who, as surety, has completed, or may complete, the work of any defaulting contractor on any such contract, or who has furnished financial assistance to a failing contractor on any such contract whereby such contractor has been enabled to complete such contract, may file claim, within the period hereinbefore fixed, and be reimbursed in the manner hereinbefore provided for the increased cost due to the causes hereinbefore specified of the labor and material supplied in so completing any such contract, or for the increased cost of the labor and material paid for from funds so furnished by such surety: *And provided further*, That the Secretary of the Treasury shall report to Congress at the beginning of each session thereof the amount of each expenditure and the facts on which the same is based. [41 Stat. L. 281.]

## PUBLIC DEBT

*Act of Sept. 24, 1918, ch. 176, 309.*

*Sec. 1. "Supplement to Second Liberty Bond Act"—Tax Exemption of Different Bond Issues, 309.*

*2. War-Savings Certificates, 310.*

*3. Proceeds from Sale of Bonds, etc.—Where Deposited, 310.*

*4. Stabilizing Foreign Exchange, 310.*

*5. Investigation, Regulation or Prohibition of Transactions in Foreign Exchange, Coin, Bullion, Credit, Evidences of Indebtedness, etc., 310.*

*6. National Banks—Limit to Liabilities which May Be Incurred by Any One Person, etc.—R. S. Sec. 5200 Amended, 311.*

*7. Title of Act, 311.*

*Act of March 3, 1919, ch. 100, 311.*

*Sec. 1. "Victory Liberty Loan Act"—Amendment of Second Liberty Bond Act—Issuance of Notes—Amount—Terms—Tax Exemption—Series—Options—Circulation Privileges—Payment, 311.*

*2. Tax Exemptions of Different Bond Issues, 312.*

*3. Certificates of Indebtedness—Amount—Amendment of Second Liberty Bond Act, 313.*

*4. Bonds, etc, Held by Nonresident Alien, Foreign Corporation, etc.—Tax Exemption, 313.*

*5. Conversion Privileges Pertaining to First Liberty Loan—Extension of Time, 313.*

*6. Cumulative Sinking Fund—Creation—Report to Congress—Repeal of R. S. Sections, 314.*

*7. Credits between United States and Foreign Governments—Obligations of Foreign Governments—Conversion Privileges—Appropriation, 314.*

*8. Obligations of Foreign Governments—Maturity, 315.*

*11. Title of Act, 315.*

**An Act To supplement the Second Liberty Bond Act, as amended, and for other purposes.**

*[Act of Sept. 24, 1918, ch. 176, 40 Stat. L. 965.]*

[SEC. 1.] ["Supplement to Second Liberty Bond Act"—tax exemption of different bond issues.] That until the expiration of two years after the date of the termination of the war between the United States and the Imperial German Government, as fixed by proclamation of the President—

(1) The interest on an amount of bonds of the Fourth Liberty Loan the principal of which does not exceed \$30,000, owned by any individual, partnership, association, or corporation, shall be exempt from graduated additional income taxes, commonly known as surtaxes, and excess profits and war-profits taxes, now or hereafter imposed by the United States, upon the income or profits of individuals, partnerships, associations, or corporations;

(2) The interest received after January 1, 1918, on an amount of bonds of the First Liberty Loan Converted, dated either November 15, 1917, or May 9, 1918, the Second Liberty Loan, converted and unconverted, and the Third Liberty Loan, the principal of which does not exceed \$45,000 in the aggregate, owned by any individual, partnership, association, or corporation, shall be exempt from such taxes: *Provided, however,* That no owner of such bonds shall be entitled to such exemption in respect to the interest on an aggregate principal amount of

such bonds exceeding one and one-half times the principal amount of bonds of the Fourth Liberty Loan originally subscribed for by such owner and still owned by him at the date of his tax return; and

(3) The interest on an amount of bonds, the principal of which does not exceed \$30,000, owned by any individual, partnership, association, or corporation, issued upon conversion of 3½ per centum bonds of the First Liberty Loan in the exercise of any privilege arising as a consequence of the issue of bonds of the Fourth Liberty Loan, shall be exempt from such taxes.

The exemptions provided in this section shall be in addition to the exemption provided in section 7 of the Second Liberty Bond Act in respect to the interest on an amount of bonds and certificates, authorized by such Act and amendments thereto, the principal of which does not exceed in the aggregate \$5,000, and in addition to all other exemptions provided in the Second Liberty Bond Act. [40 Stat. L. 965.]

For the different Liberty Bond Acts, see 1918 Supp. Fed. Stat. Ann. 672 et seq.

**SEC. 2. [War-savings certificates.]** That section 6 of the Second Liberty Bond Act is hereby amended by striking out the figures “\$2,000,000,000,” and inserting in lieu thereof the figures “\$4,000,000,000.” Such section is further amended by striking out the words “The amount of war savings certificates sold to any one person at any one time shall not exceed \$100, and it shall not be lawful for any one person at any one time to hold war savings certificates to an aggregate amount exceeding \$1,000,” and inserting in lieu thereof the words “It shall not be lawful for any one person at any one time to hold war savings certificates of any one series to an aggregate amount exceeding \$1,000.” [40 Stat. L. 966.]

**SEC. 3. [Proceeds from sale of bonds, etc.—where deposited.]** That the provisions of section 8 of the Second Liberty Bond Act, as amended by the Third Liberty Bond Act, shall apply to the proceeds arising from the payment of war-profits taxes as well as income and excess profits taxes. [40 Stat. L. 966.]

**SEC. 4. [Stabilizing foreign exchange.]** That the Secretary of the Treasury may, during the war and for two years after its termination, make arrangements in or with foreign countries to stabilize the foreign exchanges and to obtain foreign currencies and credits in such currencies, and he may use any such credits and foreign currencies for the purpose of stabilizing or rectifying the foreign exchanges, and he may designate depositaries in foreign countries with which may be deposited as he may determine all or any part of the avails of any foreign credits or foreign currencies. [40 Stat. L. 966.]

**SEC. 5. [Investigation, regulation or prohibition of transactions in foreign exchange, coin, bullion, credit, evidences of indebtedness, etc.]** That subdivision (b) of section 5 of the Trading with the Enemy Act be, and hereby is, amended to read as follows:

[ “ ] (b) That the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange and the export, hoarding, melting, or earmarkings of gold or silver coin or bullion or currency, transfers of credit in any form (other than credits relating solely to transactions to be executed wholly within the United States), and transfers of evidences of indebtedness or of the owner-

ship of property between the United States and any foreign country, whether enemy, ally of enemy, or otherwise, or between residents of one or more foreign countries, by any person within the United States; and, for the purpose of strengthening, sustaining and broadening the market for bonds and certificates of indebtedness of the United States, of preventing frauds upon the holders thereof, and of protecting such holders, he may investigate and regulate, by means of licenses or otherwise (until the expiration of two years after the date of the termination of the present war with the Imperial German Government, as fixed by his proclamation), any transactions in such bonds or certificates by or between any person or persons: *Provided*, That nothing contained in this subdivision (b) shall be construed to confer any power to prohibit the purchase or sale for cash, or for notes eligible for discount at any Federal Reserve Bank, of bonds or certificates of indebtedness of the United States; and he may require any person engaged in any transaction referred to in this subdivision to furnish, under oath, complete information relative thereto, including the production of any books of account, contracts, letters or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed." [40 Stat. L. 966.]

For sec. 5(b) of the Trading with the Enemy Act as originally enacted, see 1918 Supp. Fed. Stat. Ann. 853.

**SEC. 6. [National banks—limit to liabilities which may be incurred by any one person, etc.—R. S., sec. 5200 amended.]**

This section will be found *supra*, title NATIONAL BANKS, at p. 267, in the notes. The section of the Revised Statutes which it amends was further amended by Act of Oct. 22, 1919, which will be found under the same title at p. 266, in the text.

**SEC. 7. [Title of Act.]** That the short title of this Act shall be "Supplement to Second Liberty Bond Act." [40 Stat. L. 967.]

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**An Act To amend the Liberty Bond Acts and the War Finance Corporation Act, and for other purposes.**

[Act of March 3, 1919, ch. 100, 40 Stat. L. 1309.]

[SEC. 1.] ["Victory Liberty Loan Act"—amendment of Second Liberty Bond Act—issuance of notes—amount—terms—tax exemption—series—options—circulation privileges—payment.] That the Second Liberty Bond Act is hereby amended by adding thereto a new section to read as follows:

"SEC. 18. (a) That in addition to the bonds and certificates of indebtedness and war-savings certificates authorized by this Act and amendments thereto, the Secretary of the Treasury, with the approval of the President, is authorized to borrow from time to time on the credit of the United States for the purposes of this Act, and to meet public expenditures authorized by law, not exceeding in the aggregate \$7,000,000,000, and to issue therefor notes of the United States at not less than par in such form or forms and denomination or denominations, containing such terms and conditions, and at such rate or rates of interest, as the Secretary of the Treasury may prescribe, and each series of notes so issued shall be payable at such time not less than one year nor more than five years from the date of its issue as he may prescribe, and may be redeemable before maturity (at the option of the United States) in whole or in part, upon not

more than one year's nor less than four months' notice, and under such rules and regulations and during such period as he may prescribe.

"(b) The notes herein authorized may be issued in any one or more of the following series as the Secretary of the Treasury may prescribe in connection with the issue thereof:

"(1) Exempt, both as to principal and interest, from all taxation (except estate or inheritance taxes) now or hereafter imposed by the United States, any State, or any of the possessions of the United States, or by any local taxing authority;

"(2) Exempt, both as to principal and interest, from all taxation now or hereafter imposed by the United States, any State, or any of the possessions of the United States, or by any local taxing authority, except (a) estate or inheritance taxes, and (b) graduated additional income taxes, commonly known as surtaxes, and excess-profits and war-profits taxes, now or hereafter imposed by the United States, upon the income or profits of individuals, partnerships, associations, or corporations;

"(3) Exempt, both as to principal and interest, as provided in paragraph (2); and with an additional exemption from the taxes referred to in clause (b) of such paragraph, of the interest on an amount of such notes the principal of which does not exceed \$30,000, owned by any individual, partnership, association, or corporation; or

"(4) Exempt, both as to principal and interest, from all taxation now or hereafter imposed by the United States, any State, or any of the possessions of the United States, or by any local taxing authority, except (a) estate or inheritance taxes, and (b) all income, excess-profits, and war-profits taxes, now or hereafter imposed by the United States, upon the income or profits of individuals, partnerships, associations, or corporations.

"(c) If the notes authorized under this section are offered in more than one series bearing the same date of issue, the holder of notes of any such series shall (under such rules and regulations as may be prescribed by the Secretary of the Treasury) have the option of having such notes held by him converted at par into notes of any other such series offered bearing the same date of issue.

"(d) None of the notes authorized by this section shall bear the circulation privilege. The principal and interest thereof shall be payable in United States gold coin of the present standard of value. The word 'bond' or 'bonds' where it appears in sections 8, 9, 10, 14, and 15 of this Act as amended, and sections 3702, 3703, 3704, and 3705 of the Revised Statutes, and section 5200 of the Revised Statutes as amended, but in such sections only, shall be deemed to include notes issued under this section." [40 Stat. L. 1309.]

For the Second Liberty Bond Act, see 1918 Supp. Fed. Stat. Ann. 679.

For R. S. secs. 3702-3705, see 6 Fed. Stat. Ann. (1st ed.) 144; 8 Fed. Stat. Ann. (2d ed.) 410.

For R. S. sec. 5200, see 5 Fed. Stat. Ann. (1st ed.) 139; 6 Fed. Stat. Ann. (2d ed.) 761.

**SEC. 2. [Tax exemptions of different bond issues.]** (a) That until the expiration of five years after the date of the termination of the war between the United States and the German Government, as fixed by proclamation of the President, in addition to the exemptions provided in section 7 of the Second Liberty Bond Act in respect to the interest on an amount of bonds and certificates, authorized by such Act and amendments thereto, the principal of which does not exceed in the aggregate \$5,000, and in addition to all other exemptions provided in the Second Liberty Bond Act or the Supplement to Second Liberty Bond Act, the interest received on and after January 1, 1919, on an amount of bonds of the First Liberty Loan Converted, dated November 15, 1917, May 9, 1918. or



October 24, 1918, the Second Liberty Loan converted and unconverted, the Third Liberty Loan, and the Fourth Liberty Loan, the principal of which does not exceed \$30,000 in the aggregate, owned by any individual, partnership, association, or corporation, shall be exempt from graduated additional income taxes, commonly known as surtaxes, and excess-profits and war-profits taxes, now or hereafter imposed by the United States, upon the income or profits of individuals, partnerships, associations, or corporations.

(b) In addition to the exemption provided in subdivision (a), and in addition to the other exemptions therein referred to, the interest received on and after January 1, 1919, on an amount of the bonds therein specified the principal of which does not exceed \$20,000 in the aggregate, owned by any individual, partnership, association, or corporation, shall be exempt from the taxes therein specified: *Provided*, That no owner of such bonds shall be entitled to such exemption in respect to the interest on an aggregate principal amount of such bonds exceeding three times the principal amount of notes of the Victory Liberty Loan originally subscribed for by such owner and still owned by him at the date of his tax return. [40 Stat. L. 1310.]

For the different Liberty Bond Acts, see 1918 Supp. Fed. Stat. Ann. 672 et seq.

**SEC. 3. [Certificates of indebtedness—amount—amendment of Second Liberty Bond Act.]** That section 5 of the Second Liberty Bond Act, as amended by section 4 of the Third Liberty Bond Act, is hereby further amended by striking out the figures “\$8,000,000,000” and inserting in lieu thereof the figures “\$10,000,000,000.” [40 Stat. L. 1311.]

For section 5 before this amendment, see 1918 Supp. Fed. Stat. Ann. 683.

**SEC. 4. [Bonds, etc., held by nonresident alien, foreign corporation, etc.—tax exemption.]** That section 3 of the Fourth Liberty Bond Act is hereby amended to read as follows:

“SEC. 3. That, notwithstanding the provisions of the Second Liberty Bond Act or of the War Finance Corporation Act or of any other Act, bonds, notes, and certificates of indebtedness of the United States and bonds of the War Finance Corporation shall, while beneficially owned by a nonresident alien individual, or a foreign corporation, partnership, or association, not engaged in business in the United States, be exempt both as to principal and interest from any and all taxation now or hereafter imposed by the United States, any State, or any of the possessions of the United States or by any local taxing authority.” [40 Stat. L. 1311.]

For section 3 before this amendment, see 1918 Supp. Fed. Stat. Ann. 691.

**SEC. 5. [Conversion privileges pertaining to First Liberty Loan—extension of time.]** That the privilege of converting 4 per centum bonds of the First Liberty Loan converted and 4 per centum bonds of the Second Liberty Loan into 4½ per centum bonds, which privilege arose on May 9, 1918, and expired on November 9, 1918, may be extended by the Secretary of the Treasury for such period, upon such terms and conditions and subject to such rules and regulations, as he may prescribe. For the purpose of computing the amount of interest payable, bonds presented for conversion under any such extension shall be deemed to be converted on the dates for the payment of the semiannual interest on the respective bonds so presented for conversion next succeeding the date of such presentation. [40 Stat. L. 1311.]

For the First Liberty Bond Act, see 1918 Supp. Fed. Stat. Ann. 675.

**SEC. 6. [Cumulative sinking fund — creation — report to Congress — repeal of R. S. sections.]** (a) That there is hereby created in the Treasury a cumulative sinking fund for the retirement of bonds and notes issued under the First Liberty Bond Act, the Second Liberty Bond Act, the Third Liberty Bond Act, the Fourth Liberty Bond Act, or under this Act, and outstanding on July 1, 1920. The sinking fund and all additions thereto are hereby appropriated for the payment of such bonds and notes at maturity, or for the redemption or purchase thereof before maturity by the Secretary of the Treasury at such prices and upon such terms and conditions as he shall prescribe, and shall be available until all such bonds and notes are retired. The average cost of the bonds and notes purchased shall not exceed par and accrued interest. Bonds and notes purchased, redeemed, or paid out of the sinking fund shall be canceled and retired and shall not be reissued. For the fiscal year beginning July 1, 1920, and for each fiscal year thereafter, until all such bonds and notes are retired there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the purposes of such sinking fund, an amount equal to the sum of (1)  $2\frac{1}{2}$  per centum of the aggregate amount of such bonds and notes outstanding on July 1, 1920, less an amount equal to the par amount of any obligations of foreign Governments held by the United States on July 1, 1920, and (2) the interest which would have been payable during the fiscal year for which the appropriation is made on the bonds and notes purchased, redeemed, or paid out of the sinking fund during such year or in previous years.

The Secretary of the Treasury shall submit to Congress at the beginning of each regular session a separate annual report of the action taken under the authority contained in this section.

(b) Sections 3688, 3694, 3695, and 3696 of the Revised Statutes, and so much of section 3689 of the Revised Statutes as provides a permanent annual appropriation of 1 per centum of the entire debt of the United States to be set apart as a sinking fund, are hereby repealed. [40 Stat. L. 1311.]

For the different Liberty Bond Acts mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 672 et seq.

For the various Revised Statutes sections affected by the text other than R. S. sec. 3689, see 8 Fed. Stat. Ann. (2d ed.) 403 et seq.

For R. S. sec. 3689, see 3 Fed. Stat. Ann. (2d ed.) 143.

**SEC. 7. [Credits between United States and foreign governments — obligations of foreign governments — conversion privileges — appropriation.]** (a) That until the expiration of eighteen months after the termination of the war between the United States and the German Government, as fixed by proclamation of the President, the Secretary of the Treasury, with the approval of the President, is hereby authorized on behalf of the United States to establish, in addition to the credits authorized by section 2 of the Second Liberty Bond Act, as amended, credits with the United States for any foreign government now engaged in war with the enemies of the United States, for the purpose only of providing for purchases of any property owned directly or indirectly by the United States, not needed by the United States, or of any wheat the price of which has been or may be guaranteed by the United States. To the extent of the credits so established from time to time the Secretary of the Treasury is hereby authorized to make advances to or for the account of any such foreign government and to receive at par from such foreign government for the amount of any such advances its obligations hereafter issued bearing such rate or rates of interest, not less than 5 per centum per annum, maturing at such date or

dates, not later than October 15, 1938, and containing such terms and conditions, as the Secretary of the Treasury may from time to time prescribe. The Secretary, with the approval of the President, is hereby authorized to enter into such arrangements from time to time with any such foreign government as may be necessary or desirable for establishing such credits and for the payment of such obligations before maturity.

(b) The Secretary of the Treasury is hereby authorized from time to time to convert any short-time obligations of foreign governments which may be received under the authority of this section into long-time obligations of such foreign governments, respectively, maturing not later than October 15, 1938, and in such form and terms as the Secretary of the Treasury may prescribe; but the rate or rates of interest borne by any such long-time obligations at the time of their acquisition shall not be less than the rate borne by the short-time obligations so converted into such long-time obligations; and, under such terms and conditions as he may from time to time prescribe, to receive payment, on or before maturity, of any obligations of such foreign governments acquired on behalf of the United States under authority of this section, and, with the approval of the President, to sell any of such obligations (but not at less than par with accrued interest unless otherwise hereafter provided by law), and to apply the proceeds thereof, and any payments so received from foreign governments, on account of the principal of such obligations, to the redemption or purchase, at not more than par and accrued interest, of any bonds of the United States issued under the authority of the First Liberty Bond Act or Second Liberty Bond Act as amended and supplemented, and if such bonds can not be so redeemed or purchased, the Secretary of the Treasury shall redeem or purchase any other outstanding interest-bearing obligations of the United States which may at such time be subject to redemption or which can be purchased at not more than par and accrued interest.

(c) For the purposes of this section there is appropriated the unexpended balance of the appropriations made by section 2 of the First Liberty Bond Act and by Section 2 of the Second Liberty Bond Act as amended by the Third Liberty Bond Act and the Fourth Liberty Bond Act, but nothing in this section shall be deemed to prohibit the use of such unexpended balance or any part thereof for the purposes of section 2 of the Second Liberty Bond Act, as so amended, subject to the limitations therein contained. [40 Stat. L. 1312.]

For the Second Liberty Bond Act, sec. 2, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 680.

**SEC. 8. [Obligations of foreign governments — maturity.]** That the obligations of foreign governments acquired by the Secretary of the Treasury by virtue of the provisions of the First Liberty Bond Act and the Second Liberty Bond Act, and amendments and supplements thereto, shall mature at such dates as shall be determined by the Secretary of the Treasury: *Provided*, That such obligations acquired by virtue of the provisions of the First Liberty Bond Act, or through the conversion of short-time obligations acquired under such Act, shall mature not later than June 15, 1947, and all other such obligations of foreign governments shall mature not later than October 15, 1938. [40 Stat. L. 1313.]

For First Liberty Bond Act and Second Liberty Bond Act, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 675 et seq.

**SEC. 11. [Title of Act.]** That the short title of this Act shall be "Victory Liberty Loan Act." [40 Stat. L. 1314.]

## PUBLIC HEALTH SERVICE

See HEALTH AND QUARANTINE; HOSPITALS AND ASYLUMS

## PUBLIC LANDS

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### CROSS-REFERENCES

See also INDIANS; MINERAL LANDS, MINES AND MINING; WAR DEPARTMENT AND MILITARY ESTABLISHMENT; WATERS.

**An Act Authorizing the resurvey or retracement of lands heretofore returned as surveyed public lands of the United States under certain conditions.**

[*Act of Sept. 21, 1918, ch. 175, 40 Stat. L. 965.*]

[**Surveys — resurveys — retracement.**] That upon the application of the owners of three-fourths of the privately owned lands in any township covered by public-land surveys, more than fifty per centum of the area of which townships is privately owned, accompanied by a deposit with the United States surveyor general for the proper State, or if there be no surveyor general of such State, then with the Commissioner of the General Land Office, of the propor-

tionate estimated cost, inclusive of the necessary work, of the resurvey or retracement of all the privately owned lands in said township, the Commissioner of the General Land Office, subject to the supervisory authority of the Secretary of the Interior, shall be authorized in his discretion to cause to be made a resurvey or retracement of the lines of said township and to set permanent corners and monuments in accordance with the laws and regulations governing surveys and resurveys of public lands; that the sum so deposited shall be held by the surveyor general or commissioner when ex officio surveyor general and may be expended in payment of the cost of such survey, including field and office work, and any excess over the cost of such survey and the expenses incident thereto shall be repaid pro rata to the person making said deposits or their legal representatives; that the proportionate cost of the field and office work for the resurvey or retracement of any public lands in such township shall be paid from the current appropriation for the survey and resurvey of public lands, in addition to the portion of such appropriation otherwise allowed by law for resurveys and retracements; that similar resurveys and retracements may be made on the application, accompanied by the requisite deposit, of any court of competent jurisdiction, the returns of such resurvey or retracement to be submitted to the court; that the Secretary of the Interior is authorized to make all necessary rules and regulations to carry this Act into full force and effect. [40 Stat. L. 965.]

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**An Act To amend section three of an Act entitled "An Act to provide for stock-raising homesteads, and for other purposes," approved December twenty-ninth, nineteen hundred and sixteen.**

[Act of Oct. 25, 1918, ch. 195, 40 Stat. L. 1016.]

[Stock raising homesteads — entries — who may make — amount of land — location — additional entries — improvements.] That section three of the Act entitled "An Act to provide for stock-raising homesteads, and for other purposes," approved December twenty-ninth, nineteen hundred and sixteen, be amended to read as follows:

"SEC. 3. That any qualified homestead entryman may make entry under the homestead laws of lands so designated by the Secretary of the Interior, according to legal subdivisions, in areas not exceeding six hundred and forty acres, and in compact form so far as may be subject to the provisions of this Act, and secure title thereto by compliance with the terms of the homestead laws: *Provided*, That a former homestead entry of land of the character described in section two hereof shall not be a bar to the entry of a tract within a radius of twenty miles from such former entry under the provisions of this Act, which, together with the former entry, shall not exceed six hundred and forty acres, subject to the requirements of law as to residence and improvements, except that no residence shall be required on such additional entry if the entryman owns and is residing on his former entry: *Provided further*, That the entryman shall be required to enter all contiguous areas of the character herein described open to entry prior to the entry of any noncontiguous land: *And provided further*, That instead of cultivation as required by the homestead laws the entryman shall be required to make permanent improvements upon the land entered before final proof is submitted tending to increase the value of the same for

stock-raising purposes of the value of not less than \$1.25 per acre, and at least one-half of such improvements shall be placed upon the land within three years after the date of entry thereof." [40 Stat. L. 1016.]

For sec. 3 of Act of Dec. 29, 1916, as originally enacted, see 1918 Supp. Fed. Stat. Ann. 708.

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**An Act For the sale of isolated tracts of the public domain in Minnesota.**

[Act of Feb. 4, 1919, ch. 13, 40 Stat. L. 1055.]

[Chippewa Indian lands—sale at auction—R. S. sec. 2455 extended.] That the provisions of section twenty-four hundred and fifty-five of the Revised Statutes of the United States as amended by the Act of March twenty-eighth, nineteen hundred and twelve (Thirty-seventh Statutes at Large, page seventy-seven), relating to the sale of isolated tracts of the public domain, be, and the same are hereby, extended and made applicable to ceded Chippewa Indian lands in the State of Minnesota: *Provided*, That the provisions of this Act shall not apply to lands which are not subject to homestead entry: *Provided further*, That purchasers of land under this Act must pay for the lands not less than the price fixed in the law opening the lands to homestead entry. [40 Stat. L. 1055.]

For R. S. sec. 2455, mentioned in the text, see 8 Fed. Stat. Ann. (2d ed.) 859; 1912 Supp. Fed. Stat. Ann. 331.

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**An Act To provide for a leave of absence for homestead entrymen in one or two periods, and for longer times.**

[Act of Feb. 25, 1919, ch. 21, 40 Stat. L. 1153.]

[Homesteads—entrymen—leave of absence.] That the Act entitled "An Act to provide for leave of absence for homestead entrymen in one or two periods," approved August twenty-second, nineteen hundred and fourteen, be, and hereby is, amended to read as follows:

"That the entryman mentioned in section twenty-two hundred and ninety-one of Revised Statutes of the United States, as amended by the Act of June sixth, nineteen hundred and twelve, Thirty-seventh Statutes, one hundred and twenty-three, upon filing in the local land office notice of the beginning of such absence at his option shall be entitled to a leave of absence in one or two continuous periods, not exceeding in the aggregate five months in each year after establishing residence: *Provided*, That the register and receiver of the local land office under rules and regulations made by the Commissioner of the General Land Office may, upon proper showing, upon application of the homesteader, and only for climatic conditions, which makes residence on the homestead for seven months in each year a hardship, reduce the term of residence to not more than six months in each year, over a period of four years, or to not more than five months each year over a period of five years, but the total residence required shall in no event exceed twenty-five months, not less than five of which shall be in each year; proof to be made within five years after entry; and upon the termination of such absence, in each period, the entryman shall file a notice of such termination in the local land office; but in case of commutation the fourteen months' actual residence, as now required by law, must be shown, and the per-

son commuting be at the time a citizen of the United States." [40 Stat. L. 1153.]

For Act of Aug. 22, 1914, here amended, see 8 Fed. Stat. Ann. (2d ed.) 621; 1916 Supp. Fed. Stat. Ann. 196.

For R. S. sec. 2291, mentioned in the text, see 8 Fed. Stat. Ann. (2d ed.) 557; 1914 Supp. Fed. Stat. Ann. 336.

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**An Act To extend the provisions of the homestead laws touching credit for period of enlistment to the soldiers, nurses, and officers of the Army and the seamen, marines, nurses, and officers of the Navy and the Marine Corps of the United States who have served or will have served with the Mexican border operations or during the war between the United States and Germany and her allies.**

[Act of Feb. 25, 1919, ch. 37, 40 Stat. L. 1161.]

**[Soldiers' and sailors' homesteads — Mexican border operations — war with Germany.]** That subject to the conditions therein expressed, as to length of service and honorable discharge, the provisions of sections twenty-three hundred and four and twenty-three hundred and five, Revised Statutes of the United States, shall be applicable in all cases of military and naval service rendered in connection with the Mexican border operations or during the war with Germany and its allies as defined by public resolution numbered thirty-two, approved August twenty-ninth, nineteen hundred and sixteen (Thirty-ninth Statutes at Large, page six hundred and seventy-one), and the Act approved July twenty-eighth, nineteen hundred and seventeen (Fortieth Statutes at Large, page two hundred and forty-eight). [40 Stat. L. 1161.]

For R. S. secs. 2304, 2305, see 8 Fed. Stat. Ann. (2d ed.) 586; 6 Fed. Stat. Ann. (1st ed.) 322.

For Res. of Aug. 29, 1916, No. 32, see 1918 Supp. Fed. Stat. Ann. 705.

For Act of July 28, 1917, see 1918 Supp. Fed. Stat. Ann. 714.

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**[SEC. 1.] \* \* \* [Hearings in land entries — depositions — fees of officer taking.]** For hearings or other proceedings held by order of the Commissioner of the General Land Office to determine the character of lands; whether alleged fraudulent entries are of that character or have been made in compliance with law; and of hearings in disbarment proceedings, \$25,000: *Provided*, That where depositions are taken for use in such hearings the fees of the officer taking them shall be 20 cents per folio for taking and certifying same and 10 cents per folio for each copy furnished to a party on request. [41 Stat. L. 195.]

This is from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

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**\* \* \* [Homesteads — settlers or entrymen — excuse for nonresidence.]** That any homestead settler or entryman who, during the calendar year 1919, finds it necessary to leave his homestead to seek employment in order to obtain food and other necessities of life for himself, family, and work stock, because of great and serious drought conditions, causing total or partial failures of crops, may, upon filing with the register and receiver proof of such conditions in the form of a corroborated affidavit, be excused from residence upon his homestead

during all or part of the calendar year 1919, or the current year of such homestead which may fall principally in the year 1919, and in the making of final proof upon such an entry absence granted under this Act shall be counted and construed as constructive residence by said homesteader. [41 Stat. L. 271.]

This is from the Agricultural Appropriation Act of July 24, 1919, ch. 26.

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**An Act To authorize absence by homestead settlers and entrymen, and for other purposes.**

[Act of Sept. 29, 1919, ch. 64, 41 Stat. L. 288.]

[Homesteads — settlers and entrymen — leave of absence — vocational rehabilitation.] That every person who, after discharge from the military or naval service of the United States during the war against Germany and its allies, is furnished any course of vocational rehabilitation under the terms of the Vocational Rehabilitation Act approved June 27, 1918, upon the ground that he comes within article III of the Act of October 6, 1917, fortieth volume, Statutes at Large, page 398, and who before entering upon such course shall have made entry upon or application for public lands of the United States under the homestead laws, or who has settled or shall hereafter settle upon public lands, shall be entitled to a leave of absence from his land for the purpose of undergoing training by the Federal Board of Vocational Education, and such absence, while actually engaged in such training shall be counted as constructive residence: *Provided*, That no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year. [41 Stat. L. 288.]

For Act of June 27, 1918, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 875.

For Act of Oct. 6, 1917, art. III, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1317; 1918 Supp. Fed. Stat. Ann. (1st ed.) 908.

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**An Act To amend sections 4 and 5 of an Act entitled "An Act to provide for stock-raising homesteads, and for other purposes," approved December 29, 1916.**

[Act of Sept. 29, 1919, ch. 63, 41 Stat. L. 287.]

[Stock-raising homesteads — additional entries — contiguous lands — amount — improvements.] That sections 4 and 5 of the Act entitled "An Act to provide for stock-raising homesteads, and for other purposes," approved December 29, 1916, be amended to read as follows:

"SEC. 4. That any homestead entryman of lands of the character herein described who has not submitted final proof upon his existing entry shall have the right to enter, subject to the provisions of this Act, such amount of lands designated for entry under the provisions of this Act, within a radius of twenty miles from said existing entry, as shall not, together with the amount embraced in his original entry, exceed six hundred and forty acres, and residence upon the original entry shall be credited on both entries, but improvements must be made on the additional entry equal to \$1.25 for each acre thereof: *Provided*, That the entryman shall be required to enter all contiguous areas of the character herein described open to entry prior to the entry of any noncontiguous land.



"SEC. 5. That persons who have submitted final proof upon, or received patent for, lands of the character herein described under the homestead laws, and who own and reside upon the land so acquired, may, subject to the provisions of this Act, make additional entry for and obtain patent to lands designated for entry under the provisions of this Act, within a radius of twenty miles from the lands theretofore acquired under the homestead laws, which, together with the area theretofore acquired under the homestead laws, shall not exceed six hundred and forty acres, on proof of the expenditure required by this Act on account of permanent improvements upon the additional entry: *Provided*, That the entryman shall be required to enter all contiguous areas of the character herein described open to entry prior to the entry of any non-contiguous land." [41 Stat. L. 287.]

For sections 4 and 5 before amendment, see 1918 Supp. Fed. Stat. Ann. 709.

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**An Act Granting lands for school purposes in Government town sites on reclamation projects.**

[Act of Oct. 31, 1919, ch. 92, 41 Stat. L. 326.]

[Grants for school purposes — town sites on reclamation projects.] That the Secretary of the Interior be and he is hereby authorized, upon application by the proper officers of a school district located wholly or in part within the boundaries of a project of the United States Reclamation Service, to issue patent conveying to such district such unappropriated undisposed of lands, not exceeding six acres in area, within any Government reclamation town site situated within such school district as, in the opinion of the Secretary of the Interior, are necessary for use by said district for school buildings and grounds: *Provided*, That if any land so conveyed cease entirely to be used for school purposes title thereto shall revert to and revest in the United States. [41 Stat. L. 326.]

This Act became a law without the approval of the President by lapse of time.

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**An Act To amend an Act approved March 26, 1908, entitled "An Act to provide for the repayment of certain commissions, excess payments, and purchase moneys paid under the public land laws."**

[Act of Dec. 11, 1919, ch. —, 41 Stat. L. —.]

[Repayment of commissions, excess payments, and purchase moneys.] That an Act approved March 26, 1908 (Thirty-fifth Statutes at Large, page 48), entitled "An Act to provide for the repayment of certain commissions, excess payments, and purchase moneys paid under the public land laws," be amended to read as follows:

"SEC. 1. That where purchase moneys and commissions paid under any public land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof, or to his legal representatives, in all cases where such application, entry, or proof has been or shall hereafter be rejected, and neither such applicant nor his legal representatives shall

have been guilty of any fraud or attempted fraud in connection with such application: *Provided*, That such person or his legal representatives shall file a request for the repayment of such purchase moneys and commissions within two years from the rejection of such application, entry, or proof, or within two years from the passage of this Act as to such applications, proofs, or entries, as have been heretofore rejected.

“SEC. 2. That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives: *Provided*, That such person or his legal representatives shall file a request for the repayment of such excess within two years after the patent has issued for the land embraced in such payment, or within two years from the passage of this Act as to such excess payments as have heretofore been made.

“SEC. 3. That when the Commissioner of the General Land Office shall ascertain the amount of any excess moneys, purchase moneys, or commissions in any case where repayment is authorized by this statute, the Secretary of the Interior shall at once certify such amounts to the Secretary of the Treasury, who is hereby authorized and directed to make repayment of all amounts so certified out of any moneys not otherwise appropriated and issue his warrant in settlement thereof.

“SEC. 4. That the Secretary of the Interior is hereby authorized to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.” [41 Stat. L. —.]

For Act of March 28, 1908, here amended, see 8 Fed. Stat. Ann. (2d ed.) 527; 1909 Supp. Fed. Stat. Ann. 549.

## PUBLIC OFFICERS AND EMPLOYEES

*Act of Feb. 25, 1919, ch. 39, 323.*

*Sec. 1. Government Employees — War Service — Discharge — Reinstatement to Former Position, 323.*

*Act of March 1, 1919, ch. 86, 323.*

*Sec. 2. Government Employees — Pay — Telephone Operators — Assistant Messengers — Firemen — Watchmen — Laborers — Charwomen, 323.*

*4. Government Employees — Services No Longer Required — Free Railroad Transportation Home, 324.*

*7. Government Employees — Additional Compensation, 324.*

*9. "Joint Commission on Reclassification of Salaries" — Creation — Duties, 326.*

*Act of July 11, 1919, ch. 9 (Naval Appropriation Act), 327.*

*Employees Entering Military or Naval Service — Reinstatement on Discharge from Service, 327.*

*Act of July 11, 1919, ch. 6 (Third Deficiency Appropriation Act), 327.*

*Sec. 1. Preference to Certain Classes — Soldiers, Sailors, Marines — Widows or Wives, 327.*

*6. Influencing Members of Congress by Use of Public Moneys — Penalty, 328.*

*Act of July 11, 1919, ch. 7 (District of Columbia Appropriation Act), 328.*

*Sec. 5. Leave of Absence — Employees of District of Columbia — Holidays, 328.*

*Act of July 24, 1919, ch. 26, 328.*

*Salaries — Source — Supplementing by Individuals, etc., as Misdemeanor, 328.*

## CROSS-REFERENCES

See also *ANIMALS; CLAIMS; JUDICIAL OFFICERS; JUDICIARY; LABOR.*

[SEC. 1.] \* \* \* [Government employees — war service — discharge — reinstatement to former position.] That all former Government employees who have been drafted or enlisted in the military service of the United States in the war with Germany shall be reinstated on application to their former positions, if they have received an honorable discharge and are qualified to perform the duties of the position. [40 Stat. L. 1164.]

This is from the Deficiency Appropriation Act of Feb. 25, 1919, ch. 39.

SEC. 2. [Government employees — pay — telephone operators — assistant messengers — firemen — watchmen — laborers — charwomen.] That the pay of telephone switchboard operators, assistant messengers, firemen, watchmen, laborers, and charwomen provided for in this Act, except those employed in mints and assay offices, unless otherwise specially stated, shall be as follows: For telephone-switchboard operators, assistant messengers, firemen, and watchmen, at the rate of \$720 per annum each; for laborers, at the rate of \$660 per annum each; assistant telephone-switchboard operators, at the rate of \$600 each, and for charwomen, at the rate of \$240 per annum each. [40 Stat. L. 1265.]

This section and secs. 4, 7 and 9, which follow, are from the Legislative, Executive and Judicial Appropriation Act of March 1, 1919, ch. 86.

**SEC. 4. [Government employees—services no longer required—free railroad transportation home.]** That the heads of the several executive departments and other governmental establishments in the District of Columbia are hereby authorized and directed to furnish to such civilian employees, receiving compensation, exclusive of the additional \$120, at the rate of not more than \$1,400 per annum or less than \$100 per annum, under their respective jurisdiction as have come to the District of Columbia since April 6, 1917, whose services are no longer required and whose employment has been or may be terminated by the Government without delinquency or misconduct on their part, or who may resign from their positions, during the period from November 11, 1918, to March 31, 1919, inclusive, their actual railroad transportation, including sleeping-car accommodations, from the District of Columbia to the place from which they accepted employment or to their legal residence, or to such other place not a greater distance, as the employee may elect. Such transportation must be applied for within ten days after the termination of service and shall be used within five days after issuance unless an extension of time on account of illness be granted by the proper authority. As to the employees whose services have been terminated during the period between November 11, 1918, and the date of the passage of this Act, inclusive, the time within which transportation shall be applied for shall be twenty days from the date of the passage of this Act. Any person who shall sell, exchange, or transfer such transportation for the use of another shall be punished by a fine of not more than \$100. The expenses authorized by this Act shall be paid from the following appropriations for the fiscal year 1920, which hereby are made available therefor immediately upon approval of this Act:

For the War Department, from "Temporary employees."

For the Navy Department, from "Temporary employees."

For all other executive departments and independent establishments, from the appropriations for the support of the services in which such persons are employed. Any employee who would be entitled to transportation, including sleeping-car accommodation under this Act and who has left the District of Columbia prior to the passage of this Act, but not before December 10, 1918, upon application and presentation within sixty days after the passage of this Act of proper proof shall have refunded the cost of actual railroad transportation, including sleeping-car accommodation, from the District of Columbia to the place from which employment was accepted, or to their legal residence, or to such other place not a greater distance to which the employee may have gone. The provisions made for the transportation of employees shall not apply to those who enter such service after January 7, 1919: *Provided*, That payment to any employee for leave of absence not earned in proportion to the term of employment shall be deducted from the refund authorized in this section and the provision made in this Act for the transportation of employees shall not be supplemented in any manner by the various services in which they are employed. [40 Stat. L. 1266.]

See the note to preceding section 2.

**SEC. 7. [Government employees—additional compensation.]** That all civilian employees of the Governments of the United States and the District of Columbia who receive a total of compensation at the rate of \$2,500 per annum or less, except as otherwise provided in this section, shall receive, during the

fiscal year ending June 30, 1920, additional compensation at the rate of \$240 per annum: *Provided*, That such employees as receive a total of annual compensation at a rate more than \$2,500 and less than \$2,740 shall receive additional compensation at such a rate per annum as may be necessary to make their salaries, plus their additional compensation, at the rate of \$2,740 per annum, and no employee shall receive additional compensation under this section at a rate which is more than sixty per centum of the rate of the total annual compensation received by such employee: *Provided further*, That the increased compensation at the rate of \$120 per annum for the fiscal year ending June 30, 1919, shall not be computed as salary in construing this section: *Provided further*, That where an employee in the service on June 30, 1918, has received during the fiscal year 1919, or shall receive during the fiscal year 1920 an increase of salary at a rate in excess of \$200 per annum, or where an employee whether previously in the service or not, has entered the service since June 30, 1918, whether such employee has received an increase in salary or not, such employees shall be granted the increased compensation provided herein only when and upon the certification of the person in the legislative branch or the head of the department or establishment employing such persons of the ability and qualifications personal to such employees as would justify such increased compensation: *Provided further*, That the increased compensation provided in this section to employees whose pay is adjusted from time to time through wage boards or similar authority shall be taken into consideration by such wage boards or similar authority in adjusting the pay of such employees. *Provided further*, That no employee of the Federal Government shall, for services in the Philippine Islands, receive additional compensation under this section at a rate which is more than 20 per centum of the rate of the total annual compensation received by such employee.

The provisions of this section shall not apply to the following: Employees paid from the postal revenues and sums which may be advanced from the Treasury to meet deficiencies in the postal revenues; employees of the Panama Canal on the Canal Zone; employees of the Alaskan Engineering Commission in Alaska; employees paid from lump-sum appropriations in bureaus, divisions, commissions, or any other governmental agencies or employments created by law since January 1, 1916, except that employees of the Bureau of War Risk Insurance shall receive increased compensation at one-half the rate allowed by this section for other employees: *Provided*, That employees of said bureau who are compensated at rates below \$400 per annum shall receive additional compensation only at the rate of 60 per centum of the annual rates of compensation received by such employees; employees whose duties require only a portion of their time, except charwomen, who shall be included; employees whose services are utilized for brief periods at intervals; persons employed by or through corporations, firms, or individuals acting for or on behalf of or as agents of the United States or any department or independent establishment of the Government of the United States in connection with construction work or the operation of plants; employees who receive a part of their pay from any outside sources under cooperative arrangements with the Government of the United States or the District of Columbia; employees who serve voluntarily or receive only a nominal compensation, and employees who may be provided with special allowances because of their service in foreign countries. The provisions of this section shall not apply to employees of the railroads, express

companies, telegraph, telephone, marine cable, or radio system or systems, taken over by the United States, and nothing contained herein shall be deemed a recognition of the employees of such railroads, express companies, telegraph, telephone, marine cable, or radio system or systems, as employees of the United States.

Section six of the legislative, executive, and judicial appropriation Act approved May 10, 1916, as amended by the naval appropriation Act approved August 29, 1916, shall not operate to prevent anyone from receiving the additional compensation provided in this section who otherwise is entitled to receive the same.

Such employees as are engaged on piecework, by the hour, or at per diem rates, if otherwise entitled to receive the additional compensation shall receive the same at the rate to which they are entitled in this section when their fixed rate of pay for the regular working hours and on the basis of three hundred and thirteen days in the said fiscal year would amount to \$2,500 or less: *Provided*, That this method of computation shall not apply to any per diem employees regularly paid a per diem for every day in the year.

So much as may be necessary to pay the additional compensation provided in this section to employees of the Government of the United States is appropriated out of any money in the Treasury not otherwise appropriated.

So much as may be necessary to pay the increased compensation provided in this section to employees of the government of the District of Columbia is appropriated, one-half out of any money in the Treasury not otherwise appropriated and one-half out of the revenues of the District of Columbia, except to employees of the Washington Aqueduct and the water department, which shall be paid entirely from the revenues of the water department.

So much as may be necessary to pay the increased compensation provided in this section to persons employed under trust funds who may be construed to be employees of the Government of the United States or of the District of Columbia is authorized to be paid, respectively, from such trust funds.

Reports shall be submitted to Congress on the first day of the next regular session showing for the first four months of the fiscal year the average number of employees in each department, bureau, office, or establishment receiving the increased compensation at the rate of \$240 per annum and the average number by grades receiving the same at each other rate. [40 Stat. L. 1267 as amended by 41 Stat. L. 343.]

See the note to preceding section 2.

For Act of May 10, 1916, sec. 6, as amended by Act of Aug. 29, 1916, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 719.

This section was amended to read as here given by Act of Nov. 4, 1919, ch. 93, known as the "First Deficiency Appropriation Act, fiscal year 1920." The amendment added the last proviso of the first paragraph.

**SEC. 9. ["Joint Commission on Reclassification of Salaries"—creation—duties.]** That a joint commission is created to be known as the "Joint Commission on Reclassification of Salaries," which shall consist of three Senators, who are now Members of the Congress, to be appointed by the President of the Senate, and three Representatives, who are now Members of the Congress, to be appointed by the Speaker. Said commission shall submit its report and recommendations as early as possible, and, in any event, by the second Monday in January, 1920, and the members of such commission shall receive a compensation at the rate of \$625 per month, unless they are receiving other com-

pensation from the Government. Vacancies occurring in the membership of the commission shall be filled in the same manner as the original appointments.

It shall be the duty of the commission to investigate the rates of compensation paid to civilian employees by the municipal government and the various executive departments and other governmental establishments in the District of Columbia, except the navy yard and the Postal Service, and report by bill or otherwise, as soon as practicable, what reclassification and readjustment of compensation should be made so as to provide uniform and equitable pay for the same character of employment throughout the District of Columbia in the services enumerated.

The commission is authorized to sit during the sessions or recess of Congress, to send for persons and papers, to administer oaths, to summon and compel the attendance of witnesses, and to employ such personal services and incur such expenses as may be necessary to carry out the purposes of this section.

The heads of the various governmental services and the Commissioners of the District of Columbia shall furnish office space and equipment, detail officers and employees, furnish data and information, and make investigations whenever requested by the commission in connection with the purposes of this section.

For payment of the expenses authorized to be incurred, there is appropriated \$25,000, or so much thereof as may be necessary, to be available immediately and to be disbursed upon vouchers approved by the commission; which approval shall be conclusive upon the accounting officers of the Treasury Department. [40 Stat. L. 1269.]

See the note to preceding section 2.

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\* \* \* [Employees entering military or naval service — reinstatement on discharge from service.] That all former Government employees who have entered the military or naval service of the United States in the war with the German Government shall be reinstated on application to their former positions if they have received an honorable discharge and are qualified to perform the duties of the position. [41 Stat. L. 142.]

This is from the Naval Appropriation Act of July 11, 1919, ch. 9.

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[SEC. 1.] \* \* \* [Preference to certain classes — soldiers, sailors, marines — widows or wives.] That the Act entitled "An Act to provide for the Fourteenth and subsequent decennial censuses," approved March 3, 1919, so far as it relates to preference in employment of honorably discharged soldiers, sailors, and marines, be amended to read as follows: "That hereafter in making appointments to clerical and other positions in the Executive branch of the Government in the District of Columbia or elsewhere preference shall be given to honorably discharged soldiers, sailors, and marines, and widows of such and to the wives of injured soldiers, sailors and marines who themselves are not qualified, but whose wives are qualified to hold such positions." [41 Stat. L. 37.]

This is from the Third Deficiency Appropriation Act of July 11, 1919, ch. 6.  
For Act of March 3, 1910, sec. 6, here amended. see *ante*, p. 16.

**SEC. 6. [Influencing members of Congress by use of public moneys—penalty.]** That hereafter no part of the money appropriated by this or any other Act shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers and employees of the United States from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.

Any officer or employee of the United States who, after notice and hearing by the superior officer vested with the power of removing him, is found to have violated or attempted to violate this section, shall be removed by such superior officer from office or employment. Any officer or employee of the United States who violates or attempts to violate this section shall also be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not more than \$500 or by imprisonment for not more than one year, or both. [41 Stat. L. 68.]

This is from the Third Deficiency Appropriation Act of July 11, 1919, ch. 6.

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**SEC. 5. [Leave of absence — employees of District of Columbia — holidays.]** That all per diem employees and day laborers of the District of Columbia who have been regularly employed for fifteen working days next preceding such days as are legal holidays in the District of Columbia, and whose employment continues through and beyond said legal holidays, shall be granted such leave of absence with pay as is granted the regular annual employees of the District of Columbia for said legal holidays. [41 Stat. L. 102.]

This is from the District of Columbia Appropriation Act of July 11, 1919, ch. 7.

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\* \* \* **[Salaries — source — supplementing by individuals, etc., as misdemeanor.]** The officials and the employees of the Department of Agriculture engaged in the activities described in the preceding paragraph and paid in whole or in part out of funds contributed as provided therein, and the persons, corporations, or associations making contributions as therein provided, shall not be subject to the proviso contained in the Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1918, and for other purposes, approved March 3, 1917, in Thirty-ninth Statutes at Large, at page 1106; nor shall any official or employee engaged in the cooperative activities of the Forest Service, or the persons, corporations, or associations contributing to such activities be subject to the said proviso. [41 Stat. L. 270.]

This is from the Agricultural Appropriation Act of July 24, 1919, ch. 26.

For the proviso of the Act of March 3, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 720.



## PUBLIC PARKS

*Act of Feb. 26, 1919, ch. 45, 329.*

*Sec. 1. Lafayette National Park — Creation, 329.*

*2. Administration of Park — National Park Service, 329.*

*3. Acceptance of Lands, etc., Donated, 330.*

*Act of Feb. 26, 1919, ch. 44, 330.*

*Sec. 1. Grand Canyon National Park — Creation, 330.*

*2. Administration of Park — National Park Service, 330.*

*3. Rights of Havasupai Tribe of Indians — Preservation, 330.*

*4. Valid Existing Claims — Preservation, 330.*

*5. Rights of Way, 331.*

*6. Mineral Resources of Park — Utilization, 331.*

*7. Government Reclamation Project, 331.*

*8. Erection of Structures, 331.*

*9. Repeal of Conflicting Laws, 331.*

*Act of March 1, 1919, ch. 88, 331.*

*Rocky Mountain National Park — Amendment of Act Creating — Appropriation, 331.*

*Act of Nov. 19, 1919, ch. 110, 332.*

*Sec. 1. Zion National Park — Creation, 332.*

*2. Administration, 332.*

**An Act To establish the Lafayette National Park in the State of Maine.**

[*Act of Feb. 26, 1919, ch. 45, 40 Stat. L. 1178.*]

[**SEC. 1. [Lafayette National Park—creation.]** That the tracts of land, easements, and other real estate heretofore known as the Sieur de Monts National Monument, situated on Mount Desert Island, in the county of Hancock and State of Maine, established and designated as a national monument under the Act of June eighth, nineteen hundred and six, entitled "An Act for the preservation of American antiquities," by presidential proclamation of July eighth, nineteen hundred and sixteen, is hereby declared to be a national park and dedicated as a public park for the benefit and enjoyment of the people under the name of the Lafayette National Park, under which name the aforesaid national park shall be entitled to receive and to use all moneys heretofore or hereafter appropriated for Sieur de Monts National Monument. [40 Stat. L. 1178.]

For Act of June 8, 1906, mentioned in the text, see 8 Fed. Stat. Ann. (2d ed.) 1017; 1909 Supp. Fed. Stat. Ann., 53.

**SEC. 2. [Administration of Park — National Park Service.]** That the administration, protection, and promotion of said Lafayette National Park shall be exercised under the direction of the Secretary of the Interior by the National Park Service, subject to the provision of the Act of August twenty-fifth, nineteen hundred and sixteen, entitled "An Act to establish a National Park Service, and for other purposes," and Acts additional thereto or amendatory thereof. [40 Stat. L. 1179.]

For Act of Aug. 25, 1916, see 1918 Supp. Fed. Stat. Ann. (2d ed.) 723.

**SEC. 3. [Acceptance of lands, etc., donated.]** That the Secretary of the Interior is hereby authorized, in his discretion, to accept in behalf of the United States such other property on said Mount Desert Island, including lands, easements, buildings, and moneys, as may be donated for the extension or improvement of said park. [40 Stat. L. 1179.]

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**An Act To establish the Grand Canyon National Park in the State of Arizona.**

[Act of Feb. 26, 1919, ch. 44, 40 Stat. L. 1175.]

**[SEC. 1.] [Grand Canyon National Park — creation.]** That there is hereby reserved and withdrawn from settlement, occupancy, or disposal under the laws of the United States and dedicated and set apart as a public park for the benefit and enjoyment of the people, under the name of the "Grand Canyon National Park," the tract of land in the State of Arizona particularly described by and included within metes and bounds as follows, to wit: [*Here follows a description of the land included in the park.*] [40 Stat. L. 1175.]

**SEC. 2. [Administration of park — National Park Service.]** That the administration, protection, and promotion of said Grand Canyon National Park shall be exercised, under the direction of the Secretary of the Interior, by the National Park Service, subject to the provisions of the Act of August twenty-fifth, nineteen hundred and sixteen, entitled "An Act to establish a National Park Service, and for other purposes": *Provided*, That all concessions for hotels, camps, transportation, and other privileges of every kind and nature for the accommodation or entertainment of visitors shall be let at public bidding to the best and most responsible bidder. [40 Stat. L. 1177.]

For Act of Aug. 25, 1916, see 1918 Supp. Fed. Stat. Ann. (2d ed.) 723.

**SEC. 3. [Rights of Havasupai Tribe of Indians — preservation.]** That nothing herein contained shall affect the rights of the Havasupai Tribe of Indians to the use and occupancy of the bottom lands of the Canyon of Cataract Creek as described in the Executive order of March thirty-first, eighteen hundred and eighty-two, and the Secretary of the Interior is hereby authorized, in his discretion, to permit individual members of said tribe to use and occupy other tracts of land within said park for agricultural purposes. [40 Stat. L. 1177.]

**SEC. 4. [Valid existing claims — preservation.]** That nothing herein contained shall affect any valid existing claim, location, or entry under the land laws of the United States, whether for homestead, mineral, right of way, or any other purpose whatsoever, or shall affect the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land and nothing herein contained shall affect, diminish, or impair the right and authority of the county of Coconino, in the State of Arizona, to levy and collect tolls for the passage of live stock over and upon the Bright Angel Toll Road and Trail, and the Secretary of the Interior is hereby authorized to negotiate with the said county of Coconino for the purchase of said Bright Angel Toll Road and Trail and all rights therein, and report to Congress at as early a date as possible the terms upon which the property can be procured. [40 Stat. L. 1177.]

**SEC. 5. [Rights of way.]** That whenever consistent with the primary purposes of said park the Act of February fifteenth, nineteen hundred and one, applicable to the locations of rights of way in certain national parks and the national forests for irrigation and other purposes, and subsequent Acts shall be and remain applicable to the lands included within the park. The Secretary of the Interior may, in his discretion and upon such conditions as he may deem proper, grant easements or rights of way for railroads upon or across the park. [40 Stat. L. 1178.]

For Act of Feb. 15, 1901, see 8 Fed. Stat. Ann. (2d ed.) 811; 6 Fed. Stat. Ann. (1st ed.) 513.

**SEC. 6. [Mineral resources of park — utilization.]** That whenever consistent with the primary purposes of said park, the Secretary of the Interior is authorized, under general regulations to be prescribed by him, to permit the prospecting, development, and utilization of the mineral resources of said park upon such terms and for specified periods, or otherwise, as he may deem to be for the best interests of the United States. [40 Stat. L. 1178.]

**SEC. 7. [Government reclamation project.]** That, whenever consistent with the primary purposes of said park, the Secretary of the Interior is authorized to permit the utilization of areas therein which may be necessary for the development and maintenance of a Government reclamation project. [40 Stat. L. 1178.]

**SEC. 8. [Erection of structures.]** That where privately owned lands within the said park lie within three hundred feet of the rim of the Grand Canyon no building, tent, fence, or other structure shall be erected on the park lands lying between said privately owned lands and the rim. [40 Stat. L. 1178.]

**SEC. 9. [Repeal of conflicting laws.]** The Executive order of January eleventh, nineteen hundred and eight, creating the Grand Canyon National Monument, is hereby revoked and repealed, and such parts of the Grand Canyon National Game Preserve, designated under authority of the Act of Congress, approved June twenty-ninth, nineteen hundred and six, entitled "An Act for the protection of wild animals in the Grand Canyon Forest Reserve," as are by this Act included with the Grand Canyon National Park are hereby excluded and eliminated from said game preserve. [40 Stat. L. 1178.]

For Act of June 29, 1906, mentioned in the text, see 8 Fed. Stat. Ann. (2d ed.) 1014; 1909 Supp. Fed. Stat. Ann. 146.

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**An Act To repeal the last proviso of section four of an Act to establish the Rocky Mountain National Park, in the State of Colorado, and for other purposes, approved January twenty-sixth, nineteen hundred and fifteen.**

[Act of March 1, 1919, ch. 88, 40 Stat. L. 1270.]

**[Rocky Mountain National Park — amendment of Act creating — appropriation.]** That the last proviso of section four of an Act entitled "An Act to establish the Rocky Mountain National Park, in the State of Colorado, and for other purposes," approved January twenty-sixth, nineteen hundred and fifteen, which is in the words and figures following: " *Provided*, That no appropriation

for the maintenance, supervision, or improvement of said park in excess of \$10,000 annually shall be made unless the same shall have first been expressly authorized by law," be, and the same is hereby, repealed. [40 Stat. L. 1270.]

For Act of Jan. 26, 1915, sec. 4, see 8 Fed. Stat. Ann. (2d ed.) 992; 1916 Supp. Fed. Stat. Ann. 212.

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**An Act To establish the Zion National Park in the State of Utah.**

[Act of Nov. 19, 1919, ch. 110, 41 Stat. L. 356.]

[SEC. 1.] **[Zion National Park — creation.]** That the Zion National Monument, in the county of Washington, State of Utah, established and designated as a national monument under the Act of June 8, 1906, entitled "An Act for the preservation of American antiquities," by presidential proclamations of July 31, 1909, and March 18, 1918, is hereby declared to be a national park and dedicated as such for the benefit and enjoyment of the people, under the name of the Zion National Park, under which name the aforesaid national park shall be maintained by allotment of funds heretofore or hereafter appropriated for the national monuments, until such time as an independent appropriation is made therefor by Congress. [41 Stat. L. 356.]

For Act of June 8, 1906, mentioned in the text, see 8 Fed. Stat. Ann. (2d ed.) 1017; 1909 Supp. Fed. Stat. Ann. 569.

SEC. 2. **[Administration.]** That the administration, protection, and promotion of said Zion National Park shall be exercised under the direction of the Secretary of the Interior by the National Park Service, subject to the provision of the Act of August 25, 1916, entitled "An Act to establish a National Park Service, and for other purposes," and Acts additional thereto or amendatory thereof. [41 Stat. L. 356.]

For Act of Aug. 25, 1916, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 723.

## PUBLIC PRINTING

*Act of March 1, 1919, ch. 86, 333.*

*Sec. 11. Congressional Regulation of Printing — Printing Where Done, 333.*

*Act of July 11, 1919, ch. 6, 333.*

*Sec. 1. Bureau of Engraving and Printing — Bonds, Notes, Checks, etc.—  
Manner of Printing, 333.*

*Act of July 19, 1919, ch. 24, 334.*

*Sec. 3. Machinery and Supplies — Requisition from Other Departments, 334.*

*Act of July 24, 1919, ch. 26, 334.*

*Weather Bureau — Printing, 334.*

*Act of Aug. 2, 1919, ch. 30, 334.*

*Government Printing Office — Pay of Employees — Increase, 334.*

## CROSS-REFERENCES

See also *EDUCATION; SHIPPING AND NAVIGATION.*

**SEC. 11. [Congressional regulation of printing — printing where done.]**  
That the Joint Committee on Printing shall have power to adopt and employ such measures as, in its discretion, may be deemed necessary to remedy any neglect, delay, duplication, or waste in the public printing and binding and the distribution of Government publications: *Provided*, That hereafter no journal, magazine, periodical, or other similar publication, shall be printed and issued by any branch or officer of the Government service unless the same shall have been specifically authorized by Congress, but such publications as are now being printed without specific authority from Congress may, in the discretion of the Joint Committee on Printing, be continued until the close of the next regular session of Congress, when, if authority for their continuance is not then granted by Congress, they shall not thereafter be printed: *Provided further*, That on and after July 1, 1919, all printing, binding, and blank-book work for Congress, the Executive Office, the judiciary, and every executive department, independent office, and establishment of the Government, shall be done at the Government Printing Office, except such classes of work as shall be deemed by the Joint Committee on Printing to be urgent or necessary to have done elsewhere than in the District of Columbia for the exclusive use of any field service outside of said District. [40 Stat. L. 1270.]

This is sec. 11 of the Legislative, Executive and Judicial Appropriation Act of March 1, 1919, ch. 86.

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[SEC. 1.] \* \* \* [Bureau of Engraving and Printing — bonds, notes, checks, etc.— manner of printing.] The Secretary of the Treasury is hereby authorized, during the emergency growing out of the war with Germany, to have all bonds, notes, checks, or other printed papers now or hereafter authorized to be executed by the Bureau of Engraving and Printing of the Treasury Department printed in such manner and by whatever plate-printing process and on any style of plate-printing presses that he may consider suitable for the issue of such securities and other papers in the form that will properly safeguard the interests of the Government, and that such presses as are used in printing from intaglio plates shall be operated by plate printers except on

such work as is now being done by other processes and any similar work that may be necessary hereafter: *Provided*, That in the execution of such work only such part of it shall be transferred from the present method of executing it as will permit of the retention in the service of such permanent plate printers as are now engaged in the execution of such work or such temporary plate printers similarly employed and who can qualify under civil-service regulations for permanent appointments; and all Acts or parts of Acts heretofore enacted relative to the use of power and hand presses in the printing of securities of the Government are hereby suspended and declared not in effect until that time, and at the termination of said emergency such Acts or parts of Acts shall be in effect and force as prior to the Act of October 6, 1917. [41 Stat. L. 44.]

This is from the Third Deficiency Appropriation Act of July 11, 1919, ch. 6.

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SEC. 3. \* \* \* [Machinery and supplies — requisition from other departments.] That any officer of the Government having machinery, material, equipment or supplies for printing, binding, and blank book work, including lithography, photolithography, and other processes of reproduction, which are no longer required or authorized for his service, shall submit a detailed report of the same to the Public Printer, and the Public Printer is hereby authorized, with the approval of the Joint Committee on Printing, to requisition such articles of the character herein described as are serviceable in the Government Printing Office, and the same shall be promptly delivered to that office. [41 Stat. L. 233.]

This is from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

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\* \* \* [Weather Bureau — printing.] That no printing shall be done by the Weather Bureau that, in the judgment of the Secretary of Agriculture, can be done at the Government Printing Office without impairing the service of said bureau: *And provided further*, That the proviso contained in section 11 of the Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1920, shall not prohibit the printing in the printing office of the Weather Bureau in the city of Washington of the maps, bulletins, circulars, forms, and other publications herein authorized; \* \* \* [41 Stat. L. 239.]

This is from the Agricultural Appropriation Act of July 24, 1919, ch. 26.

For Act of March 1, 1919, sec. 11, mentioned in the text, see *supra* p. 333.

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### **An Act Increasing the pay of printers and pressmen employed in the Government Printing Office, and for other purposes.**

[Act of Aug. 2, 1919, ch. 30, 41 Stat. L. 272.]

[Government printing office — pay of employees — increase.] That on and after the passage of this Act the pay of all printers, printer linotype operators, printer monotype keyboard operators, makers-up, copy editors, proof readers, bookbinders, bookbinder-machine operators, and pressmen employed in the Government Printing Office shall be at the rate of 75 cents per hour for the time actually employed. [41 Stat. L. 272.]

## PUBLIC PROPERTY, BUILDINGS AND GROUNDS

*Act of March 1, 1919, ch. 86, 335.*

*Sec. 10. Public Buildings Commission, 335.*

**SEC. 10. Public Buildings Commission:** With a view to the control and allotment of space in owned or leased Government buildings in the District of Columbia, a Public Buildings Commission is hereby created to be composed of two Senators to be appointed by the President of the Senate and two Members of the House of Representatives to be appointed by the Speaker, who shall serve thereon only so long as they are Members of Congress, and the Superintendent of the Capitol Building and Grounds, the officer in charge of public buildings and grounds, and the Supervising Architect or the Acting Supervising Architect of the Treasury during any vacancy in said office. Said commission shall elect one of its members as chairman of the commission and is authorized to employ such expert clerical or other services as it may deem necessary.

Any vacancies in said commission shall be filled in the same manner as the original appointments were made.

Said commission shall have the absolute control of and the allotment of all space in the several public buildings, owned or buildings leased by the United States in the District of Columbia, with the exception of the Executive Mansion and office of the President, Capitol Building, the Senate and House Office Buildings, the Capitol power plant, the buildings under the jurisdiction of the Regents of the Smithsonian Institution, and the Congressional Library Building, and shall from time to time assign and allot, for the use of the several activities of the Government, all such space.

For expenses of said commission, \$10,000, to be immediately available and remain available until expended and to be paid out on vouchers signed by the chairman of said commission. [40 Stat. L. 1269.]

This is from the Legislative, Executive and Judicial Appropriation Act of March 1, 1919, ch. 86.

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## RADIO

See TELEGRAPHS, TELEPHONES, AND CABLES

[335]

## RAILROADS

*Act of March 2, 1919, ch. 95, 336.*

*Sec. 7. Routing of Freight — Inland Canal or Coastwise Waterway, 336.*

*Act of Oct. 22, 1919, ch. 81, 336.*

*Union Pacific Railroad Company — Right of Way — Partial Conveyance for Road Purposes, 336.*

*Act of Nov. 19, 1919, ch. 116, 337.*

*Sec. 1. Purchases of Equipment by United States Government — Reimbursement for Sums Advanced — Disposition of Equipment — Powers of President, 337.*

*2. Contracts for Sale of Equipment — Form, Contents and Effect, 337.*

*3. Act as limiting Powers of President Previously Conferred, 337.*

*4. Execution of Powers of President by Agents, 337.*

*5. Act as Emergency Legislation, 337.*

### CROSS-REFERENCES

See also *ALASKA; ANIMALS; CEMETERIES.*

**SEC. 7. [Routing of freight — inland canal or coastwise waterway.]** That the Act entitled "An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes," approved March 21, 1918, be, and the same hereby is, amended by adding at the end of section 6 thereof the following:

"No provision of this Act shall be construed to prevent the routing of freight by a shipper or consignee over any inland canal or coastwise waterway, or a part way over such waterway and a part way by rail. In case the shipper or consignee shall so route the freight, no provision of this Act shall be construed as giving power to change the routing." [40 Stat. L. 1290.]

This is from the Rivers and Harbors Appropriation Act of March 2, 1919, ch. 95.

For Act of March 21, 1918, sec. 6, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 761.

**An Act Authorizing the Union Pacific Railroad Company, or its successors, to convey for public-road purposes, certain parts of its right of way.**

[Act of Oct. 22, 1919, ch. 81, 41 Stat. L. 304.]

**[Union Pacific Railroad Company — right of way — partial conveyance for road purposes.]** That the Union Pacific Railroad Company, or any of its successors or assigns, is hereby authorized to convey to any State, county, or municipality any portion of its right of way, to be used as a public highway or street: *Provided*, That no such conveyance shall have the effect to diminish the right of way of said railroad company to a less width than fifty feet on each side of the center of the main track of the railroad as now established and maintained. [41 Stat. L. 304.]

This act became a law without the approval of the President.



**An Act To provide for the reimbursement of the United States for motive power, cars, and other equipment ordered for railroads and systems of transportation under Federal control, and for other purposes.**

[*Act of Nov. 19, 1919, ch. 116, 41 Stat. L. 359.*]

[SEC. 1.] **[Purchases of equipment by United States Government — reimbursement for sums advanced — disposition of equipment — powers of President.]** That in order to make provision for the reimbursement of the United States for the sums advanced to provide motive power, cars, and other equipment ordered by the President for the railroads and systems of transportation now under Federal control, herein called "carriers," pursuant to the authority conferred by the second paragraph of section 6 of the Act of March 21, 1918, the President may, upon such terms as he shall deem advisable, receive in reimbursement cash, or obligations of any carrier, or part cash and part such obligations, or in his discretion he may accept for such motive power, cars, or other equipment, cash or the shares of stock or obligations, secured or unsecured, of any corporation not a carrier organized for the purpose of owning equipment or equipment obligations, or part cash and part such shares of stock and obligations, and he may transfer to such corporation any obligations of carriers received on account of motive power, cars, or other equipment, and he may execute any instruments necessary and proper to carry out the intent of the second paragraph of section 6 of said Act of March 21, 1918, to the end that title to the motive power, cars and other equipment so ordered by the President as aforesaid for the carriers may rest in them or their trustees or nominees.

In addition to the powers herein and heretofore conferred, the President is further authorized to dispose, in the manner and for the consideration aforesaid, of motive power, cars, and other equipment, if any, provided by him in accordance with any other provisions of said section, and of any obligations of carriers that may be received in reimbursement of the cost thereof. [41 Stat. L. 359.]

For Act of March 21, 1918, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 757.

SEC. 2. **[Contracts for sale of equipment — form, contents and effect.]** That any contract for the sale of any motive power, cars, or other equipment ordered or provided under any of the provisions of section 6 of said Act of March 21, 1918, may provide that title thereto, notwithstanding delivery of possession, shall not vest in the carrier until the purchase price, which may be payable in installments during any period not exceeding fifteen years, shall be fully paid and the conditions of purchase fully performed. Any such contract shall be in writing, and acknowledged or proved before some person authorized to administer oaths, and filed with the Interstate Commerce Commission within sixty days after the delivery thereof, and shall be valid and enforceable as against all persons whomsoever. [41 Stat. L. 359.]

SEC. 3. **[Act as limiting powers of President previously conferred.]** That nothing herein contained shall be deemed to abrogate or limit the powers conferred upon the President by said Act of March 21, 1918. [41 Stat. L. 359.]

For the Act of March 21, 1918, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 759.

SEC. 4. **[Execution of powers of President by agents.]** That the President may execute any of the powers herein granted through such agencies as he may determine. [41 Stat. L. 359.]

SEC. 5. **[Act as emergency legislation.]** That this Act is emergency legislation, enacted to meet conditions growing out of war and to effectuate said Act of March 21, 1918. [41 Stat. L. 359.]

## RECLAMATION

See PUBLIC LANDS; WATERS

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## RED CROSS

See CUSTOMS DUTIES

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## RENTS

See DISTRICT OF COLUMBIA

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## RIVERS, HARBORS AND CANALS

*Act of March 2, 1919, ch. 95, 338.*

*Sec. 3. Government Dredging Plant — Construction or Use, 338.*

*8. Improvements — Private Contracts, 338.*

*10. Contracts Uncompleted Prior to April 6, 1917 — Readjustment — Increased Compensation, 339.*

### CROSS-REFERENCES

See also *RAILROADS; SHIPPING AND NAVIGATION.*

**An Act Making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes.**

[*Act of March 2, 1919, ch. 95, 40 Stat. L. 1287.*]

**SEC. 3. [Government dredging plant — construction or use.]** That in all cases where the project for a work of river or harbor improvement, heretofore, herein, or hereafter authorized, provides for the construction or use of Government dredging plant, the Secretary of War may, in his discretion, have the work done by contract if reasonable prices can be obtained. [40 Stat. L. 1287.]

**SEC. 8. [Improvements — private contracts.]** That no part of the funds herein or hereafter appropriated for works of river and harbor improvement shall be used to pay for any work done by private contract if the contract price is more than 25 per centum in excess of the estimated cost of doing the work by Government plant: *Provided*, That in estimating the cost of doing the work by Government plant, including the cost of labor and materials, there shall also be taken into account proper charges for depreciation of plant and all supervising and overhead expenses and interest on the capital invested in the Government plant, but the rate of interest shall not exceed the maximum prevailing rate being paid by the United States on current issues of bonds or other evidences of indebtedness. [40 Stat. L. 1290.]

SEC. 10. [Contracts uncompleted prior to April 6, 1917 — readjustment — increased compensation.] That the Secretary of War is hereby authorized to ascertain whether any of the contracts for work on river and harbor improvements entered into but not completed prior to April 6, 1917, the date of the entrance of the United States into war with Germany, have become inequitable and unjust on account of increased cost of materials, labor, and other unforeseen conditions arising out of the war; and to ascertain and report what amounts, if any, in addition to those fixed by the terms of said contracts, should in justice and equity be paid to contractors, for work performed between April 6, 1917, and July 18, 1918, the date of the approval of an Act entitled "An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," on account of the increased cost of labor and materials and other unforeseen conditions arising out of the war during that period: *Provided*, That in every case the amount so ascertained shall not exceed the actual loss sustained by the contractor in performing the work between the said dates: *Provided further*, That when such amount shall have been ascertained, the Secretary of War shall transmit to Congress for consideration a statement or statements of all findings or determinations rendered by authority of this section, the amounts thereof, the names of contractors, and dates of contracts. [40 Stat. L. 1290.]

For Act of July 18, 1918, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 772.

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## ROADS

See POSTAL SERVICE

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## SCHOOLS

See PUBLIC LANDS

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## SEEDS

See AGRICULTURE

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## SELECTIVE DRAFT ACT

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

## SHIPPING AND NAVIGATION

*Act of July 18, 1918, ch. 157, 340.*

- Sec. 1. Act Authorizing President to Prescribe Rates, Requisition Vessels, etc.*  
     — *Definitions, 340.*  
     2. *Delegation of Authority, 340.*  
     3. *Termination of Authority Conferred by Act, 341.*  
     4. *Conflicting Laws, 341.*  
     5. *Charters Pertaining to United States Vessels — Approval by President*  
        — *Alterations, 341.*  
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     7. *Priorities Affecting Vessels, 341.*  
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     9. *Rules, Regulations and Orders Affecting Navigation, 342.*  
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     11. *Requisition of Vessels — Compensation — Loss of or Damage to Vessels,*  
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     13. *Requisition of Terminal Facilities — Compensation, 343.*  
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- Sec. 1. Emergency Shipping Fund — Acquisition of Ships or Material or Plants*  
     *for Production Thereof — Charter Hire — Amendment to Statute, 344.*

*Act of July 19, 1919, ch. 24, 345.*

- Sec. 1. Emergency Shipping Fund — Reduction of Appropriation — Compen-*  
     *sation for Ship Construction — Disposal of Plants and Materials —*  
     *Expenditures for Printing, 345.*

### CROSS-REFERENCES

See also *LABOR; STEAM VESSELS.*

**An Act To confer on the President power to prescribe charter rates and freight rates and to requisition vessels, and for other purposes.**

[*Act of July 18, 1918, ch. 157, 40 Stat. L. 913.*]

[**SEC. 1.**] [**Act authorizing President to prescribe rates, requisition vessels, etc.— definitions.**] That when used in this Act —

(a) The term “United States” includes any State, Territory, or District of the United States, the insular possessions, the Canal Zone, and all lands or waters subject to the jurisdiction of the United States.

(b) The term “person” includes corporations, partnerships, associations, and States, municipalities, and other subdivisions thereof.

(c) The term “charter” means any agreement, contract, lease, or commitment by which the possession or services of a vessel are secured for a period of time, or for one or more voyages, whether or not a demise of the vessel. [40 Stat. L. 913.]

**SEC. 2. [Delegation of authority.]** That the President may exercise the power and authority hereby vested in him through such agency or agencies as he shall determine from time to time. [40 Stat. L. 913.]

SEC. 3. **[Termination of authority conferred by Act.]** That all power and authority hereby vested in the President or by him delegated and all restrictions imposed in this Act shall cease upon the proclamation of the final treaty of peace between the United States and the Imperial German Government: *Provided*, That if, in the judgment of the President, the tonnage shortage at such time is so severe that national interests of the United States are jeopardized, he may, by proclamation, extend the provisions of this Act for a further period of not exceeding nine months. [40 Stat. L. 913.]

SEC. 4. **[Conflicting laws.]** That the powers herein conferred shall be without prejudice to any power heretofore conferred on the President, or by him delegated. [40 Stat. L. 913.]

SEC. 5. **[Charters pertaining to United States vessels—approval by President—alterations.]** That the President may, by proclamation, require that vessels of the United States of any specified class or description, or in any specified trade or trades, shall not be chartered unless the instrument in which such charter is embodied, and the rates, terms, and conditions thereof are first approved by him. Whenever any vessel is comprised in any such proclamation, it shall be unlawful to make any charter thereof, or comply with or perform any of the rates, terms, or conditions of any charter thereof, or to operate such vessel under any charter, without first obtaining the approval thereof by the President.

Whenever any charter of such vessel is approved, it shall be unlawful, without the approval of the President first obtained, to make any alterations in such charter, or additions thereto or deletions therefrom, or to make or receive any payment or do any act with respect to such vessel, except in accordance with such charter. [40 Stat. L. 913.]

SEC. 6. **[Freight rates—terms and conditions of affreightment.]** That the President shall have power to determine, prescribe, and enforce reasonable freight rates and the terms and conditions of affreightment which shall govern the transportation of goods on vessels of the United States, which shall be filed with the United States Shipping Board and open to public inspection. It shall be unlawful to charge or collect any compensation for the transportation of goods on any such vessel, or to enforce or attempt to enforce any terms or conditions of affreightment, or to make or receive any payment or do any act with respect to such transportation, not in accordance with the rates, terms, and conditions so prescribed, anything in any contract, whether heretofore or hereafter made, to the contrary notwithstanding. [40 Stat. L. 914.]

SEC. 7. **[Priorities affecting vessels.]** That the President shall have power to prescribe the order of priority in which goods shall be carried or other services performed by any vessel of the United States and to specify goods which shall be carried or to direct the voyage or employment of any such vessel and to make such rules, regulations, and orders, with respect to any such vessel, relating to the loading, discharging, lighterage, or storage of goods, or the procurement of bunker fuel, or any other matter relating to the receiving, handling, transporting, storing, or delivering of goods, as may in his judgment be necessary and proper for the efficient utilization of transportation facilities and the effective conduct of the war. [40 Stat. L. 914.]

SEC. 8. [**Vessels included.**] That the President may by proclamation extend the provisions of sections five, six, and seven, or any of them, to any vessel of foreign nationality under charter to a citizen of the United States or other person subject to the jurisdiction thereof. [40 Stat. L. 914.]

SEC. 9. [**Rules, regulations and orders affecting navigation.**] That the President shall have power to make such rules, regulations, and orders regarding voyages, courses, the use of protective devices, and any other matters affecting the navigation, equipment, fueling, painting, or arming of vessels of the United States as may, in his judgment, be conducive to the protection of such vessels from submarines, mines, or other war perils, any expense so incurred to be allowed for in determining freight and charter rates under this Act. If in his judgment any vessel or class of vessels on account of size, speed, structure, method of propulsion, or for any other reason is unfit for service in any waters which he may declare to be a danger zone, he may, by order, exclude such vessel or vessels from such danger zone. It shall be unlawful to violate any order, rule, or regulation made under this section. Rules, regulations, or orders issued under this section may, in the discretion of the President, be issued confidentially, in which event they shall be binding only on such persons as have notice thereof. [40 Stat. L. 914.]

SEC. 10. [**Charters pertaining to foreign vessels — approval by President — alterations.**] That the President may by proclamation require that no citizen of the United States, or other person subject to the jurisdiction thereof, shall charter any vessel of foreign nationality unless the instrument in which such charter is embodied and the rates, terms, and conditions thereof are first approved by the President. After the making of such proclamation it shall be unlawful for any such citizen or person to make any charter of any such vessel, or comply with or perform any of the rates, terms, or conditions of any charter thereof, or to operate any such vessel under any charter, without first obtaining the approval thereof by the President.

Whenever any such charter is approved it shall be unlawful, without the approval of the President first obtained, to make any alterations in such charter or additions thereto or deletions therefrom, or to make or receive any payment or do any act with respect to such vessel, except in accordance with such charter. [40 Stat. L. 914.]

SEC. 11. [**Requisition of vessels — compensation — loss of or damage to vessels.**] That the President shall have power to requisition for military purposes, or for any other national purpose connected with or arising out of the present war, the temporary possession of any vessel, or, without taking actual possession, to requisition the services of any vessel and to require the person entitled to the possession thereof to issue to the master such instructions as may be necessary to place the vessel at the service of the United States.

Upon requisitioning such possession or services, or as soon thereafter as the exigencies of the situation may permit, the President shall transmit to the person entitled to the possession of such vessel a charter setting forth the terms which, in his judgment, should govern the relations between the United States and such person and a statement of the rental or rate of hire which, in his judgment, will be just compensation for the use of such vessel and for the services

required under the terms of such charter. If such person does not execute and deliver such charter and accept such rental or rate of hire, the President shall pay to such person a sum equal to seventy-five per centum of such rental or rate of hire as the same may from time to time be due under the terms of the charter, and such person shall be entitled to sue the United States to recover such further sum as added to such seventy-five per centum will make up such amount as will be just compensation for the use of the vessel and for the services required. In the event of loss of or damage to such vessel, due to the operation of a risk assumed by the United States under the terms of such charter (in the event that no valuation of such vessel or mode of compensation has been agreed to), the United States shall pay just compensation for such loss or damage, to be determined by the President; and if the amount so determined is not satisfactory to the person entitled to receive just compensation, the President shall pay to such person seventy-five per centum of the amount so determined, and such person shall be entitled to sue the United States to recover such further sum as added to such seventy-five per centum will make up such amount as will be just compensation. [40 Stat. L. 915.]

**SEC. 12. [Priorities affecting terminal facilities.]** That the President shall have power to prescribe the order of priority in which persons in possession of dry docks, wharves, lighterage systems, or loading or discharging terminal facilities in any port of the United States, or warehouses, equipment or terminal railways connected therewith, shall serve vessels and shippers, and to determine, prescribe, and enforce the rates, terms, and conditions charged or required for the furnishing of such services, including stevedoring and handling of cargo, and the handling, dispatching, and bunkering of vessels, and to make such rules and regulations with respect to the conduct of any such business as may be necessary and proper. It shall be unlawful to charge, collect, or claim any compensation, or to enforce or attempt to enforce any terms or conditions, or to make or receive any payment or do any act, with respect to any such service not in accordance with the rates, terms, and conditions so prescribed, any thing in any contract, whether heretofore or hereafter made, to the contrary notwithstanding. [40 Stat. L. 915.]

**SEC. 13. [Requisition of terminal facilities — compensation.]** That the President shall have power to lease or requisition the use or temporary possession of, or to assume temporary control of, any dry docks, wharves, or loading or discharging terminal facilities, in any port of the United States, or warehouses, equipment, or terminal railways connected therewith.

Whenever the President requisitions or assumes control of any such property, the United States shall pay just compensation therefor, to be determined by the President. If the amount so determined is not satisfactory to the person entitled to receive just compensation, the President shall pay to such person seventy-five per centum of the amount so determined and such person shall be entitled to sue the United States to recover such further sum as added to such seventy-five per centum will make up such amount as will be just compensation.

Whenever the President acquires by purchase, lease, or requisition, or assumes control of any such property immediate possession may be taken thereof to the extent of the interest acquired therein, and such property may be immediately occupied and used without regard to the provisions of section three hundred and fifty-five of the Revised Statutes.

Nothing in this section shall authorize the President to requisition the title to any such property owned by any State, municipality, or subdivision thereof. [40 Stat. L. 915.]

For R. S. sec. 355, see 8 Fed. Stat. Ann. (2d ed.) 1105; 6 Fed. Stat. Ann. (1st ed.) 695.

**SEC. 14. [Suit against United States — manner of bringing.]** That whenever by this Act permission is given to sue the United States such suit shall be brought in the manner provided in section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code. [40 Stat. L. 916.]

For Jud. Code, sec. 24, par. 20, see 4 Fed. Stat. Ann. (2d ed.) 1059; 1912 Supp. Fed. Stat. Ann. 140.

For Jud. Code, sec. 145, see 5 Fed. Stat. Ann. (2d ed.) 649; 1912 Supp. Fed. Stat. Ann. 200.

**SEC. 15. [Management of vessels, etc., requisitioned — proceeds.]** That all vessels of which the possession of services are requisitioned under this Act, and all dry docks, wharves, loading or discharging terminal facilities, warehouses, equipment, or terminal railways, of which the President may acquire the title or possession or of which he may assume control under this Act, may be operated and managed as the President may from time to time direct. The net proceeds derived from any activity authorized in this Act or the joint resolution of May twelfth, nineteen hundred and seventeen (Public Numbered Two), or the division entitled "Emergency shipping fund" of the Act of June fifteenth, nineteen hundred and seventeen (Public Numbered Twenty-three), shall be deposited in the Treasury in a separate and distinct fund and may be expended by the President in carrying out the purposes of this Act, and within the limits of the amounts heretofore or hereafter authorized, for the construction, requisitioning, or purchasing of vessels: *Provided*, That none of the provisions of this Act shall apply to vessels plying exclusively on the inland rivers and canals of the United States. [40 Stat. L. 916.]

For Res. of May 12, 1917, see 1918 Supp. Fed. Stat. Ann. 803.

For Act of June 15, 1917, see 1918 Supp. Fed. Stat. Ann. 803, and for amendments to the Act, see *infra*, this page.

**SEC. 16. [Violations of Act.]** That whoever does or attempts to do anything in this Act declared to be unlawful, or willfully violates any rule, regulation, or order issued under authority conferred herein, shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than two years, or both: *Provided*, That the district court of the Canal Zone shall have jurisdiction of offenses committed against the provisions of this Act within the Canal Zone. [40 Stat. L. 916.]

**SEC. 17. [Invalidity of part of Act — effect on remainder.]** That if any provision of this Act, or the application of such provision to certain circumstances, is held unconstitutional, the remainder of the Act, and the application of such provision to circumstances other than those as to which it is held unconstitutional, shall not be affected thereby. [40 Stat. L. 916.]

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[SEC. 1.] \* \* \* [Emergency shipping fund — acquisition of ships or material or plants for production thereof — charter hire — amendment to statute.] 1. The emergency shipping fund provision of the urgent deficiency



appropriation Act of June 15, 1917, as amended by the Act of April 22, 1918 (Public Act No. 138 of the Sixty-fifth Congress), is hereby amended as follows:

(I) In subdivision (d) of paragraph one, to begin said subdivision and to precede the words "to requisition," are now inserted the words: "To acquire, construct, establish, or extend any plant, and in pursuance thereof, to purchase, requisition, or otherwise acquire title to or use of land improved or unimproved or interest therein; and".

(II) In subdivision (f) of said paragraph one, after the words "or assume control of," are now inserted the words "or to extend, improve, or increase, or cause to be extended, improved, or increased".

(III) After said subdivision (f) in said paragraph one, a new subdivision is now inserted as follows:

"(g) In pursuance of the foregoing powers, or any of them, to make advance payments or loans of such amounts and upon such terms as the President may deem necessary and proper."

(IV) In paragraph eight of said provisions, after the word "shipyard," are now inserted the words "dry-dock, marine railway, pier." In said paragraph the words "or other facilities connected therewith" are stricken out and there are now inserted after the word "terminal," the following words: "and any facilities or improvements connected with any of the foregoing descriptions of property." [40 Stat. L. 1022.]

This and the following two paragraphs are from the "First Deficiency Appropriation Act, 1919," of Nov. 4, 1918, ch. 201.

For Act of June 15, 1917, here amended, and the amending Act of April 22, 1918, see 1918 Supp. Fed. Stat. Ann. 803.

2. For the acquisition or establishment of plants suitable for shipbuilding or ship maintenance or repair, or of materials essential thereto, and for the enlargement or extension of such plants as are now or may be hereafter acquired or established, authority is granted to enter into contracts or otherwise to incur obligations for not to exceed \$34,662,500 in addition to the amounts heretofore appropriated: *Provided*, That obligations incurred hereunder may be met from appropriations made or to be made for the construction of ships.

3. The United States Shipping Board shall not require payment from the War Department for the charter hire of vessels furnished or to be furnished from July 1, 1918, to June 30, 1919, inclusive, for the use of that department when such vessels are owned by the United States Government. [40 Stat. L. 1022.]

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[Sec. 1.] \* \* \* [Emergency shipping fund — reduction of appropriation — compensation for ship construction — disposal of plants and materials — expenditures for printing.] The authorization of \$2,884,000,000 heretofore established for the construction of ships is reduced by the sum of \$120,000,000.

For purchasing, requisitioning, or otherwise acquiring plants, material, charters, or ships now constructed or in the course of construction, and the expediting of construction of ships thus under construction, and for the cost of construction of ships, within the limit of cost authorized by law, \$356,000,000; and the unexpended balances of the appropriations for establishing plants and acquiring property for the housing of shipyard employees and their families, the taking over of certain transportation systems and the transportation of shipyard and plant employees, the purchase of ships under construction or to

be constructed in shipyards in foreign countries, and the operation of ships, contained in the Sundry Civil Appropriation Act for the fiscal year 1919, and the unexpended balance of the appropriation of \$150,000,000 for the purchase of ships contained in the Deficiency Appropriation Act approved October 6, 1917, are reappropriated and made available to meet obligations already incurred within the purposes of the appropriation herein made.

No contracts for ship construction to be entered into shall provide that the compensation of the contractor shall be the cost of construction plus a percentage thereof for profit, or plus a fixed fee for profit.

Any material or plant, as defined under the emergency shipping fund provision of the Deficiency Appropriation Act approved June 15, 1917, acquired by the United States Shipping Board Emergency Fleet Corporation, may be disposed of as the President may direct.

No part of the appropriations made in this Act for the Shipping Board or the Emergency Fleet Corporation shall be expended for the preparation, printing, or publication of any bulletins, newspapers, magazines, or periodicals, or for services in connection with same, not including preparation and printing of reports or documents authorized by law. [41 Stat. L. 180.]

This is from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

For Act of June 15, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 803.

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## SMITHSONIAN INSTITUTION

*Act of Nov. 4, 1919, ch. 93, 346.*

*Sec. 1. Transfer of Building by Secretary of War, 346.*

[SEC. 1.] \* \* \* [Transfer of building by Secretary of War.] To enable the Regents of the Smithsonian to heat, and to fit up for an exhibition of the aircraft and accessories produced by this Government since the declaration of war, the temporary metal structure erected in the Smithsonian Grounds by the War Department under the authority of public resolution Numbered 5, approved June 9, 1917, \$14,000: *Provided*, That the Secretary of War is hereby authorized to transfer the custody and control of the said building to the Regents of the Smithsonian Institution. [41 Stat. L. 328.]

This is from the "First Deficiency Appropriation Act, fiscal year 1920," of Nov. 4, 1919, ch. 93.

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## SOLDIERS' AND SAILORS' CIVIL RELIEF

*Act of Sept. 3, 1919, ch. 55, 346.*

*Default Judgments — Affidavit as to Military Service, 346.*

**An Act Relating to affidavits required by the Act entitled "An Act to extend protection to the civil rights of members of the Military and Naval Establishments of the United States engaged in the present war."**

[Act of Sept. 3, 1919, ch. 55, 41 Stat. L. 282.]

[Default judgments — affidavit as to military service.] That where any judgment has been entered since March 8, 1918, in any action or proceeding commenced in any court where there was a failure to file in such action the

affidavits required by section 200 of article 2 of the Act approved March 8, 1918, entitled "An Act to extend protection to the civil rights of members of the Military and Naval Establishments of the United States engaged in the present war" (Fortieth Statutes at Large, page 440), the plaintiff, after such notice as the court may prescribe, may file an affidavit stating that the defendant, or defendants, in default in such judgments, are not at the time of such filing, and were not at the time of the entry of such judgment, in the naval or military service of the United States, and upon the filing of such affidavit the court may enter an order that such judgment, if otherwise legal, shall stand and be effective as of the date of the entry of such judgment as if such affidavit had been duly filed. Any person who shall make or use such an affidavit as aforesaid, knowing it to be false, shall be punishable by imprisonment not to exceed two years or by fine not to exceed \$5,000, or both, in the discretion of the court. [41 Stat. L. 282.]

For Act of March 8, 1918, sec. 200, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 814.

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## SOLDIERS' HOME

See HOSPITALS AND ASYLUMS

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## STATE DEPARTMENT

*Act of March 1, 1919, ch. 86, 347.*

*Sec. 1. Under Secretary of State — Creation of Office — Salary, 347.*

*Act of Nov. 4, 1919, ch. 93, 347.*

*Sec. 1. Additional Officers and Employees — Rate of Compensation, 347.*

[SEC. 1.] \* \* \* [Under Secretary of State — creation of office — salary.]

Under Secretary of State, to be appointed by the President, by and with the advice and consent of the Senate, \$7,500. [40 Stat. L. 1224.]

This is from the Legislative, Executive and Judicial Appropriation Act of March 1, 1919, ch. 86.

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[SEC. 1.] \* \* \* [Additional officers and employees — rate of compensation.] For additional officers and employees in the Department of State during the fiscal year 1920, \$200,000: *Provided*, That no person shall be employed hereunder at a rate of compensation exceeding \$4,500 per annum. [41 Stat. L. 329.]

This is from the "First Deficiency Appropriation Act, fiscal year 1920," of Nov. 4, 1919, ch. 93.

## STEAM VESSELS

*Act of Oct. 25, 1919, ch. 82, 348.*

*Vessels Owned or Operated by Shipping Board — Statutes Applicable, 348.*

### CROSS-REFERENCE

See also *SHIPPING AND NAVIGATION*.

**An Act Extending the provisions for the regulation of steam vessels to vessels owned or operated by the United States Shipping Board, and for other purposes.**

[*Act of Oct. 25, 1919, ch. 82, 41 Stat. L. 305.*]

**[Vessels owned or operated by Shipping Board — statutes applicable.]**  
That all steam vessels owned or operated by the United States Shipping Board, or any corporation organized or controlled by it, shall be subject to all the provisions of title 52 of the Revised Statutes of the United States for the regulation of steam vessels and acts amendatory thereof or supplemental thereto. [41 Stat. L. 305.]

This Act became a law without the approval of the President.  
Title 52 includes R. S. secs. 4399–4500, and will be found in 9 Fed. Stat. Ann. (2d ed.) 414 et seq.; 7 Fed. Stat. Ann. (1st ed.) 161.

## SUFFRAGE

Proposed constitutional amendment granting suffrage to women, see *Index*.

## TAXATION

See *INTERNAL REVENUE; PUBLIC DEBT*

## TELEGRAPHS, TELEPHONES AND CABLES

*Act of Oct. 29, 1918, ch. 197, 348.*

*Sec. 1. Government Operation and Control of Wires — Protection of Users, 348.*

*2. Property of Government Telegraph and Telephone System — Larceny, etc., 349.*

*3. Receiving, etc., Stolen Property, 349.*

*4. Burglarizing, etc., Property, 349.*

*5. Assault on Employees of System — Robbery, etc., 349.*

*Act of July 11, 1919, ch. 10, 350.*

*Sec. 1. Government Control of Wires and Radio Systems — Repeal of Resolution Affecting — Telephone Rates, 350.*

*2. Time of Returning Systems to Owners, 350.*

*3. Compensation — Adjustment, 350.*

*4. Report by President to Congress, 351.*

**An Act Providing for the protection of the users of the telephone and telegraph service and the properties and funds belonging thereto during Government operation and control.**

[*Act of Oct. 29, 1918, ch. 197, 40 Stat. L. 1017.*]

[SEC. 1.] **[Government operation and control of wires — protection of users.]** That whoever during the period of governmental operation of the tele-

phone and telegraph systems of the United States by the Postmaster General, under the Act of Congress approved July sixteenth, nineteen hundred and eighteen, and the proclamation of the President dated July twenty-second, nineteen hundred and eighteen, shall, without authority and without the knowledge and consent of the other users thereof, except as may be necessary for operation of the service, tap any telegraph or telephone line, or willfully interfere with the operation of such telephone and telegraph systems or with the transmission of any telephone or telegraph message, or with the delivery of any such message, or whoever being employed in any such telephone or telegraph service shall divulge the contents of any such telephone or telegraph message to any person not duly authorized or entitled to receive the same, shall be fined not exceeding \$1,000 or imprisoned for not more than one year, or both. [40 Stat. L. 1017.]

For Act of July 16, 1918, see 1918 Supp. Fed. Stat. Ann. 834.

**SEC. 2. [Property of government telegraph or telephone system — larceny, etc.]** That whoever shall steal, purloin, embezzle, or without authority destroy any money, property, record, voucher, or valuable thing whatever of the moneys, goods, chattels, records, or property of any telephone or telegraph system operated by the Postmaster General under the Act of Congress approved July sixteenth, nineteen hundred and eighteen, and the proclamation of the President dated July twenty-second, nineteen hundred and eighteen, shall be fined not more than \$5,000 or imprisoned not more than five years, or both. [40 Stat. L. 1018.]

**SEC. 3. [Receiving, etc., stolen property.]** That whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain any money, property, record, voucher, or valuable thing whatever of the moneys, goods, chattels, records, or property of any telephone or telegraph system operated by the Postmaster General under the Act of Congress approved July sixteenth, nineteen hundred and eighteen, and the proclamation of the President dated July twenty-second, nineteen hundred and eighteen, which has been embezzled, stolen, or purloined by any other person, knowing the same to be embezzled, stolen, or purloined, shall be fined not more than \$1,000 or imprisoned not more than five years, or both, and such person may be tried either before or after the conviction of the principal defendant. [40 Stat. L. 1018.]

**SEC. 4. [Burglarizing, etc., property.]** That whoever shall forcibly break into, or attempt to break into, any telephone or telegraph office, or any building used in whole or in part as such telephone or telegraph office, of any telephone or telegraph system operated by the Postmaster General under the Act of Congress approved July sixteenth, nineteen hundred and eighteen, and the proclamation of the President dated July twenty-second, nineteen hundred and eighteen, with intent to commit in such telephone or telegraph office or building, or part thereof so used, any larceny or other depredation, shall be fined not more than \$1,000 or imprisoned not more than five years, or both. [40 Stat. L. 1018.]

**SEC. 5. [Assault on employees of system — robbery, etc.]** That whoever shall assault any person having lawful charge, control, or custody of any money or property of any telephone or telegraph system operated by the Postmaster General under the Act of Congress dated July sixteenth, nineteen hundred and

eighteen, and the proclamation of the President dated July twenty-second, nineteen hundred and eighteen, with intent to rob, steal, or purloin such money or property, or any part thereof, or shall rob any such person of such money or property, or any part thereof, shall be imprisoned not more than five years; and if in the effecting or attempting to effect such robbery, he shall wound such person having custody of the money or property, or put his life in danger by the use of a dangerous weapon, shall be imprisoned not more than ten years. [40 Stat. L. 1018.]

**An Act To repeal the joint resolution entitled "Joint resolution to authorize the President in time of war to supervise or take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war and to provide just compensation therefor," approved July 16, 1918, and for other purposes.**<sup>1</sup>

[Act of July 11, 1919, ch. 10, 41 Stat. L. 157.]

[SEC. 1.] **[Government control of wires and radio systems—repeal of resolution affecting—telephone rates.]** That chapter 154 of the Acts of the second session of the Sixty-fifth Congress, being the joint resolution entitled "Joint resolution to authorize the President in time of war to supervise or take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof and to operate the same in such manner as may be needful or desirable for the duration of the war and to provide just compensation therefor," approved on the 16th day of July, 1918, be, and the same is hereby, repealed to take effect at midnight on the last day of the calendar month in which this Act is approved: *Provided, however,* That the existing toll and exchange telephone rates as established or approved by the Postmaster General on or prior to June 6, 1919, shall continue in force for a period not to exceed four months after this Act takes effect, unless sooner modified or changed by the public authorities—State, municipal, or otherwise—having control or jurisdiction of tolls, charges, and rates or by contract or by voluntary reduction. [41 Stat. L. 157.]

For Res. of June 6, 1919, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 834.

SEC. 2. **[Time of returning systems to owners.]** That the President be, and he is hereby, authorized and directed, at midnight on the last day of the calendar month in which this Act is approved, to return and deliver to the respective owners thereof all of the systems, lines, and property taken possession of or received, operated, supervised, or controlled by him under authority of said joint resolution. [41 Stat. L. 157.]

SEC. 3. **[Compensation—adjustment.]** That the first proviso of said joint resolution prescribing the just compensation to be paid for and on account of said supervision, possession, control, or operation therein specified shall continue in full force and effect until such just compensation shall be fully adjusted and paid in the manner and according to the terms and conditions therein set forth. [41 Stat. L. 158.]

<sup>1</sup> For Res. of July 16, 1918, here repealed, see 1918 Supp. Fed. Stat. Ann. 834.

**SEC. 4. [Report by President to Congress.]** That within ninety days after this Act shall take effect the President shall cause to be made to the Congress a detailed account and report of all his acts and proceedings in connection with the supervision, possession, control, and operation of the telephone, telegraph, and marine cable systems of the United States, and of all moneys received and expended, and all property and assets acquired or held, and all liabilities or obligations incurred, including contracts relative to compensation awards, such report to show in detail the financial results of the operation of each separate wire system from August 1, 1918, up to the date when the said systems shall have been returned. [41 Stat. L. 158.]

## TIMBER LANDS AND FOREST RESERVES

*Act of Oct. 1, 1918, ch. 178, 351.*

*Timber Needed in Prosecution of War — Authority to Take, 351.*

*Act of Oct. 21, 1918, ch. 192, 351.*

*Oregon National Forest — Lands Set Aside, 351.*

*Act of Feb. 28, 1919, ch. 69, 352.*

*Sec. 8. National Forests — Roads and Trails, 352.*

*Act of March 3, 1919, ch. 111, 352.*

*Right to Cut Timber for Certain Purposes — Oregon, 352.*

*Act of March 3, 1919, ch. 115, 353.*

*Right to Cut Timber for Certain Purposes — California, 353.*

*Act of July 24, 1919, ch. 26, 353.*

*Timber and Forest Products — Exportation, 353.*

**[Timber needed in prosecution of war — authority to take.]** That hereafter during the existing state of war, the Secretary of Agriculture is authorized, under regulations to be prescribed by him, to permit the War Department, or any other Department, Board, or Commission, of the Government, to take from the national forests such timber as may be needed in the prosecution of the war, and the Secretaries of the Departments, Boards, or the Commissions which may obtain such timber, are severally authorized to sell, or otherwise dispose of, any timber necessarily cut in carrying out the provisions of this paragraph and any materials manufactured therefrom which are not necessary for war purposes. [40 Stat. L. 990.]

This is from the Agricultural Appropriation Act of Oct. 1, 1918, ch. 178.

**An Act To reserve as a part of the Oregon National Forest certain lands that were revested in the United States pursuant to the decision of the Supreme Court of the United States in the case of the Oregon and California Railroad Company against the United States.**

[Act of Oct. 21, 1918, ch. 192, 40 Stat. L. 1015.]

**[Oregon National Forest — lands set aside.]** That all of the land contained within the grant by the United States to the Oregon and California Railroad Company that was revested in the United States pursuant to the decision of the

Supreme Court of the United States in the case of Oregon and California Railroad Company against United States (Two hundred and thirty-eighth United States, page three hundred and ninety-three), and an Act of Congress approved June ninth, nineteen hundred and sixteen, that lies within that part of the Oregon National Forest that is described in the proclamation of the President under date of June seventeenth, eighteen hundred and ninety-two, and designated as Bull Run National Forest, be, and the same hereby is, reserved and set aside as a part of the Oregon National Forest. [40 Stat. L. 1015.]

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**SEC. 8. [National forests—roads and trails.]** That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending June 30, 1919, the sum of \$3,000,000, for the fiscal year ending June 30, 1920, the sum of \$3,000,000, and for the fiscal year ending June 30, 1921, the sum of \$3,000,000, available until expended by the Secretary of Agriculture in cooperation with the proper officials of the State, Territory, insular possession, or county, in the survey, construction, and maintenance of roads and trails within or partly within the national forests, when necessary for the use and development of resources of the same or desirable for the proper administration, protection, and improvement of any such forest. Out of the sums so appropriated the Secretary of Agriculture may, without the cooperation of such officials, survey, construct, and maintain any road or trail within a national forest which he finds necessary for the proper administration, protection, and improvement of such forest, or which in his opinion is of national importance. In the expenditure of this fund for labor preference shall be given, other conditions being equal, to honorably discharged soldiers, sailors, and marines.

The Secretary of Agriculture shall make annual report to Congress of the amounts expended hereunder. [40 Stat. L. 1201.]

This is sec. 8 of the Postal Appropriation Act of Feb. 28, 1919, ch. 69. The remaining sections are set out *ante*, p. 294.

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**An Act To grant to citizens of Malheur County, Oregon, the right to cut timber in the State of Idaho for agricultural, mining, or other domestic purposes, and to remove such timber to Malheur County, Oregon.**

[Act of March 3, 1919, ch. 111, 40 Stat. L. 1321.]

**[Right to cut timber for certain purposes—Oregon.]** That section eight of an Act entitled "An Act to repeal the timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, chapter five hundred and sixty-one, as amended by an Act approved March third, eighteen hundred and ninety-one, chapter five hundred and fifty-nine, page one thousand and ninety-three, volume twenty-six, United States Statutes at Large, be, and the same is hereby, amended by adding thereto the following:

"That it shall be lawful for the Secretary of the Interior to grant permits, under the provisions of the eighth section of the Act of March third, eighteen hundred and ninety-one, to citizens of Malheur County, Oregon, to cut timber



in the State of Idaho for agricultural, mining, or other domestic purposes, and to remove the timber so cut to Malheur County, State of Oregon." [40 Stat. L. 1321.]

For Act of March 3, 1891, sec. 8, here amended, see 7 Fed. Stat. Ann. (1st ed.) 306; 9 Fed. Stat. Ann. (2d ed.) 629.

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**An Act To grant to citizens of Modoc County, California, the right to cut timber in the State of Nevada for agricultural, mining, or other domestic purposes, and to remove such timber to Modoc County, California.**

[Act of March 3, 1919, ch. 115, 40 Stat. L. 1322.]

[Right to cut timber for certain purposes — California.] That section eight of an Act entitled "An Act to repeal the timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, chapter five hundred and sixty-one, as amended by an Act approved March third, eighteen hundred and ninety-one, chapter five hundred and fifty-nine, page one thousand and ninety-three, volume twenty-six, United States Statutes at Large, be, and the same is hereby, amended by adding thereto the following:

"That it shall be lawful for the Secretary of the Interior to grant permits under the provisions of the eighth section of the Act of March third, eighteen hundred and ninety-one, to citizens of Modoc County, California, to cut timber in the State of Nevada for agricultural, mining, or other domestic purposes, and to remove the timber so cut to Modoc County, State of California." [40 Stat. L. 1322.]

For Act of March 3, 1891, sec. 8, here amended, see 7 Fed. Stat. Ann. (1st ed.) 306; 9 Fed. Stat. Ann. (2d ed.) 629.

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[Timber and forest products — exportation.] \* \* \* the Secretary of Agriculture may, in his discretion, permit timber and other forest products cut or removed from the national forests to be exported from the State or Territory in which said forests are respectively situated. [41 Stat. L. 248.]

This is from the Agricultural Appropriation Act of July 24, 1919, ch. 26.

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## TIME

Act of Aug. 20, 1919, ch. 51, 353.

Daylight Saving Law — Repeal, 353.

**An Act For the repeal of the daylight-saving law.**

[Act of Aug. 20, 1919, ch. 51, 41 Stat. L. 280.]

[Daylight saving law — repeal.] That section 3 of the Act entitled "An Act to save daylight and to provide standard time for the United States," approved March 19, 1918, is hereby repealed, effective on the last Sunday of October, 1919, after the approval of this Act, when by the retarding of one hour the standard time of each zone shall be returned to and thereafter be

the mean astronomical time of the degree of longitude governing each zone as defined in section 1 of said Act approved March 19, 1918.

F H GILLET

*Speaker of the House of Representatives.*

THOS. R. MARSHALL,

*Vice President of the United States and  
President of the Senate.*

IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES.

*August 19, 1919.*

The President of the United States having returned to the House of Representatives, in which it originated, the bill (H. R. 3854) "For the repeal of the daylight-saving law," with his objections thereto, the House proceeded in pursuance of the Constitution to reconsider the same; and

*Resolved*, That the said bill pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest:

WM TYLER PAGE

*Clerk of the House of Representatives.*

IN THE SENATE OF THE UNITED STATES.

*August 20, 1919.*

The Senate having proceeded, in pursuance of the Constitution to reconsider the bill (H. R. 3854), "An Act for the repeal of the daylight-saving law," returned to the House of Representatives by the President of the United States, with his objections, and sent by the House of Representatives to the Senate with the message of the President returning the bill.

*Resolved*, That the bill do pass, two-thirds of the Senate agreeing to pass the same.

Attest:

GEORGE A. SANDERSON *Secretary.*

[41 Stat. L. 280.]

For Act of March 19, 1918, which was amended by this Act, see 1918 Supp. Fed. Stat. Ann. 842.

## TRADE COMBINATIONS AND TRUSTS

*Act of Nov. 4, 1919, ch. 93, 354.*

*Sec. 1. Appropriation for Enforcement of Antitrust Laws — Classes Excepted,*  
354.

[SEC. 1.] \* \* \* [Appropriation for enforcement of antitrust laws — classes excepted.] For the enforcement of antitrust laws \$200,000: *Provided, however*, That no part of this money shall be spent in the prosecution of any organization other than an organization of public officers or any individual other than a public officer for entering into any combination or agreement having in view of the increasing of wages, shortening of hours, or bettering the conditions of labor, or for any act done in furtherance thereof, not in itself unlawful: *Provided further*, That no part of this appropriation shall be expended for the

prosecution of producers of farm products and associations of farmers who cooperate and organize in an effort to and for the purpose to obtain and maintain a fair and reasonable price for their products. [41 Stat. L. 336.]

This is from the "First Deficiency Appropriation Act, fiscal year 1920," of Nov. 4, 1919, ch. 93.

## TRADING WITH THE ENEMY

*Act of Nov. 4, 1918, ch. 201, 355.*

*Sec. 1. Delivery of Property, etc., to Alien Property Custodian — Recordation, etc.— Shares of Stock — Remedy of Persons Deprived of Property, 355.*

*Act of July 11, 1919, ch. 6, 356.*

*Sec. 1. Claims to Property Held by Alien Property Custodian or United States Treasurer, 356.*

*Res. of Nov. 19, 1919, No. 21, ch. 121, 357.*

*Dyes and Coal Tar Products — Control of Imports — Extension of Period, 357.*

### CROSS-REFERENCE

See also *PUBLIC DEBT*.

[SEC. 1.] \* \* \* [Delivery of property, etc., to alien property custodian — recordation, etc.— shares of stock — remedy of persons deprived of property.]

Subsection (c) of section seven of the "Trading with the enemy Act," approved October 6, 1917, is amended to read as follows:

"(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

"Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

"Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books

in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States." [40 Stat. L. 1020.]

This is from the "First Deficiency Appropriation Act, 1919," of Nov. 4, 1918, ch. 201.

For Act of Oct. 6, 1917, sec. 7, subsec. c, which is here amended, see 1918 Supp. Fed. Stat. Ann. 856.

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[SEC. 1.] \* \* \* [Claims to property held by alien property custodian or United States Treasurer.] That section 9 of the "Act to define, regulate, and punish trading with the enemy, and for other purposes," approved October 6, 1917, is hereby amended to read as follows:

"SEC. 9. That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest,

right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the Alien Property Custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated: *Provided, however,* That in respect of all property heretofore determined by the President to have been held for, by, on account of, or on behalf of, or for the benefit of a person who was an enemy or ally of enemy, if the President, after further investigation, shall determine that such person was an enemy or ally of enemy solely by reason of residence in that portion of the territory of any nation associated with the United States in the prosecution of the war which was occupied by the military or naval forces of Germany or Austria-Hungary, or their allies, and that such person is a citizen or subject of such associated nation, then the President, without any application being made therefor, may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Property Custodian, or by the Treasurer of the United States, or of the interest therein to which the President shall determine such person entitled, either to the said enemy or to the person by whom said property was conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian. And the receipt of the said enemy or of the person by whom said property was conveyed, transferred, assigned, or delivered to the Alien Property Custodian, shall be a full acquittance and discharge of the Alien Property Custodian or the Treasurer of the United States as the case may be, and of the United States in respect of all claims of all persons heretofore or hereafter claiming any right, title, or interest in said property, or compensation or damages arising from the capture of such property by the President or the Alien Property Custodian: *Provided further, however,* That except as herein provided no such action by the President shall bar any person from the prosecution of any suit at law or in equity to establish any right, title, or interest which he may have therein.

"Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

"This section shall not apply, however, to money paid to the Alien Property Custodian under section 10 hereof." [41 Stat. L. 35.]

This is from the "Third Deficiency Appropriation Act" of July 11, 1919, ch. 6.  
For Act of Oct. 6, 1917, sec. 9, here amended, see 1918 Supp. Fed. Stat. Ann. 858.

### Joint Resolution To continue the control of imports of dyes and coal-tar products.

[Res. of Nov. 19, 1919, No. 21, ch. 121, 41 Stat. L. 361.]

[Dyes and coal tar products — control of imports — extension of period.]  
That notwithstanding the prior termination of the present war, the provisions

of the Trading with the Enemy Act, approved October 6, 1917, and of any proclamation of the President issued in pursuance thereof which prohibit or control the importation into the United States of dyes or other products derived directly or indirectly from coal tar, are continued until January 15, 1920. [41 Stat. L. 361.]

For Act of Oct. 6, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 846.

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## TREASURY DEPARTMENT

*Act of July 19, 1919, ch. 24, 358.*

*Sec. 1. Enforcement of Laws — Detail of Persons, 358.*

*Fuel for Buildings — Contract for Purchase — Anticipating Appropriation, 358.*

[SEC. 1.] \* \* \* [Enforcement of laws — detail of persons.] The Secretary of the Treasury is authorized to use for, and in connection with, the enforcement of the laws relating to the Treasury Department and the several branches of the public service under its control, not exceeding at any one time four persons paid from the appropriation for the collection of customs, four persons paid from the appropriation for salaries and expenses of internal-revenue agents or from the appropriation for the foregoing purpose, and four persons paid from the appropriation for suppressing counterfeiting and other crimes, but not exceeding six persons so detailed shall be employed at any one time hereunder: *Provided*, That nothing herein contained shall be construed to deprive the Secretary of the Treasury from making any detail now otherwise authorized by existing law. [41 Stat. L. 173.]

This and the following paragraph are from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

[Fuel for buildings — contract for purchase — anticipating appropriation.] \* \* \* That the Secretary of the Treasury is authorized to contract for the purchase of fuel for public buildings under the control of the Treasury Department in advance of the availability of the appropriation for the payment thereof. Such contracts, however, shall not exceed the necessities of the current fiscal year. [41 Stat. L. 171.]

This is from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

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## TRUST COMPANIES

See CORPORATIONS

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## UNIFORMS

See COAST GUARD; NAVAL ACADEMY; NAVY; WAR DEPARTMENT AND MILITARY ESTABLISHMENT

## VESSELS

See SHIPPING AND NAVIGATION

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## VICTORY LIBERTY LOAN ACT

See PUBLIC DEBT

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## VIRGIN ISLANDS

See POSTAL SERVICE

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## VOCATIONAL REHABILITATION

*Act of Feb. 26, 1919, ch. 46, 359.*

*Special Fund for Vocational Education — Use, 359.*

*Act of July 11, 1919, ch. 12, 360.*

*Persons Entitled to Courses of Vocational Rehabilitation — Courses Prescribed — Compensation — War Risk Insurance — Appropriation, 360.*

*Act of July 19, 1919, ch. 24, 361.*

*Sec. 1. Additional Appropriation — Compensation for Personal Service, 361.*

*Act of Nov. 4, 1919, ch. 93, 361.*

*Sec. 1. Additional Appropriation — Salary Limitation, 361.*

**An Act Extending the use of the special fund for vocational education provided by section seven of the vocational rehabilitation Act, approved June twenty-seventh, nineteen hundred and eighteen, and for other purposes.**

[*Act of Feb. 26, 1919, ch. 46, 40 Stat. L. 1179.*]

[**Special fund for vocational education — use.**] That the special fund for vocational education, authorized by section seven of the vocational rehabilitation Act, approved June twenty-seventh, nineteen hundred and eighteen, together with the items of appropriation made by said Act, are hereby made available, in addition to the purposes therein prescribed, for such other expenses as in the discretion of the board is deemed necessary and proper for the payment of necessary travel, lodging, subsistence, and other expenses of disabled men while under investigation by the board to determine their eligibility for training under the Act, and the purchase of supplies, equipment, and clothing for disabled men when ready to enter employment, and the traveling expenses of such men to place of employment and for supplementing any or all of the other items of appropriation made by said Act. [40 Stat. L. 1179.]

For Act of June 27, 1918, sec. 7, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 878.

**An Act To amend an Act entitled "An Act to provide for vocational rehabilitation and return to civil employment of disabled persons discharged from the military or naval forces of the United States, and for other purposes," approved June 27, 1918.**

[*Act of July 11, 1919, ch. 12, 41 Stat. L. 158.*]

[Persons entitled to courses of vocational rehabilitation—courses prescribed—compensation—war risk insurance—appropriation.] That section 2 of the Act entitled "An Act to provide for vocational rehabilitation and return to civil employment of disabled persons discharged from the military or naval forces of the United States, and for other purposes," approved June 27, 1918, be hereby amended to read as follows:

"SEC. 2. That every person enlisted, enrolled, drafted, inducted, or appointed in the military or naval forces of the United States, including members of training camps authorized by law, who, since April 7, 1917, has resigned or has been discharged or furloughed therefrom under honorable conditions, having a disability incurred, increased, or aggravated while a member of such forces, or later developing a disability traceable in the opinion of the board to service with such forces, and who, in the opinion of the Federal Board for Vocational Education, is in need of vocational rehabilitation to overcome the handicap of such disability, shall be furnished by the said board, where vocational rehabilitation is feasible, such course of vocational rehabilitation as the board shall prescribe and provide.

"The board shall have the power, and it shall be its duty, to furnish the persons included in this section suitable courses of vocational rehabilitation, to be prescribed and provided by the board; and every person electing to follow such a course of vocational rehabilitation shall, while following the same, be paid monthly by the said board from the appropriation hereinafter provided such sum as in the judgment of the said board is necessary for his maintenance and support and for the maintenance and support of persons depending upon him, if any: *Provided, however,* That in no event shall the sum so paid such person while pursuing such course be more than \$80 per month for a single man without dependents, or for a man with dependents \$100 per month plus the several sums prescribed as family allowances under section 204 of Article II of the War Risk Insurance Act.

"No compensation under Article III of the Act entitled 'An Act to amend an Act entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department," ' approved October 6, 1917, shall be paid for the period during which any such person is being furnished by said board a course of vocational rehabilitation and support as herein authorized: *Provided, however,* That in the event any person pursuing a course of vocational rehabilitation is entitled under said Article III to compensation in an amount in excess of the payments made to him by the said board for his support and the support of his dependents, if any, the Bureau of War Risk Insurance shall pay monthly to such person such additional amount as may be necessary to equal the total compensation due under said Article III of said Act.

"There is hereby appropriated out of any money in the Treasury of the United States not otherwise appropriated, available immediately and until expended, the sum of \$6,000,000, or so much thereof as may be necessary, to be used by the Federal Board for Vocational Education for the purpose of



making the payments prescribed by this section and for defraying the administrative expenses incident thereto." [41 Stat. L. 158.]

For Act of June 27, 1918, sec. 2, amended by this Act, see 1918 Supp. Fed. Stat. Ann. 875.

For War Risk Insurance Act, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1299; 1918 Supp. Fed. Stat. Ann. 889.

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[SEC. 1.] \* \* \* [Additional appropriation — compensation for personal service.] For an additional amount for carrying out the provisions of the act entitled "An act to provide for the vocational rehabilitation and return to civil employment of disabled persons discharged from the military or naval forces of the United States, and for other purposes," approved June 27, 1918, as amended, including personal services in the District of Columbia and elsewhere, printing and binding to be done at the Government Printing Office, law books, books of reference, and periodicals, \$8,000,000, of which sum not exceeding \$15,000 may be expended for rent of quarters in the District of Columbia if space is not provided in government-owned buildings by the Public Buildings Commission: *Provided*, That no person shall be paid by said Board out of the appropriation contained in this Act, or the Act approved July [11], 1919, amending section 2 of the Act approved June 27, 1918, at a rate of compensation exceeding \$2,500 per annum and rates above that sum, except not to exceed the following: One at \$6,000, two at \$5,000 each, twenty-eight in excess of \$3,500 and not in excess of \$4,000 each, twenty-seven at \$3,500 each, seventy at \$3,000 each, sixty at \$2,750 each, and one hundred at \$2,500 each. [41 Stat. L. 178.]

This is from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

The Act of July 11, 1919, mentioned in the text, is set out *supra*, this title, p. 360.

For Act of June 27, 1918, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 878.

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[SEC. 1.] \* \* \* [Additional appropriation — salary limitation.] For an additional amount for carrying out the provisions of the Act entitled "An Act to provide for the vocational rehabilitation and return to civil employment of disabled persons discharged from the military or naval forces of the United States, and for other purposes," approved June 27, 1918, as amended, including personal services in the District of Columbia and elsewhere, printing and binding to be done at the Government Printing Office, law books, books of reference, and periodicals, \$5,000,000: *Provided*, That the salary limitations prescribed by the item of appropriation for vocational rehabilitation contained in the Sundry Civil Act, approved July 19, 1919, shall apply to the appropriation hereby made. [41 Stat. L. 328.]

This is from the "First Deficiency Appropriation Act, fiscal year 1920," of Nov. 4, 1919, ch. 93.

For Act of June 27, 1918, see 1918 Supp. Fed. Stat. Ann. 875.

For Act of July 19, 1919, mentioned in the text, see the preceding text paragraph.

## WAR DEPARTMENT AND MILITARY ESTABLISHMENT

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#### CROSS-REFERENCES

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**An Act Amending the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen.**

[*Act of Aug. 31, 1918, ch. 166, 40 Stat. L. 955.*]

[**SEN. 1.**] [**Selective Draft Act — amendments — persons affected by act — subjects of neutral nations seeking naturalization.**] That the second sentence of section two of the Act entitled "An Act to authorize the President to

increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen, as amended, be, and is hereby, amended to read as follows:

Such draft as herein provided shall be based upon liability to military service of all male citizens and male persons residing in the United States, not alien enemies, who have declared their intention to become citizens, between the ages of eighteen and forty-five, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this Act: *Provided*, That the President may draft such persons liable to military service in such sequence of ages and at such time or times as he may prescribe: *Provided further*, That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen, and he shall forever be debarred from becoming a citizen of the United States. [40 Stat. L. 955.]

For sec. 2 of the Act of May 18, 1917, as originally enacted, see 9 Fed. Stat. Ann. (2d ed.) 1156; 1918 Supp. Fed. Stat. Ann. (1st ed.) 1015.

**SEC. 2. [Exemptions — necessary industries.]** That the provision wherever occurring in section four of said Act, "persons engaged in industries, including agriculture, found to be necessary to the maintenance of the Military Establishment or the effective operation of the military forces or the maintenance of national interest during the emergency," be, and is hereby, amended to read as follows:

Persons engaged in industries, occupations, or employments, including agriculture, found to be necessary to the maintenance of the Military Establishment or the effective operation of the military forces or the maintenance of national interest during the emergency. [40 Stat. L. 955.]

For sec. 4, herein mentioned, as originally enacted, see 9 Fed. Stat. Ann. (2d ed.) 1157; 1918 Supp. Fed. Stat. Ann. (1st ed.) 1016.

**SEC. 3. [Registration — re-enlistments in naval or marine service.]** That section five of said Act be, and is hereby, amended to read as follows:

That all male persons between the ages of eighteen and forty-five, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President, and, upon proclamation by the President or other public notice given by him or by his direction stating the time or times and place or places of any such registration, it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army; officers and enlisted men of the National Guard while in the service of the United States; officers of the Officers' Reserve Corps and enlisted men in the Enlisted Reserve Corps while in the service of the United States; officers and enlisted men of the Navy and Marine Corps; officers and enlisted and enrolled men of the Naval Reserve Force and Marine Corps Reserve while in the service of the United States; officers commissioned in the Army of the United States under the provisions of this Act; persons who, prior to any day set for registration by the President hereunder, have registered under the terms of this Act or under the terms of the resolution entitled "Joint resolution providing for the registration

for military service of all male persons citizens of the United States and all male persons residing in the United States who have, since the fifth day of June, nineteen hundred and seventeen, and on or before the day set for the registration by proclamation by the President, attained the age of twenty-one years, in accordance with such rules and regulations as the President may prescribe under the terms of the Act approved May eighteenth, nineteen hundred and seventeen, entitled 'An Act to authorize the President to increase temporarily the Military Establishment of the United States,' approved May twentieth, nineteen hundred and eighteen, whether called for service or not, and diplomatic representatives, technical attachés of foreign embassies and legations, consuls general, consuls, vice consuls, and consular agents of foreign countries, residing in the United States, who are not citizens of the United States to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act upon the publication of any such proclamation or any such other public notice as aforesaid given by the President or by his direction; and any person who shall willfully fail or refuse to present himself for registration or to submit thereto as herein provided shall be guilty of a misdemeanor and shall, upon conviction in a district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year and shall thereupon be duly registered: *Provided*, That in the call of the docket precedence shall be given, in courts trying the same, to the trial of criminal proceedings under this Act: *Provided further*, That persons shall be subject to registration as herein provided who shall have attained their eighteenth birthday and who shall not have attained their forty-sixth birthday on or before the day set for the registration in any such proclamation by the President or any such other public notice given by him or by his direction, and all persons so registered shall be and remain subject to draft into the forces hereby authorized unless exempted or excused therefrom as in this Act provided: *Provided further*, That the President may at such intervals as he may desire from time to time require all male persons who have attained the age of eighteen years since the last preceding date of registration and on or before the next date set for registration by proclamation by the President, except such persons as are exempt from registration hereunder, to register in the same manner and subject to the same requirements and liabilities as those previously registered under the terms hereof: *And provided further*, That in the case of temporary absence from actual place of legal residence of any person liable to registration as provided herein, such registration may be made by mail under regulations to be prescribed by the President: *And provided further*, That men registered under the provisions of this Act who have served in the Navy of the United States shall, upon their own application, be permitted to reenlist in the naval or marine service of the United States with and by the approval of the Secretary of the Navy. [40 Stat. L. 955.]

For sec. 5, as originally enacted, see 9 Fed. Stat. Ann. (2d ed.) 1159; 1918 Supp. Fed. Stat. Ann. (1st ed.) 1018.

For Act of May 20, 1918, herein mentioned, see 9 Fed. Stat. Ann. (2d ed.) 1164; 1918 Supp. Fed. Stat. Ann. (1st ed.) 1039.

**SEC. 4. [Induction of drafted men into what branch of service.]** That all men rendered available for induction into the military service of the United States through registration or draft heretofore or hereafter made pursuant to law, shall be liable to service in the Army or the Navy or the Marine Corps,

and shall be allotted to the Army, the Navy, and the Marine Corps under regulations to be prescribed by the President: *Provided*, That all persons drafted and allotted to the Navy or the Marine Corps in pursuance hereof shall, from the date of allotment, be subject to the laws and regulations governing the Navy and the Marine Corps, respectively. [40 Stat. L. 956.]

SEC. 5. [Wife of soldier or sailor — qualification for position under government.] That the wife of a soldier or sailor serving in the present war shall not be disqualified for any position or appointment under the Government because she is a married woman. [40 Stat. L. 956.]

SEC. 6. [Soldiers entitled to commissions or admission to officers' schools.] That soldiers, during the present emergency, regardless of age and existing law and regulations, shall be eligible to receive commissions in the Army of the United States. They shall likewise be eligible to admission to officers' schools under such rules and regulations as may be adopted for entrance to such schools, but shall not be barred therefrom or discriminated against on account of age. [40 Stat. L. 956.]

SEC. 7. [Training of soldiers at educational institutions.] That the Secretary of War is authorized to assign to educational institutions, for special and technical training, soldiers who enter the military service under the provisions of this Act in such numbers and under such regulations as he may prescribe; and is authorized to contract with such educational institutions for the subsistence, quarters, and military and academic instruction of such soldiers. [40 Stat. L. 957.]

SEC. 8. [Soldiers under age — public lands — entries.] That any person, under the age of twenty-one, who has served or shall hereafter serve in the Army of the United States during the present emergency, shall be entitled to the same rights under the homestead and other land and mineral entry laws, general or special, as those over twenty-one years of age now possess under said laws: *Provided*, That any requirements as to establishment of residence within a limited time shall be suspended as to entry by such person until six months after his discharge from military service: *Provided further*, That applications for entry may be verified before any officer in the United States, or any foreign country, authorized to administer oaths by the laws of the State or Territory in which the land may be situated. [40 Stat. L. 957.]

This section is amended by the Joint Resolution of Sept. 13, 1918, No. 41, which provides as follows: "That no relinquishment of any public land entry made under and by authority of section eight of the Act of Sixty-fifth Congress, second session, entitled 'An Act amending the Act entitled 'An Act to authorize the President to increase temporarily the Military Establishment of the United States,' approved May eighteenth, nineteen hundred and seventeen, shall be valid or effective for any purpose unless executed after the entryman shall have actually resided upon and cultivated the land, in the case of a homestead entry, for at least six months, and in the case of an entry made under other than the homestead laws, after the entryman shall have complied with the provisions of the applicable law for at least one year. Any person, firm, or corporation soliciting or dealing with the relinquishment of such claim or entry prior to the completion of compliance with the applicable law and with this resolution, and who or which solicits, demands, or receives or accepts any fee or compensation for locating, filing, or securing the claims or entries for persons entitled to the benefits of said section shall, upon conviction, be fined not to exceed \$1,000 or imprisoned for not exceeding two years, or both."

**SEC. 9. [Uniforms and other military equipment—furnishing by government.]** That hereafter, uniforms, accouterments, and equipment shall, upon the request of any officer of the Army or cadet at the Military Academy, be furnished by the Government at cost, subject to such restrictions and regulations as the Secretary of War may prescribe. [40 Stat. L. 957.]

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[SEC. 1.] \* \* \* **[Allotments and family allowances—payment—enlisted men reported as missing.]** For the purpose of the payment of allotments made by the enlisted men or the payment of family allowances under Article II of the Act of October 6, 1917, as amended, an enlisted man reported as missing in action shall be considered as occupying a pay status until his actual status has been determined by proper official authority of the department in which the man served or is serving: *Provided*, That payments authorized hereunder shall not continue for more than one year. [40 Stat. L. 1024.]

This and the two paragraphs which follow are from the "First Deficiency Appropriation Act, 1919," of Nov. 4, 1918, ch. 201.

For Act of Oct. 16, 1917, Art. II, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 903.

\* \* \* **[Quartermaster Corps—funds derived from sale of supplies—disposition.]** All funds hereafter derived from the sale of ice or as receipts from the sale of electric current or laundry work under the appropriations of the Quartermaster Corps shall be deposited in the Treasury of the United States as miscellaneous receipts. [40 Stat. L. 1028.]

\* \* \* **[Expenditures for post gardens.]** That so much of the Act of July 16, 1892, as provides that no money appropriated for the support of the Army shall be expended for post gardens is suspended during the fiscal year 1919. [40 Stat. L. 1028.]

For Act of July 16, 1892, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1099; 7 Fed. Stat. Ann. (1st ed.) 1015.

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**SEC. 1406. [Bonus to soldiers and sailors serving during War with Germany.]** That all persons serving in the military or naval forces of the United States during the present war who have, since April 6, 1917, resigned or been discharged under honorable conditions (or, in the case of reservists, been placed on inactive duty), or who at any time hereafter (but not later than the termination of the current enlistment or term of service) in the case of the enlisted personnel and female nurses, or within one year after the termination of the present war in the case of officers, may resign or be discharged under honorable conditions (or, in the case of reservists, be placed on inactive duty), shall be paid, in addition to all other amounts due them in pursuance of law, \$60 each.

This amount shall not be paid (1) to any person who though appointed or inducted into the military or naval forces on or prior to November 11, 1918, had not reported for duty at his station on or prior to such date; or (2) to any person who has already received one month's pay under the provisions of section 9 of the Act entitled "An Act to authorize the President to increase temporarily the military establishment of the United States," approved May 18,



1917; or (3) to any person who is entitled to retired pay; or (4) to the heirs or legal representatives of any person entitled to any payment under this section who has died or may die before receiving such payment. In the case of any person who subsequent to separation from the service as above specified has been appointed or inducted into the military or naval forces of the United States and has been or is again separated from the service as above specified, only one payment of \$60 shall be made.

The above amount, in the case of separation from the service on or prior to the passage of this Act, shall be paid as soon as practicable after the passage of this Act, and in the case of separation from the service after the passage of this Act shall be paid at the time of such separation.

The amounts herein provided for shall be paid out of the appropriations for "pay of the Army" and "pay of the Navy," respectively, by such disbursing officers as may be designated by the Secretary of War and the Secretary of the Navy.

The Secretary of War and the Secretary of the Navy respectively shall make all regulations necessary for the enforcement of the provisions of this section. [40 Stat. L. 1151.]

This is from the "Internal Revenue Act of 1918," ch. 18, enacted Feb. 24, 1919, and in effect the following day. The Act is set out *ante*, p. 90.

For Act of May 18, 1917, sec. 9, see 9 Fed. Stat. Ann. (2d ed.) 1161; 1918 Supp. Fed. Stat. Ann. 1021.

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**An Act To amend an Act entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department," approved September second, nineteen hundred and fourteen, and an Act in amendment thereto approved October sixth, nineteen hundred and seventeen.**

[Act of Feb. 25, 1919, ch. 36, 40 Stat. L. 1160.]

**[War Risk Insurance—investigation of applications for family allowances—Sec. 210 amended.]** That the Act entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department" be, and is hereby, amended by adding the following new paragraph to section two hundred and ten of Article II of the said Act:

"*Provided, however,* That whenever the commissioner shall by further investigation or reinvestigation modify the existing award, no reimbursement from the person receiving an allowance shall be required for allotments and allowances already paid nor shall any deductions be made from allotments and allowances to be paid in the future for any change in award made in previous allotments and allowances, except where it is conclusively shown that the person receiving the allowance does not bear the relationship to the enlisted man which is required by the Act and except in cases of manifest fraud." [40 Stat. L. 1160.]

For Act of Sept. 2, 1914, as amended by Act of Oct. 6, 1917, see 9 Fed. Stat. Ann. (2d ed.) 1299; 1918 Supp. Fed. Stat. Ann. 889.

**Joint Resolution Authorizing and directing the accounting officers of the Treasury to allow credit to the disbursing clerk of the Bureau of War Risk Insurance in certain cases.**

[*Res. of Feb. 26, 1919, No. 52, ch. 53, 40 Stat. L. 1184.*]

**[Bureau of War Risk Insurance — accounts of disbursing clerk — allowance of credit for certain payments.]** That for such reasonable time as may be fixed by the Secretary of the Treasury, but not extending beyond the fiscal year ending June thirtieth, nineteen hundred and twenty, the accounting officers of the Treasury are hereby authorized and directed to allow credit in the accounts of the disbursing clerk of the Bureau of War Risk Insurance for all payments of insurance installments heretofore or hereafter made under the provisions of Article IV of the war risk insurance Act in advance of the verification of the deduction on the pay rolls, or of the payment otherwise, of all premiums. [40 Stat. L. 1184.]

For the War Risk Insurance Act, art. IV, see 9 Fed. Stat. Ann. (2d ed.) 1325; 1918 Supp. Fed. Stat. Ann. 916.

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**An Act To authorize the payment of allotments out of the pay of enlisted men in certain cases in which these payments have been discontinued.**

[*Act of Feb. 28, 1919, ch. 82, 40 Stat. L. 1212.*]

**[War Risk Insurance — resumption of payment of allotments out of pay of enlisted men.]** That in all of those cases in which an authority of allotment by an enlisted man directing the payment of an indicated amount to a designated beneficiary is on file in the Bureau of War Risk Insurance, and payments pursuant to this authority had been made by said bureau prior to July first, nineteen hundred and eighteen, but which payments were discontinued as of that date, the War and Navy Departments are directed to resume the payments of allotments in these cases, pursuant to the authority on file as aforesaid, pending the receipt of a new authority, or of a written rescission of the old authority from the enlisted men. In those cases in which pending the receipt of the new authority, the military authorities, beginning with July first, nineteen hundred and eighteen, have reserved from month to month out of the soldier's monthly accruing pay, the amount directed to be paid by the original authority of allotment, the War and Navy Departments, upon resuming the payment of allotments in such cases, under the authority of this Act, shall pay all arrearages out of these respective reservations. [40 Stat. L. 1212.]

For the War Risk Insurance Act, see 9 Fed. Stat. Ann. (2d ed.) 1299; 1918 Supp. Fed. Stat. Ann. 889.

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**An Act Permitting any person who has served in the United States Army, Navy, or Marine corps in the present war to retain his uniform and personal equipment, and to wear the same under certain conditions.**

[*Act of Feb. 28, 1919, ch. 70, 40 Stat. L. 1202.*]

**[SEC. 1.] [Discharged soldiers, sailors, and marines — uniforms and equipment.]** That any person who served in the United States Army, Navy, or Marine Corps in the present war may, upon honorable discharge and return to

civil life, permanently retain one complete suit of outer uniform clothing, including the overcoat, and such articles of personal apparel and equipment as may be authorized, respectively, by the Secretary of War or the Secretary of the Navy, and may wear such uniform clothing after such discharge: *Provided*, That the uniform above referred to shall include some distinctive mark or insignia to be prescribed, respectively, by the Secretary of War or the Secretary of the Navy, such mark or insignia to be issued, respectively, by the War Department or Navy Department to all enlisted personnel so discharged. The word "Navy" shall include the officers and enlisted personnel of the Coast Guard who have served with the Navy during the present war. [40 Stat. L. 1202.]

**SEC. 2. [Discharge as of what period — uniform already restored to government — duty of government to return.]** That the provisions of this Act shall apply to all persons who served in the United States Army, Navy, or Marine Corps during the present war honorably discharged since April sixth, nineteen hundred and seventeen. And in cases where such clothing and uniforms have been restored to the Government on their discharge the same or similar clothing and uniform in kind and value as near as may be shall be returned and given to such soldiers, sailors, and marines. [40 Stat. L. 1203.]

**SEC. 3. [Discharged soldiers, sailors, and marines — mileage.]** That section one hundred and twenty-six of the Act entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," approved June third, nineteen hundred and sixteen, be amended to read as follows:

"SEC. 126. That an enlisted man honorably discharged from the Army, Navy, or Marine Corps since November eleventh, nineteen hundred and eighteen, or who may hereafter be honorably discharged, shall receive five cents per mile from the place of his discharge to his actual bona fide home or residence, or original muster into the service, at his option: *Provided*, That for sea travel on discharge, transportation and subsistence only shall be furnished to enlisted men: *Provided*, That naval reservists duly enrolled who have been honorably released from active service since November eleventh, nineteen hundred and eighteen, or who may hereafter be honorably released from active service, shall be entitled likewise to receive mileage as aforesaid." [40 Stat. L. 1203.]

For section 126, before the amendment shown in the text, see 9 Fed. Stat. Ann. (2d ed.) 1221; 1918 Supp. Fed. Stat. Ann. 969.

This section is affected by the Act of Sept. 29, 1919, ch. 65, set out *infra*, p. 380.

**SEC. 4. [Repeal of inconsistent Acts.]** That all Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed. [40 Stat. L. 1203.]

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### **An Act To authorize the resumption of voluntary enlistment in the Regular Army, and for other purposes.**

[Act of Feb. 28, 1919, ch. 79, 40 Stat. 1211.]

**[Voluntary enlistments in regular army — resumption — period — pay.]** That so much of sections seven and fourteen of the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment

of the United States," approved May eighteenth, nineteen hundred and seventeen, as impose restrictions upon enlistments in the Regular Army, are hereby repealed in so far as they apply to enlistments and reenlistments in the Regular Army after the date of approval of this Act: *Provided*, That from and after the approval of this Act, one-third of the enlistments in the Regular Army of the United States shall be for a period of one year, and the remaining two-thirds thereof shall be for the period of three years. Any person enlisting under the provisions of this Act shall not be required to serve with the reserves. The pay of the men enlisted hereunder shall be the same as that provided by the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May 18, 1917: *Provided further*, That after the expiration of one year those enlisting for the period of three years may be discharged in the discretion of the Secretary of War under such rules and regulations as may be prescribed by him after one year of service. [40 Stat. L. 1211.]

For Act of May 18, 1917, see 9 Fed. Stat. Ann. (2d ed.) 1136; 1918 Supp. Fed. Stat. Ann. 1010.

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**An Act To amend section four of Chapter V of an Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and nineteen," approved July ninth, nineteen hundred and eighteen, and to make said amendment retroactive.**

[Act of Feb. 28, 1919, ch. 80, 40 Stat. L. 1211.]

**[Army Nurse Corps — salaries.]** That section four of Chapter V of an Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and nineteen," approved July ninth, nineteen hundred and eighteen, be, and the same hereby is, amended, to be effective as of and from July ninth, nineteen hundred and eighteen, by changing the clause "chief nurses, \$120, in addition to the pay of a nurse," to "chief nurses, \$360, in addition to the pay of a nurse." [40 Stat. L. 1211.]

For Act of July 9, 1918, ch. V, sec. 4, see 1918 Supp. Fed. Stat. Ann. (2d ed.) 891; 1918 Supp. Fed. Stat. Ann. (1st ed.) 1050.

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**An Act To amend the fiftieth article of war.**

[Act of Feb. 28, 1919, ch. 81, 40 Stat. L. 1211.]

**[Articles of war — courts martial — mitigation or remission of sentences.]** That article fifty of section thirteen hundred and forty-two of the Revised Statutes of the United States, as amended by the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, be, and the same is hereby, amended to read as follows:

"ART. 50. MITIGATION OR REMISSION OF SENTENCES.—The power to order the execution of the sentence adjudged by a court-martial shall be held to include, *inter alia*, the power to mitigate or remit the whole or any part of the sentence.

"Any unexecuted portion of a sentence adjudged by a court-martial may be

mitigated or remitted by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the person under sentence is held, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority; but no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority, and no approved sentence of loss of files by an officer shall be remitted or mitigated by any authority inferior to the President, except as provided in the fifty-second article.

“When empowered by the President so to do, the commanding general of the Army in the field or the commanding general of the territorial department or division may mitigate or remit, and order executed as mitigated or remitted, any sentence which under these articles requires the confirmation of the President before the same may be executed.

“The power of remission and mitigation shall extend to all uncollected forfeitures adjudged by sentence of a court-martial.” [40 Stat. L. 1211.]

For R. S. sec. 1342, art. 50, here amended, see 9 Fed. Stat. Ann. (2d ed.) 1273; 1918 Supp. Fed. Stat. Ann. 986.

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[SEC. 1.] \* \* \* [Signal office—services of skilled draftsmen, etc.]

The services of skilled draftsmen and such other services as the Secretary of War may deem necessary may be employed only in the Signal Office to carry into effect the various appropriations for fortifications and other works of defense, and for the Signal Service of the Army, to be paid from such appropriations, in addition to the foregoing employees appropriated for in the Signal Office: *Provided*, That the entire expenditures for the purpose for the fiscal year 1920 shall not exceed \$53,280, and the Secretary of War shall each year in the annual estimates report to Congress the number of persons so employed, their duties, and the amount paid to each. [40 Stat. L. 1238.]

This and the two paragraphs which follow are from the Legislative, Executive and Judicial Appropriation Act of March 1, 1919, ch. 86.

\* \* \* [Office of Chief of Ordnance—services of skilled draftsmen, etc.]

The services of skilled draftsmen and such other services as the Secretary of War may deem necessary may be employed only in the office of the Chief of Ordnance to carry into effect the various appropriations for the armament of fortifications and for the arming and equipping of the National Guard, to be paid from such appropriations, in addition to the amount specifically appropriated for draftsmen in the Army Ordnance Bureau: *Provided*, That the entire expenditures for this purpose for the fiscal year 1920 shall not exceed \$400,000, and the Secretary of War shall each year in the annual estimates report to Congress the number of persons so employed, their duties, and the amount paid to each. [40 Stat. L. 1239.]

See the note to preceding paragraph.

\* \* \* [Chief of Engineers—services of skilled draftsmen, etc.] The services of skilled draftsmen, civil engineers, and such other services as the Secretary of War may deem necessary, may be employed only in the office of the Chief of Engineers, to carry into effect the various appropriations for rivers and harbors, fortifications, and surveys and preparation for and the consideration of

river and harbor estimates and bills, to be paid from such appropriations: *Provided*, That the expenditures on this account for the fiscal year 1920 shall not exceed \$50,400; the Secretary of War shall each year, in the annual estimates, report to Congress the number of persons so employed, their duties, and the amount paid to each. [40 Stat. L. 1239.]

See the note to the second preceding paragraph.

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**An Act Granting to members of the Army Nurse Corps (female) and Navy Nurse Corps (female), Army field clerks, field clerks, Quartermaster Corps, and civil employees of the Army pay and allowances during any period of involuntary captivity by the enemy of the United States.**

[Act of March 3, 1919, ch. 112, 40 Stat. L. 1321.]

[Involuntary captivity — pay and allowances — Nurse Corps — field clerks — Quartermaster Corps — civil employees.] The members of the Army Nurse Corps (female) or of the Navy Nurse Corps (female), Army field clerks, Quartermaster Corps, and civil employees of the Army, shall be entitled to full pay and allowances during any period of involuntary captivity by the enemy of the United States; and their right to such full pay and allowances shall not be abridged or lost by reason of absence from duty when that absence is caused by involuntary captivity by the enemy of the United States. Any captivity by the enemy shall be construed to be involuntary until the contrary shall be affirmatively established.

All rights and privileges hereunder shall be in force from April sixth, nineteen hundred and seventeen, to the end of the existing war. [40 Stat. L. 1321.]

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**An Act Making appropriations for the support of the Army for the fiscal year ending June 30, 1920, and for other purposes.**

[Act of July 11, 1919, ch. 8, 41 Stat. L. 109.]

\* \* \* [Officers and contract surgeons — expenses when traveling by air — payment.] That hereafter actual and necessary expenses only, not to exceed \$8 per day, shall be paid to officers of the Army and contract surgeons when traveling by air on duty without troops, under competent orders. [41 Stat. L. 109.]

\* \* \* [Aviation — flying schools — instruction — cadets — number and pay — discharges — commissions.] The Secretary of War is hereby authorized and directed to establish and maintain at one or more established flying schools courses of instruction for aviation students.

Aviation students shall be enlisted in or appointed to the grade of flying cadet, Air Service, which grade is hereby established: *Provided*, That the total number of flying cadets shall not at any time exceed one thousand three hundred. The base pay of a flying cadet shall be \$75 per month, including extra pay for flying risk as provided by law. The ration allowance of a flying cadet shall not exceed \$1 per day, and his other allowances shall be those of a private, first class, Air Service.

Upon completion of a course prescribed for flying cadets, each flying cadet, if he so desire, may be discharged and commissioned as a second lieutenant in the Officers' Reserve Corps: *Provided*, That the Secretary of War is authorized to discharge at any time any flying cadet whose discharge shall have been recommended by a board of not less than three officers. [41 Stat. L. 109.]

\* \* \* [Enlisted men — withholding pay.] That the pay due enlisted men of the Army shall not be withheld from them by reason of the fact that their service records or other official papers showing the status of their accounts with respect to pay have been lost or not returned from overseas and, under such regulations as may be prescribed by the Secretary of War, these men may be paid upon their personal affidavit as to date of last payment and condition of their accounts: *Provided further*, That payments made in accordance with such regulations (or which have already been made upon the affidavit of the soldier) shall be passed by the accounting officers of the Treasury to the credit of the disbursing officers making them. [41 Stat. L. 110.]

\* \* \* [Enlisted men — increase of pay.] That the provisions of section 10 of an Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May 18, 1917, in so far as it increases the pay of the enlisted men of the Army, be, and the same hereby are, continued in force and effect from and after the date and approval of this Act. [41 Stat. L. 110.]

For Act of May 18, 1917, sec. 10, see 9 Fed. Stat. Ann. (2d ed.) 1162; 1918 Supp. Fed. Stat. Ann. 1022.

\* \* \* [Field clerks — pay — employment of additional clerks.] That Army field clerks shall have the same allowances and benefits as heretofore allowed by law to pay clerks, Quartermaster Corps, not including retirement: *Provided, however*, That the minimum or entrance pay exclusive of said allowances, of said Army field clerks shall be \$1,200 per annum: *Provided further*, That Army field clerks shall receive the same increase of pay for service beyond the continental limits of the United States as is allowed by law to commissioned officers of the Army: *And provided further*, That the Secretary of War is authorized to employ, during the present emergency and for a period not exceeding four months thereafter, such additional Army field clerks as may be necessary, not exceeding 4,272. [41 Stat. L. 112.]

\* \* \* [Quartermaster corps — field clerks, messengers and laborers — assignment to duty.] That said [field] clerks, messengers, and laborers shall be employed and assigned by the Secretary of War to the offices and positions in which they are to serve: *Provided further*, That no clerk, messenger, or laborer at headquarters of tactical divisions, military departments, brigades, service schools, and office of the Chief of Staff shall be assigned to duty in any bureau of the War Department. [41 Stat. L. 112.]

\* \* \* [Warrant officers — pay for foreign service.] That hereafter warrant officers shall receive the same increase of pay for service beyond the continental limits of the United States as is allowed to commissioned officers of the Army. [41 Stat. L. 112.]

\* \* \* **[Motor ambulances — purchase without advertisement.]** That the Secretary of War may, in his discretion, select types and makes of motor ambulances for the Army and authorize their purchase without regard to the laws prescribing advertisement for proposals for supplies and materials for the Army. [41 Stat. L. 121.]

\* \* \* **[Continuance of Chemical Warfare Service, Air Service, Construction Division, Tank Corps and Motor Transport Corps.]** That the several organizations of the Army, to wit: The Chemical Warfare Service, the Air Service, the Construction Division, the Tank Corps, and the Motor Transport Corps, with their powers and duties as defined in orders and regulations in force and effect on November 11, 1918, shall be continued to and until June 30, 1920. [41 Stat. L. 129.]

\* \* \* **[Officers' Reserve Corps — Appointment of officers of emergency Army — grade.]** That officers of the emergency Army appointed to the Officers' Reserve Corps may be appointed therein to the grade held by them in the emergency Army or next higher grade, as the Secretary of War may direct.

\* \* \* **Disposal of real property by sale or lease:** That the President is hereby authorized, through the head of any executive department, upon terms and conditions considered advisable by him or such head of department, to sell or lease real property or any interest therein or appurtenant thereto acquired by the United States of America since April 6, 1917, for storage purposes for the use of the Army, which in the judgment of the President or the head of such department is no longer needed for use by the United States of America, and to execute and deliver in the name of the United States and in its behalf any and all contracts, conveyances, or other instruments necessary to effectuate any such sale or lease.

That all moneys received by the United States as the proceeds of any such sale or lease shall be deposited in the Treasury of the United States to the credit of "Miscellaneous receipts" and a full report of the same shall be submitted annually to Congress.

\* \* \* **Transfer of ammunition:** That the Secretary of War be, and he is hereby, authorized to turn over on request from other executive departments of the Government, in his discretion, from time to time, without charge therefor, such ammunition, explosives, and other ammunition components as may prove to be or shall become surplus or unsuitable for the purposes of the War Department and as shall be suitable for use in the proper activities of other executive departments.

\* \* \* **Medical supplies for the American Red Cross:** The Secretary of War is hereby authorized to place at the disposal of the American Red Cross, such medical and surgical supplies, and supplementary and dietary foodstuffs used in the treatment of the sick and injured now in Europe and designed for but which are not now essential to the needs of the American Expeditionary Forces, or needed for use in military hospitals in the United States, or as military or hospital stores for the Army of the United States, to be used by said American Red Cross as it shall determine, to relieve and supply the pressing needs of the peoples of countries involved in the late war. The Secretary of War shall prescribe regulations and conditions for the selection and delivery of said supplies and foodstuffs to the American Red Cross for the purposes aforesaid. [41 Stat. L. 129.]



\* \* \* **[Inconsistent acts repealed.]** That all Acts or parts of Acts inconsistent with any of the provisions of this Act are hereby repealed. [41 Stat. L. 131.]

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**SEC. 5. [Unused war supplies — purchases by different executive departments.]** That the heads of the several executive departments and other responsible officials, in expending appropriations contained in this or any other Act, so far as possible shall purchase material, supplies, and equipment, when needed and funds are available, from other services of the Government possessing material, supplies, and equipment no longer required because of the cessation of war activities. It shall be the duty of the heads of the several executive departments and other officials, before purchasing any of the articles described herein, to ascertain from the other services of the Government whether they have articles of the character described that are serviceable. And articles purchased by one service from another, if the same have not been used, shall be paid for at a reasonable price not to exceed actual cost, and if the same have been used, at a reasonable price based upon length of usage. The various services of the Government are authorized to sell such articles under the conditions specified, and the proceeds of such sales shall be covered into the Treasury as a miscellaneous receipt: *Provided*, That this section shall not be construed to amend, alter, or repeal the Executive order of December 3, 1918, concerning the transfer of office material, supplies, and equipment in the District of Columbia falling into disuse because of the cessation of war activities. [41 Stat. L. 67.]

This is from the Third Deficiency Appropriation Act of July 11, 1919, ch. 6.

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[SEC. 1.] \* \* \* **[Transfer of explosives to Interior Department.]** The Secretary of War is authorized to transfer, without charge, to the Secretary of the Interior for use of the Interior Department, explosives and explosive material for which the War Department has no further use. [41 Stat. L. 193.]

This and secs. 4 and 5 which follow are from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

**SEC. 4. [Files and records of agencies created for period of war — disposition.]** That except as otherwise provided by law the President is authorized to transfer to the custody and care of such of the departments or independent establishments as he may determine the files and records of the agencies created for the period of the war upon the discontinuance of such activities. [41 Stat. L. 233.]

This is from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

**SEC. 5. [Motor vehicles and equipment — transfer to other branches of Government service.]** The Secretary of War is authorized to transfer any unused and surplus motor-propelled vehicles and motor equipment of any kind, the payment for same to be made as provided herein, to any branch of the Government service having appropriations available for the purchase of said vehicles and equipment: *Provided*, That in case of the transfers herein authorized a reasonable price not to exceed actual cost, and if the same have been used, at a reasonable price based upon length of usage, shall be determined upon

and an equivalent amount of each appropriation available for said purchase shall be covered into the Treasury as a miscellaneous receipt, and the appropriation in each case reduced accordingly: *Provided further*, That it shall be the duty of each official of the Government having such purchases in charge to procure the same from any such unused or surplus stock if possible: *Provided further*, That hereafter no transfer of motor-propelled vehicles and motor equipment, unless specifically authorized by law, shall be made free of charge to any branch of the Government service. [41 Stat. L. 233.]

This is from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

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**Joint Resolution Authorizing the Secretary of War to loan tents for use at encampments held by veterans of the World War.**

[*Res. of July 26, 1919, No. 65, ch. 28, 41 Stat. L. 272.*]

[**Loan of tents by Secretary of War.**] That the last proviso of H. J. Res. 11, approved March 2, 1913, be, and the same is, amended to read as follows:

"That hereafter no loan of tents shall be made except to the Grand Army of the Republic, the United Confederate Veterans, the United Spanish War Veterans, and to recognized organizations of veterans of the late World War by whatever name they may be known." [41 Stat. L. 272.]

The proviso of the resolution of March 2, 1913, amended by this resolution, provided as follows: "That hereafter no loan of tents shall be made except to the Grand Army of the Republic and the United Confederate Veterans."

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**An Act To amend an Act entitled "An Act to amend an Act entitled 'An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department, approved September 2, 1914,' as amended."**

[*Act of Aug. 6, 1919, ch. 33, 41 Stat. L. 274.*]

[**War Risk Insurance Act — sec. 12 amended — compensation for disability — amount.**] That section 12 of an Act entitled "An Act to amend an Act entitled 'An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department, approved September 2, 1914,' as amended," be, and is hereby, amended as follows:

At the end of subdivision H, section 12, insert: "Except in case of loss of both hands and both eyes, or in case of loss of both feet and both eyes, or in case of loss of both hands and both feet, in which cases there shall be an allowance of \$100 per month for a nurse or attendant, the same in addition to the \$100 per month allowed in this Act for the loss of both feet, or both hands, or both eyes." [41 Stat. L. 274.]

This Act amends section 302 of the Act of Sept. 2, 1914, as amended by Act of June 25, 1918, § 12. For the rest of section 302, see 9 Fed. Stat. Ann. (2d ed.) 1319; 1918 Supp. Fed. Stat. Ann. (1st ed.) 910.

**An Act Relating to the creation of the office of General of the Armies of the United States.**

[*Act of Sept. 3, 1919, ch. 56, 41 Stat. L. 283.*]

[**General of Armies of United States—creation of office.**] That the office of General of the Armies of the United States is hereby revived, and the President is hereby authorized, in his discretion and by and with the advice and consent of the Senate, to appoint to said office a general officer of the Army who, on foreign soil and during the recent war, has been especially distinguished in the higher command of military forces of the United States; and the officer appointed under the foregoing authorization shall have the pay prescribed by section 24 of the Act of Congress approved July 15, 1870, and such allowances as the President shall deem appropriate; and any provision of existing law that would enable any other officer of the Army to take rank and precedence over said officer is hereby repealed: *Provided*, That no more than one appointment to office shall be made under the terms of this Act. [41 Stat. L. 283.]

The Act of July 15, 1870, § 24, mentioned in the text, provided as follows: "The pay of the general shall be thirteen thousand five hundred dollars a year."

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**An Act To provide necessary commissioned personnel for the Army until June 30, 1920.**

[*Act of Sept. 17, 1919, ch. 61, 41 Stat. L. 286.*]

[**Officers of army—number—selection—detail of officers on active list—retirement—Air Service.**] That until June 30, 1920, the Secretary of War is authorized and directed to maintain such commissioned personnel in addition to the officers of the permanent establishment and to retain at their temporary grades such officers of the Regular Army as in his judgment may be necessary for the proper performance of the functions of the Military Establishment: *Provided*, That additional officers so maintained shall be selected, so far as practicable, from officers and enlisted men who served during the emergency and are applicants for appointments in the permanent establishment: *Provided further*, That after October 31, 1919, the total number of commissioned officers exclusive of retired officers and disabled emergency officers awaiting discharge upon completion of treatment for physical reconstruction, shall at no time exceed eighteen thousand: *Provided further*, That no officer on the active list shall be detailed for recruiting service or for duty at schools and colleges, not including schools of the service, where officers on the retired list can be secured who are competent for such duty: *And provided further*, That hereafter officers retired for physical disability shall not form part of the limited retired list: *And provided further*, That one thousand two hundred emergency officers shall be assigned to the Air Service, of whom not less than 85 per centum shall be duly qualified fliers. [41 Stat. L. 286.]

**An Act To provide travel allowances for certain retired enlisted men and Regular Army reservists.**

[*Act of Sept. 29, 1919, ch. 65, 41 Stat. L. 288.*]

[**Discharged soldiers, sailors and marines—travel allowances.**] That section 126 of the Act entitled “An Act for making further and more effectual provisions for the national defense, and for other purposes,” approved June 3, 1916, as amended by section 3 of an Act entitled “An Act permitting any person who has served in the United States Army, Navy, or Marine Corps in the present war to retain his uniform and personal equipment, and to wear the same under certain conditions,” approved February 28, 1919, shall be held to apply to any enlisted man for whom the law authorizes travel allowances as an incident to entry upon and relief from active duty with the Army who has been called into active service during the present emergency, or who shall hereafter be called into active service. [41 Stat. L. 288.]

For Act of June 3, 1916, sec. 126, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1221; 1918 Supp. Fed. Stat. Ann. (1st ed.) 969.

For Act of Feb. 28, 1919, ch. 70, mentioned in the text, see *supra*, this title, p. 370.

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**Joint Resolution To provide for the payment of travel pay upon discharge to men of the Regular Army enlisted prior to April 2, 1917.**

[*Res. of Sept. 29, 1919, No. 14, ch. 70, 41 Stat. L. 291.*]

[**Travel pay—discharged enlisted men of regular army.**] That those enlisted men of the Army who enlisted in the Regular Army prior to April 2, 1917, and who have accepted or may accept their discharge from such enlistment in order to reenlist under the terms of the Act entitled “An Act to authorize the resumption of voluntary enlistment in the Regular Army, and for other purposes,” approved February 28, 1919, shall upon such discharge receive travel pay at the rate provided in the Act entitled “An Act permitting any person who has served in the United States Army, Navy, or Marine Corps in the present war to retain his uniform and personal equipment, and to wear the same under certain conditions,” approved February 28, 1919, from the place of such discharge to their actual bona fide home or residence or original muster into the service, as they may elect. The Secretary of War is authorized to discharge any or all of these men enlisted prior to April 2, 1917, who desire discharge from their old enlistment for the purpose of so reenlisting, regardless of whether or not the period of their original contract or enlistment has been completed: *Provided*, That in case any enlisted man has been or hereafter shall be discharged for the purpose of reenlisting in the Regular Army, he shall be entitled to the payment of \$60 as provided in section 1406 of the Act entitled “An Act to provide revenue, and for other purposes,” approved February 24, 1919. [41 Stat. L. 291.]

For Act of Feb. 28, 1919, ch. 70, mentioned in the text, see *supra*, this title, p. 370.

For Act of Feb. 24, 1919, ch. 18, § 1406, see *supra*, this title, p. 368.

**An Act To provide for further educational facilities by authorizing the Secretary of War to sell at reduced rates certain machine tools not in use for Government purposes to trade, technical, and public schools and universities, other recognized educational institutions, and for other purposes.**

*[Act of Nov. 19, 1919, ch. 118, 41 Stat. L. 360.]*

**[Sale of machine tools to educational institutions.]** That the Secretary of War be, and he is hereby, authorized, under such regulations as he may prescribe, to sell at 15 per centum of their cost to trade, technical, and public schools and universities, and other recognized educational institutions, upon application in writing, such machine tools as are suitable for their use which are now owned by the United States of America and are under the control of the War Department and are not needed for Government purposes. The money realized from the sale may be used by the Secretary of War to defray expenses, except cost of transportation, incident to distribution of the tools, and the balance shall be turned into the Treasury of the United States as miscellaneous receipts: *Provided*, That in the event any such material is offered for sale by said institutions without the consent in writing of the Secretary of War, title thereto shall revert to the United States. *[41 Stat. L. 360.]*

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**An Act To amend the Articles of War.**

*[Act of Nov. 19, 1919, ch. 112, 41 Stat. L. 356.]*

**[Articles of War — article 112 amended — effects of deceased persons.]** That article 112 of section 1342 of the Revised Statutes of the United States, as amended by the Act entitled “An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1919, approved July 9, 1918,” be, and the same is hereby, amended to read as follows:

“ARTICLE 112. EFFECTS OF DECEASED PERSONS — DISPOSITION OF.—In case of the death of any person subject to military law the commanding officer of the place of command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters, and if no legal representative or widow be present the commanding officer shall direct a summary court to secure all such effects; and said summary court shall have authority to collect and receive any debts due decedent's estate by local debtors; and as soon as practicable after the collection of such effects said summary court shall transmit such effects, and any money collected, through the Quartermaster Department, at Government expense, to the widow or legal representative of the deceased, if such be found by said court, or to the son, daughter, father, provided the father has not abandoned the support of his family, mother, brother, sister, or the next of kin in the order named, if such be found by said court, or the beneficiary named in the will of the deceased, if such be found by said court, and said court shall thereupon make to the War Department a full report of its transactions; but if there be none of the persons hereinabove named, or such persons or their addresses are not known to or readily ascertainable by said court, and the said court shall so find, said summary court shall have authority to convert into cash, by public or private sale, not earlier than thirty days after the death of the deceased, all effects

of deceased except sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes; and as soon as practicable after converting such effects into cash said summary court shall deposit with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposits, any will or other papers of value belonging to the deceased, any sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes, together with an inventory of the effects secured by said summary court, and a full account of its transactions to the War Department for transmission to the Auditor for the War Department for action as authorized by law in the settlement of accounts of deceased officers and enlisted men of the Army.

“ The provisions of this article shall be applicable to inmates of the United States Soldiers' Home who die in any United States military hospital outside of the District of Columbia where sent from the home for treatment.” [41 Stat. L. 356.]

For Act of July 9, 1918, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1243 et seq.

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**An Act To provide for the payment of six months' pay to the widow, children, or other designated dependent relative of any officer or enlisted man of the Regular Army whose death results from wounds or disease not the result of his own misconduct.**

[Act of Dec. 17, 1919, ch. —, 41 Stat. L. —.]

[SEC. 1.] [Officers and enlisted men of regular army — death from wounds or disease — six months' pay to widows, etc.] That hereafter, immediately upon official notification of the death from wounds or disease, not the result of his own misconduct, of any officer or enlisted man on the active list of the Regular Army or on the retired list when on active duty, the Quartermaster General of the Army shall cause to be paid to the widow, and if there be no widow to the child or children, and if there be no widow or child to any other dependent relative of such officer or enlisted man previously designated by him, an amount equal to six months' pay at the rate received by such officer or enlisted man at the date of his death. The Secretary of War shall establish regulations requiring each officer and enlisted man having no wife or child to designate the proper dependent relative to whom this amount shall be paid in case of his death. Said amount shall be paid from funds appropriated for the pay of the Army. [41 Stat. L. —.]

SEC. 2. [Officers and enlisted men affected by Act.] That nothing in this Act shall be construed as making the provisions of this Act applicable to officers or enlisted men of any forces or troops of the Army of the United States other than those of the Regular Army, and nothing in this Act shall be construed to apply in commissioned grades to any officers except those holding permanent or provisional appointments in the Regular Army. [41 Stat. L. —.]

**An Act To amend and modify the War Risk Insurance Act.***[Act of Dec. 24, 1919, ch. —, 41 Stat. L. —.]*

**[SEC. 1.] [War Risk Insurance Act — amendments — offices abolished — Commissioner of Military and Naval Insurance and of Marine and Seamen's Insurance.]** That the office of the Commissioner of Military and Naval Insurance and the office of the Commissioner of Marine and Seamen's Insurance created by the War Risk Insurance Act are hereby abolished and the powers and duties pertaining to such offices are hereby transferred to the Director of the Bureau of War Risk Insurance, who shall hereafter receive a salary at the rate of \$7,500 per annum. Until such time as the Secretary of the Treasury may direct otherwise, and subject to the provisions of section 9 of the War Risk Insurance Act, there shall be in the Bureau of War Risk Insurance a Division of Marine and Seamen's Insurance and a Division of Military and Naval Insurance. All laws inconsistent with this section are hereby so modified as to conform to the provisions hereof. *[41 Stat. L. —.]*

The War Risk Insurance Act and the various amendments thereto will be found in 9 Fed. Stat. Ann. (2d ed.) 1299; 1916 Supp. 283; 1918 Supp. (2d ed.) 907; 1918 Supp. (1st ed.) 889, and this title.

**SEC. 2. [“Child” defined — adopted child — section 22 amended.]** That paragraph (b) of the second subdivision (1) of section 22 of the War Risk Insurance Act is hereby amended to read as follows:

“(b) A child legally adopted.” *[41 Stat. L. —.]*

For section 22 here amended in part, see 9 Fed. Stat. Ann. (2d ed.) 1308; 1918 Supp. Fed. Stat. Ann. (1st ed.) 899.

**SEC. 3. [“Child” defined — illegitimate child — section 22 amended.]** That paragraph (d) of the second subdivision (1) of section 22 of the War Risk Insurance Act is hereby amended to read as follows:

“(d) An illegitimate child, but, as to the father only, if acknowledged in writing signed by him, or if he has been judicially ordered or decreed to contribute to such child's support, or has been judicially decreed to be the putative father of such child.” *[41 Stat. L. —.]*

For section 22 here amended in part, see 9 Fed. Stat. Ann. (2d ed.) 1308; 1918 Supp. Fed. Stat. Ann. (1st ed.) 899.

**SEC. 4. [“Father” and “mother” defined — “brother” and “sister” defined — section 22 amended.]** That section 22 of the War Risk Insurance Act is hereby amended by inserting therein immediately following subdivisions (4) and (5), respectively, two new subdivisions to be known as subdivision (4a) and subdivision (5a) and to read as follows:

“(4a) The terms ‘father’ and ‘mother’ include stepfathers and stepmothers, fathers and mothers through adoption, and persons who have stood in loco parentis to a member of the military or naval forces at any time prior to his enlistment or induction for a period of not less than one year: *Provided*, That this subdivision shall be deemed to be in effect as of October 6, 1917.”

“(5a) The terms ‘brother’ and ‘sister’ include the children of a person who, for a period of not less than one year, stood in loco parentis to a member of the military or naval forces of the United States at any time prior to his enlistment or induction, or another member of the same household as to whom

such person during such period likewise stood in loco parentis: *Provided*. That this subdivision shall be deemed to be in effect as of October 6, 1917." [41 Stat. L. —.]

For section 22 here amended, see 9 Fed. Stat. Ann. (2d ed.) 1308; 1918 Supp. Fed. Stat. Ann. (1st ed.) 899.

**SEC. 5. [Inmates of insane asylums — payments to whom made — section 23 amended.]** That section 23 of the War Risk Insurance Act is hereby amended by the addition thereto of a new paragraph to read as follows:

"If any person entitled to receive payments under this Act shall be an inmate of any asylum or hospital for the insane maintained by the United States, or by any of the several States or Territories of the United States, or any political subdivision thereof, and no guardian or curator of the property of such person shall have been appointed by competent legal authority, the director, if satisfied after due investigation that any such person is mentally incompetent, may order that all moneys payable to him or her under this Act shall be held in the Treasury of the United States to the credit of such person. All funds so held shall be disbursed under the order of the director and subject to his discretion, either to the chief executive officer of the asylum or hospital in which such person is an inmate, to be used by such officer for the maintenance and comfort of such inmate, subject to the duty to account to the Bureau of War Risk Insurance and to repay any surplus at any time remaining in his hands in accordance with regulations to be prescribed by the director; or to the wife (or dependent husband if the inmate is a woman), minor children, and dependent parents of such inmate, in such amounts as the director shall find necessary for their support and maintenance, in the order named; or, if at any time such inmate shall be found to be mentally competent, or shall die, or a guardian or curator of his or her estate be appointed, any balance remaining to the credit of such inmate shall be paid to such inmate, if mentally competent, and otherwise to his or her guardian, curator or personal representatives." [41 Stat. L. —.]

For section 23 here amended, see 9 Fed. Stat. Ann. (2d ed.) 1310; 1918 Supp. Fed. Stat. Ann. 901.

**SEC. 6. [Assignment of insurance — section 28 construed.]** That the provisions of section 28 of the War Risk Insurance Act shall not be construed to prohibit the assignment by any person to whom converted insurance shall be payable under Article IV of such Act of his interest in such insurance to any other member of the permitted class of beneficiaries. [41 Stat. L. —.]

For section 28 here construed, see 9 Fed. Stat. Ann. (2d ed.) 1311; 1918 Supp. Fed. Stat. Ann. (1st ed.) 902.

**SEC. 7. [Persons inducted into service but not accepted and enrolled — death or disability — compensation — new section added.]** That a new section is hereby added to the War Risk Insurance Act, to be known as section 31, and to read as follows:

"**SEC. 31.** That if after induction by the local draft board, but before being accepted and enrolled for active service, the person died or became disabled as a result of disease contracted or injury suffered in the line of duty and not due to his own willful misconduct involving moral turpitude, or as a result of the aggravation, in the line of duty and not because of his own willful mis-



conduct involving moral turpitude, of an existing disease or injury, he or those entitled thereto shall receive the benefits of compensation payable under Article III: *Provided*, That any insurance application made by a person after induction by the local draft board but before being accepted and enrolled for active service shall be deemed valid." [41 Stat. L. —.]

For Article III mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1317; 1918 Supp. Fed. Stat. Ann. 908.

**SEC. 8. [Family allowance — payment — period — cases of desertion, imprisonment and missing men — section 204 amended.]** That the second paragraph of section 204 of the War Risk Insurance Act is hereby amended to read as follows:

"The family allowance shall be paid from the time of enlistment to death in or one month after discharge from the service, but not for more than four months after the termination of the present war emergency. No family allowance shall be made for any period preceding November 1, 1917. The payment shall be subject to such regulations as may be prescribed relative to cases of desertion and imprisonment and of missing men." [41 Stat. L. —.]

For section 204 here amended, see 9 Fed. Stat. Ann. (2d ed.) 1313; 1918 Supp. Fed. Stat. Ann. (1st ed.) 904.

**SEC. 9. [Family allowances and allotments — discontinuance — termination of war — new section added.]** That a new section is hereby added to Article II of the War Risk Insurance Act, to be known as section 211, and to read as follows:

"SEC. 211. That all family allowances and allotments payable by the Bureau of War Risk Insurance under the authority of this article shall be discontinued at the end of the fourth calendar month after the termination of the present war emergency, as declared by proclamation of the President of the United States, and thereafter all allotments of pay shall be voluntary and shall be made under such regulations as may be prescribed by the Secretary of War and the Secretary of the Navy, respectively." [41 Stat. L. —.]

**SEC. 10. [Compensation for death — funeral expenses — section 301 amended.]** That the second paragraph of subdivision (g) of section 301 of the War Risk Insurance Act is hereby amended to read as follows:

"If death occur or shall have occurred subsequent to April 6, 1917, and before discharge or resignation from service, the United States shall pay for burial expenses and the return of body to his home a sum not to exceed \$100, as may be fixed by regulations."

That section 301 of the War Risk Insurance Act, as amended, shall be deemed to be in effect as of April 6, 1917: *Provided, however*, That before compensation thereunder shall be paid there shall first be deducted from said sum so to be paid the amount of any payments such person may have received by way of gratuities or payments under pension laws in force and existence between April 6, 1917, and October 6, 1917. [41 Stat. L. —.]

For section 301 here amended, see 9 Fed. Stat. Ann. (2d ed.) 1317; 1918 Supp. Fed. Stat. Ann. (1st ed.) 908.

**SEC. 10a. [Compensation for death or disability — section 300 amended.]** That section 300 of the War Risk Insurance Act is hereby amended to read as follows:

“SEC. 300. That for death or disability resulting from personal injury suffered or disease contracted in the line of duty, by any commissioned officer or enlisted man, or by any member of the Army Nurse Corps (female) or of the Navy Nurse Corps (female) when employed in the active service under the War Department or Navy Department, the United States shall pay compensation as hereinafter provided; but no compensation shall be paid if the injury or disease has been caused by his own willful misconduct: *Provided*, That for the purposes of this section said officer, enlisted man, or other member shall be held and taken to have been in sound condition when examined, accepted, and enrolled for service: *Provided further*, That this section, as amended, shall be deemed to become effective as of April 6, 1917.” [41 Stat. L. —.]

For section 300 here amended, see 9 Fed. Stat. Ann. (2d ed.) 1317; 1918 Supp. Fed. Stat. Ann. (1st ed.) 908.

SEC. 11. [Compensation for disability — amount — transportation — medical services and supplies — section 302 amended.] That section 302 of the War Risk Insurance Act is hereby amended to read as follows:

“SEC. 302. That if disability results from the injury —

“(1) If and while the disability is rated as total and temporary, the monthly compensation shall be the following amounts:

“(a) If the disabled person has neither wife nor child living, \$80.

“(b) If he has a wife but no child living, \$90.

“(c) If he has a wife and one child living, \$95.

“(d) If he has a wife and two or more children living, \$100.

“(e) If he has no wife but one child living, \$90, with \$5 for each additional child.

“(f) If he has a mother or father, either or both dependent on him for support, then, in addition to the above amounts, \$10 for each parent so dependent.

“(2) If and while the disability is rated as partial and temporary, the monthly compensation shall be a percentage of the compensation that would be payable for his total and temporary disability, equal to the degree of the reduction in earning capacity resulting from the disability, but no compensation shall be payable for a reduction in earning capacity rated at less than 10 per centum.

“(3) If and while the disability is rated as total and permanent, the rate of compensation shall be \$100 per month: *Provided, however*, That the loss of both feet, or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden, shall be deemed to be total, permanent disability: *Provided further*, That for double, total, permanent disability the rate of compensation shall be \$200 per month.

“(4) If and while the disability is rated as partial and permanent, the monthly compensation shall be a percentage of the compensation that would be payable for his total and permanent disability equal to the degree of the reduction in earning capacity resulting from the disability, but no compensation shall be payable for a reduction in earning capacity rated at less than 10 per centum.

“A schedule of ratings of reductions in earning capacity from specific injuries or combinations of injuries of a permanent nature shall be adopted and applied by the bureau. Ratings may be as high as 100 per centum. The ratings shall

be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations and not upon the impairment in earning capacity in each individual case, so that there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of a permanent injury. The bureau in adopting the schedule of ratings of reduction in earning capacity shall consider the impairment in ability to secure employment which results from such injuries. The bureau shall from time to time readjust this schedule of ratings in accordance with actual experience.

"(5) If the disabled person is so helpless as to be in constant need of a nurse or attendant, such additional sum shall be paid, but not exceeding \$20 per month, as the director may deem reasonable.

"(6) In addition to the compensation above provided, the injured person shall be furnished by the United States such reasonable governmental medical, surgical, and hospital services and with such supplies, including wheeled chairs, artificial limbs, trusses, and similar appliances, as the director may determine to be useful and reasonably necessary, which wheeled chairs, artificial limbs, trusses, and similar appliances may be procured by the Bureau of War Risk Insurance in such manner, either by purchase or manufacture, as the director may determine to be advantageous and reasonably necessary: *Provided*, That nothing in this Act shall be construed to affect the necessary military control over any member of the military or naval establishments before he shall have been discharged from the military or naval service.

"(7) Where the disabled person and his wife are not living together, or where the children are not in the custody of the disabled person the amount of the compensation shall be apportioned as may be prescribed by regulations.

"(8) The term ' wife ' as used in this section shall include ' husband ' if the husband is dependent upon the wife for support.

"(9) That the Bureau of War Risk Insurance is hereby authorized to furnish transportation, also the medical, surgical, and hospital services and the supplies and appliances provided by subdivision (6) hereof, to discharged members of the military or naval forces of those Governments which have been associated in war with the United States since April 6, 1917, and come within the provisions of laws of such Governments similar to the War Risk Insurance Act, at such rates and under such regulations as the Director of the Bureau of War Risk Insurance may prescribe; and the Bureau of War Risk Insurance is hereby authorized to utilize the similar services, supplies, and appliances provided for the discharged members of the military and naval forces of those Governments which have been associated in war with the United States since April 6, 1917, by the laws of such Governments similar to the War Risk Insurance Act, in furnishing the discharged members of the military and naval forces of the United States who live within the territorial limits of such Governments and come within the provisions of subdivision (6) hereof, with the services, supplies, and appliances provided for in such subdivision; and any appropriations that have been or may hereafter be made for the purpose of furnishing the services, supplies, and appliances provided for by subdivision (6) hereof are hereby made available for the payment to such Governments or their agencies for the services, supplies, and appliances so furnished at such rates and under such regulations as the Director of the Bureau of War Risk Insurance may prescribe.

"(10) That section 302 of the War Risk Insurance Act as amended shall be deemed to be in effect as of April 6, 1917: *Provided*, That any person who is now receiving a gratuity or pension under existing law shall not receive com-

pensation under this Act unless he shall first surrender all claim to such gratuity or pension." [41 Stat. L. —.]

For section 302 here amended, see 9 Fed. Stat. Ann. (2d ed.) 1319; 1918 Supp. Fed. Stat. Ann. (1st ed.) 910.

**SEC. 12. [Time for application — death before application.]** That section 401 of the War Risk Insurance Act is hereby amended to read as follows:

"**SEC. 401.** That such insurance must be applied for within one hundred and twenty days after enlistment or after entrance into or employment in the active service and before discharge or resignation, except that those persons who are in the active war service at the time of the publication of the terms and conditions of such contract of insurance may apply at any time within one hundred and twenty days thereafter and while in such service: *Provided*, That any person in the active service on or after the 6th day of April, 1917, and before the 11th day of November, 1918, who while in such active service made application for insurance after the expiration of more than one hundred and twenty days after October 15, 1917, or more than one hundred and twenty days after entrance into or employment in the active service, and whose application was accepted and a policy issued thereon, and from whom premiums were collected, and who becomes or had become totally and permanently disabled, or dies or has died, shall be deemed to have made legal application for such insurance and the policy issued on such application shall be valid. Any person in the active service on or after the 6th day of April, 1917, and before the 11th day of November, 1918, who, while in such service, and before the expiration of one hundred and twenty days after October 15, 1917, or one hundred and twenty days after entrance into or employment in the active service, becomes or has become totally and permanently disabled, or dies or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of \$25 each; and any person inducted into the service by a local draft board after the 6th day of April, 1917, and before the 11th day of November, 1918, who, while in such service, and before being accepted and enrolled for active military or naval service, becomes or has become totally and permanently disabled, or dies or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of \$25 each. If he shall die either before he shall have received any of such monthly installments or before he shall have received two hundred and forty of such monthly installments, then \$25 per month shall be paid to his widow from the time of his death and during her widowhood; or if there is no widow surviving him, then to his child or children; or if there is no child surviving him, then to his mother; or if there be no mother surviving him, then to his father, if and while they survive him: *Provided, however*, That no more than two hundred and forty of such monthly installments, including those received by such person during his total and permanent disability, shall be so paid. The amount of the monthly installments shall be apportioned between children as may be provided by regulations: *Provided further*, That each officer and enlisted man attached to the United States ship Cyclops on the 4th day of March, 1918, and every officer and enlisted man who on said date was a passenger on said vessel shall be deemed to have been granted insurance in the sum of \$5 000 permitted under the War Risk Insurance Act." [41 Stat. L. —.]

For section 401 here amended, see 9 Fed. Stat. Ann. (2d ed.) 1325; 1918 Supp. Fed. Stat. Ann. (1st ed.) 916.

**SEC. 13. [Beneficiaries — enlargement of class — section 402 amended.]** That the permitted class of beneficiaries for insurance as specified in section 402 of the War Risk Insurance Act is hereby enlarged so as to include, in addition to the persons therein enumerated, uncles, aunts, nephews, nieces, brother-in-law and sister-in-law of the insured. This section shall be deemed to be in effect as of October 6, 1917: *Provided*, That nothing herein shall be construed to interfere with the payment of the monthly installments authorized to be made under the provisions of said War Risk Insurance Act, as originally enacted and subsequently amended, up to and including the second calendar month after the passage of this Act: *Provided further*, That all awards of insurance under the provisions of the said War Risk Insurance Act, as originally enacted and subsequently amended, shall be revised as of the first day of the third calendar month after the passage of this Act, in accordance with the provisions of the said War Risk Insurance Act as modified by this amendatory Act. [41 Stat. L. —.]

For section 402 here amended, see 9 Fed. Stat. Ann. (2d ed.) 1326; 1918 Supp. Fed. Stat. Ann. (1st ed.) 917.

**SEC. 14. [Failure of beneficiaries to survive insured — effect on monthly installments.]** That if no person within the permitted class of beneficiaries survive the insured, then there shall be paid to the estate of the insured the monthly installments payable and applicable under the provisions of Article IV of the War Risk Insurance Act. [41 Stat. L. —.]

For Article IV mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1325; 1918 Supp. Fed. Stat. Ann. (1st ed.) 916.

**SEC. 15. [Death of person awarded yearly renewable term insurance — monthly installments to whom payable.]** That if any person to whom such yearly renewable term insurance has been awarded dies, or his rights are otherwise terminated after the death of the insured, but before all of the two hundred and forty monthly installments have been paid, then the monthly installments payable and applicable shall be payable to such person or persons within the permitted class of beneficiaries as would, under the laws of the State of residence of the insured, be entitled to his personal property in case of intestacy; and if the permitted class of beneficiaries be exhausted before all of the two hundred and forty monthly installments have been paid, then there shall be paid to the estate of the last surviving person within the permitted class the remaining unpaid monthly installments. [41 Stat. L. —.]

**SEC. 16. [Converted insurance — no designated beneficiary — effect.]** That if no beneficiary within the permitted class be designated by the insured as beneficiary for converted insurance, granted under the provisions of Article IV of the War Risk Insurance Act, either in his lifetime or by his last will and testament, or if the designated beneficiary does not survive the insured, then there shall be paid to the estate of the insured the remaining unpaid monthly installments; or if the designated beneficiary survives the insured and dies before receiving all of the installments of converted insurance payable and applicable, then there shall be paid to the estate of such beneficiary the remaining unpaid monthly installments. [41 Stat. L. —.]

For Article IV mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1325; 1918 Supp. Fed. Stat. Ann. (1st ed.) 916.

**SEC. 17. [Converted insurance — optional settlements — installments.]** That the Bureau of War Risk Insurance may make provision in the contract for converted insurance for optional settlements, to be selected by the insured, whereby such insurance may be made payable either in one sum or in installments for thirty-six months or more. The bureau may also include in said contract a provision authorizing the beneficiary to elect to receive payment of the insurance in installments for thirty-six months or more, but only if the insured has not exercised the right of election as hereinbefore provided; and even though the insured may have exercised his right of election, the said contract may authorize the beneficiary to elect to receive such insurance in installments spread over a greater period of time than that selected by the insured. [41 Stat. L. —.]

**SEC. 18. [Premiums paid on account of converted insurance — disposition.]** That all premiums paid on account of insurance converted under the provisions of Article IV of the War Risk Insurance Act shall be deposited and covered into the Treasury to the credit of the United States Government life insurance fund and shall be available for the payment of losses, dividends, refunds, and other benefits provided for under such insurance. Payments from this fund shall be made upon and in accordance with awards by the director.

The Bureau of War Risk Insurance is hereby authorized to set aside out of the funds so collected such reserve funds as may be required, under accepted actuarial principles, to meet all liabilities under such insurance; and the Secretary of the Treasury is hereby authorized to invest and reinvest the said United States Government life insurance fund, or any part thereof, in interest-bearing obligations of the United States and to sell the obligations for the purposes of the said fund. [41 Stat. L. —.]

For Article IV mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1325; 1918 Supp. Fed. Stat. Ann. (1st ed.) 916.

**SEC. 19. [Monthly installments — death of person entitled to receive same — payment to personal representatives.]** That the amount of the monthly installments of allotment and family allowance, compensation, or yearly renewable term insurance which has become payable under the provisions of the War Risk Insurance Act but which has not been paid prior to the death of the person entitled to receive the same may be payable to the personal representatives of the deceased person. [41 Stat. L. —.]

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## WAR FINANCE CORPORATION

See CORPORATIONS

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## WAR RISK INSURANCE

See VOCATIONAL REHABILITATION; WAR DEPARTMENT AND MILITARY  
ESTABLISHMENT

# WAR SAVINGS CERTIFICATES

See PUBLIC DEBT

## WAREHOUSES

*Act of July 24, 1919, ch. 26, 391.*

*United States Warehouse Act — Amendments — Bond for License — Contents of Receipt, 391.*

\* \* \* [United States Warehouse Act — amendments — bond for license — contents of receipt.] That, effective on and after the passage of this Act, section 6 of said United States Warehouse Act is hereby amended by striking out of the first sentence of said section the words "other than personal security", and by striking out at the end of the second sentence of said section the words "including the requirements of fire insurance"; and section 18 of said Act is hereby amended by striking out at the end of said section the words "if it have plainly and conspicuously embodied in its written or printed terms a provision that such receipt is not negotiable" (Acts August 11, 1916, volume 39, pages 486-491, sections 1-33; October 1, 1918, volume 40, page 1003, section 1.) [41 Stat. L. 266.]

This is from the Agricultural Appropriation Act of July 24, 1919, ch. 26.  
For Act of Aug. 11, 1916, here amended, see 1918 Supp. Fed. Stat. Ann. 1057.

## WATERS

*Act of July 19, 1919, ch. 24, 391.*

*Sec. 1. Reclamation — Lands Withdrawn — Proceeds of Lease or Sale of Products — Reclamation Fund, 391.*

*Act of Oct. 22, 1919, ch. 77, 392.*

*Sec. 1. Reclamation of Arid Public Lands in Nevada — Exploration for Water — Irrigation — Permits, 392.*

- 2. Designation of Lands Subject to Disposal — Application for Permit Upon Land Not Designated, 392.*
- 3. Filing of Permit — Affidavit — Grant of Permit, 393.*
- 4. Conditions Affecting Permit — Cancellation, 393.*
- 5. Issuance of Patent to Successful Explorer — Area Included, 393.*
- 6. Area Not Included in Patent — Disposition, 393.*
- 7. Receipts from Sale of Land — Disposition, 394.*
- 8. Reservation of Coal and Other Mineral Deposits, 394.*
- 9. Rules and Regulations — Authority to Prescribe, 394.*

### CROSS-REFERENCES

See also *RAILROADS; RIVERS, HARBORS AND CANALS; SHIPPING AND NAVIGATION.*

[SEC. 1.] \* \* \* [Reclamation — lands withdrawn — proceeds of lease or sale of products — reclamation fund.] The proceeds heretofore or hereafter received from the lease of any lands reserved or withdrawn under the reclama-

tion law or from the sale of the products therefrom shall be covered into the reclamation fund; and where such lands are affected by a reservation or withdrawal under some other law, the proceeds from the lease of land and the sale of products therefrom shall likewise be covered into the reclamation fund in all cases where such lands are needed for the protection or operation of any reservoir or other works constructed under the reclamation law, and such lands shall be and remain under the jurisdiction of the Secretary of the Interior. [41 Stat. L. 202.]

This is from the Sundry Civil Appropriation Act of July 19, 1919, ch. 24.

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**An Act To encourage the reclamation of certain arid lands in the State of Nevada, and for other purposes.**

[Act of Oct. 22, 1919, ch. 77, 41 Stat. L. 293.]

[SEC. 1.] **[Reclamation of arid public lands in Nevada—exploration for water—irrigation—permits.]** That the Secretary of the Interior is hereby authorized to grant to any citizen of the United States, or to any association of such citizens, a permit, which shall give the exclusive right, for a period not exceeding two years, to drill or otherwise explore for water beneath the surface of not exceeding two thousand five hundred and sixty acres of unreserved, unappropriated, nonmineral, nontimbered public lands of the United States in the State of Nevada not known to be susceptible of successful irrigation at a reasonable cost from any known source of water supply: *Provided, however,* That not more than one such permit shall be issued to the same citizen or the same association of citizens within an area of forty miles square: *And provided further,* That said land shall not be fenced or otherwise exclusively used by the permittee except as herein provided: *And provided further,* That said land shall theretofore have been designated by the Secretary of the Interior as subject to disposal under the provisions of this act. [41 Stat. L. 293.]

SEC. 2. **[Designation of lands subject to disposal—application for permit upon land not designated.]** That the Secretary of the Interior is hereby authorized, on application or otherwise, to designate the lands subject to disposal under the provisions of this act: *Provided, however,* That where any person or association qualified to receive a permit under the provisions of this act shall make application for such permit upon land which has not been designated as subject to disposal under the provisions of this act (provided said application is accompanied and supported by properly corroborated affidavit of the applicant, in duplicate, showing prima facie that the land applied for is of the character contemplated by this act), such application, together with the regular fees and commissions, shall be received by the register and receiver of the land district in which said land is located and suspended until it shall have been determined by the Secretary of the Interior whether said land is actually of that character. That during such suspension the land described in the application shall not be disposed of; and if the land shall be designated under this act, then such application shall be allowed; otherwise it shall be rejected, subject to appeal. [41 Stat. L. 294.]



**SEC. 3. [Filing of permit — affidavit — grant of permit.]** That any qualified applicant for a permit under section 1 of this Act shall file with the register or receiver of the land district in which said land is located the application for such permit and shall make and subscribe before the proper officer and file with said register or receiver an affidavit that such application is honestly and in good faith made for the purpose of reclamation and cultivation and not for the benefit of any other person or corporation, and that the applicant is not acting as agent for any person, corporation, or syndicate in making such application, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land applied for or any part thereof, and that the applicant will faithfully and honestly endeavor to comply with all of the requirements of this Act, and shall pay to said register and receiver a filing fee of 1 cent per acre for each acre of land embraced in said application, and such applicant shall then be entitled to receive such permit after the lands embraced therein are designated as provided in section 2 of this Act. [41 Stat. L. 294.]

**SEC. 4. [Conditions affecting permit — cancellation.]** That such a permit shall be upon condition that the permittee shall begin operations for the development of underground waters within six months from the date of the permit and continue such operations with reasonable diligence until water has been discovered in the quantity hereinafter described, or until the date of the expiration of the permit. Upon the presentation at any time of proof satisfactory to the Secretary of the Interior that any permittee is not conducting such operations in good faith and with reasonable diligence, or has violated any of the terms of the permit, the Secretary shall forthwith cancel such permit, and such permittee shall not again be granted a permit under this Act. [41 Stat. L. 294.]

**SEC. 5. [Issuance of patent to successful explorer — area included.]** That on establishing at any time within two years from the date of the permit to the satisfaction of the Secretary of the Interior that underground waters in sufficient quantity to produce at a profit agricultural crops other than native grasses upon not less than twenty acres of land has been discovered and developed and rendered available for such use within the limits of the land embraced in any permit the said permittee shall be entitled to a patent for one-fourth of the land embraced in the permit, such area to be selected by the permittee in compact form according to the legal subdivisions of the public land surveys if the land be surveyed, or to be surveyed at his expense under rules and regulations established by the Secretary of the Interior if located on unsurveyed land. [41 Stat. L. 294.]

**SEC. 6. [Area not included in patent — disposition.]** That the remaining area within the limits of the land embraced in any such permit shall thereafter be subject to entry and disposal only under "An Act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, and amendments thereto, known as the one-hundred-and-sixty-acre homestead Act. [41 Stat. L. 294.]

For Act of May 20, 1862, mentioned in the text, see 8 Fed. Stat. Ann. (2d ed.) 543; 6 Fed. Stat. Ann. (1st ed.) 285.

**SEC. 7. [Receipts from sale of land—disposition.]** That the receipts obtained from the sale of lands under the provisions of section 6 hereof shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the act of Congress approved June 17, 1902, known as the Reclamation Act. [41 Stat. L. 295.]

For Act of June 17, 1902, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1363; 7 Fed. Stat. Ann. (1st ed.) 1098.

**SEC. 8. [Reservation of coal and other mineral deposits.]** That all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and other valuable minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other valuable mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this Act, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entrymen or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the register and receiver of the local land office of the district wherein the land is situate, subject to appeal to the Commissioner of the General Land Office: *Provided*, That all patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notations declaring them to be subject to the provisions of this Act with reference to the disposition, occupancy, and use of the surface of the land. [41 Stat. L. 295.]

**SEC. 9. [Rules and regulations—authority to prescribe.]** That the Secretary of the Interior is authorized to prescribe the necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act. [41 Stat. L. 295.]

## WEIGHTS AND MEASURES

*Act of July 18, 1918, ch. 156, 395.*

*Sec. 1. Standardization of Screw Threads — Commission — Creation, 395.*

*2. Duty of Commission — Standards — Adoption — Use, 395.*

*3. Promulgation of Standards — Publication, 395.*

*4. Commission — Pay, 395.*

*5. Commission — Rules and Regulations, 395.*

*6. Termination of Commission, 395.*

**An Act To provide for the appointment of a commission to standardize screw threads.**

*[Act of July 18, 1918, ch. 156, 40 Stat. L. 912.]*

**[SEC. 1.] [Standardization of screw threads — Commission — creation.]**

That a commission is hereby created, to be known as the Commission for the Standardization of Screw Threads, hereinafter referred to as the commission, which shall be composed of nine commissioners, one of whom shall be the Director of the Bureau of Standards, who shall be chairman of the commission; two commissioned officers of the Army, to be appointed by the Secretary of War; two commissioned officers of the Navy, to be appointed by the Secretary of the Navy; and four to be appointed by the Secretary of Commerce, two of whom shall be chosen from nominations made by the American Society of Mechanical Engineers and two from nominations made by the Society of Automotive Engineers. *[40 Stat. L. 912, as amended by 40 Stat. L. 1291.]*

This section was amended to read as above by Act of March 3, 1919, ch. 96, 40 Stat. L. 1291.

**SEC. 2. [Duties of commission — standards — adoption — use.]** That it shall be the duty of said commission to ascertain and establish standards for screw threads, which shall be submitted to the Secretary of War, the Secretary of the Navy, and the Secretary of Commerce for their acceptance and approval. Such standards, when thus accepted and approved, shall be adopted and used in the several manufacturing plants under the control of the War and Navy Departments, and, so far as practicable, in all specifications for screw threads in proposals for manufactured articles, parts, or materials to be used under the direction of these departments. *[40 Stat. L. 913.]*

**SEC. 3. [Promulgation of standards — publication.]** That the Secretary of Commerce shall promulgate such standards for use by the public and cause the same to be published as a public document. *[40 Stat. L. 913.]*

**SEC. 4. [Commission — pay.]** That the commission shall serve without compensation, but nothing herein shall be held to affect the pay of the commissioners appointed from the Army and Navy or of the Director of the Bureau of Standards. *[40 Stat. L. 913.]*

**SEC. 5. [Commission — rules and regulations.]** That the commission may adopt rules and regulations in regard to its procedure and the conduct of its business. *[40 Stat. L. 913.]*

**SEC. 6. [Termination of commission.]** That the commission shall cease and terminate at the end of one year and six months from the date of its original appointment. *[40 Stat. L. 913, as amended by 40 Stat. L. 1291.]*

This section was amended to read as above by Act of March 3, 1919, ch. 96, 40 Stat. L. 1291.

**WHEAT**

See FOOD AND DRUGS

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**WIRES**

See TELEGRAPHS, TELEPHONES, AND CABLES

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**WITNESSES**

See AGRICULTURE

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**WOMAN SUFFRAGE**

Proposed constitutional amendment granting suffrage to women, see page 840, post.

# SUPPLEMENTAL NOTES TO STATUTES

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Throughout these Notes references to 1st ed. Fed. Stat. Ann. and Supplements thereto are indicated in [ ]. A complete table of these references, numerically arranged, appears among the tables at the beginning of this volume.



# AGRICULTURE

Vol. I, p. 212, sec. 1. [First ed., vol. I, p. 9.]

A state statute limiting the appropriation payable to any university for maintenance does not apply to an appropriation under this section. *Indiana State Board of Finance v. State*, (Ind. 1919) 121 N. E. 649.

Vol. I, p. 223, sec. 7. [First ed., 1912 Supp., p. 4.]

**Sufficiency of information.**—An information which charges that a shipment of insect powder was adulterated within the meaning of this section in that its strength or purity fell below the professed standard or quality under which it was sold, is insufficient where it fails to state facts to show that the label on the powder imported a professed standard or quality. *Parke v. U. S.*, (C. C. A. 5th Cir. 1919) 255 Fed. 933, wherein the court said: "This was a prosecution instituted by an information containing two counts, each of which charged that the plaintiff in error, *Parke, Davis & Co.*, a corporation, on or about March 4, 1912, did wrongfully and unlawfully ship and cause to be shipped and transported for sale, from New Orleans, La., to the purchaser thereof, to wit, the Southern Drug Company, Houston, Tex., a certain insecticide, to wit, a quantity of so-called insect powder, which when so shipped bore the following label on the packages containing the same:

"1 lb. Net. *Parke, Davis & Co.* 90, 92 & 94 Maiden Lane, New York. [P. D. & Co. Brand Insect Powder P. D. & Co.]"

"The first count charged that said insect powder, when so shipped, labeled as aforesaid, was adulterated in the following manner and particulars, to wit:

"That said label indicated that the said insecticide was a pure and genuine insect powder, whereas, in truth and in fact, it was not a pure and genuine insect powder, but the strength and purity of said so-called insect powder, when shipped as aforesaid, then and there fell below the professed standard of quality under which it was sold, in that it was sold as a pure and genuine insect powder, whereas said insect powder contained an excessive and unlawful amount and quantity of pyrethrum stems in violation of law and the Insecticide Act 1910."

"In the connection in which the letters 'P. D.' are found on the label, they are to be taken as used as the initials of a previously stated name. The bracketed words of the label import insect powder of the named brand. The term 'insect powder' is one which was in common use long before the enactment of the statute. Judicial cogni-

zance is taken of the meaning of words or terms in common use. The following is the definition of the term given in the *Century Dictionary*: 'A dry powder used to kill or expel insects; an insecticide or insectifuge.' That definition is followed by this statement:

"The principal kinds, used against museum and household pests, are the Persian, made from the dry flowers of pyrethrum roseum; the Dalmatian (also called Persian), from those of pyrethrum cinerariae-folium; and the Californian, also made from the last-named plant, all of which are known as buhach."

"Where words in everyday use are put upon labels, they are to be given their ordinary and customary meaning so far as they have one, unless it is disclosed that their use was under such circumstances that they conveyed a different meaning. *Libby, McNeill & Libby v. United States*, 210 Fed. 148, 127 C. C. A. 14; *United States v. 150 Cases of Fruit Pudding*, (D. C.) 211 Fed. 360. The information does not allege any facts or circumstances from which it could be inferred that the term 'insect powder' as used in the label had a meaning other than the one it has in everyday use. If the word 'insecticide' had been used, it would have conveyed the same meaning, except that it would not have indicated that the thing referred to was a dry powder. The use of either of the words is not inconsistent with the thing referred to being a mixture containing ingredients lacking in purity or insecticidal value. And the use of either of them does not constitute a profession of standard or quality or a statement of the ingredients or substances contained in the thing referred to. The statute specifies ingredients of paris green and lead arsenate the presence or absence of which is given such effect that those articles are to be deemed adulterated. Those provisions are not applicable to insecticides other than the ones named. So far as appears, at the time of the alleged shipments, no regulation had been prescribed which purported to deal with the use of the word 'insect powder' on labels.

"The first count of the information undertook to charge that the subject of the alleged shipment was adulterated within the meaning of the provision of the statute that an article should be deemed to be adulterated 'if its strength or purity fall below the professed standard or quality under which it is sold.' It does not attempt to charge that the thing shipped was adulterated within the meaning of any other clause of the statute's definition of that term. That count failed to state facts constituting the offense attempted to be charged, in that it failed to show that the alleged label or any part of

it imported a professed standard or quality under which the subject of the alleged shipment was sold. It imported no more than that the thing referred to was a powder intended to be used to kill, repel, or mitigate insects."

**Vol. I, p. 223, sec. 8.** [First ed., 1912 Supp., p. 5.]

The use of the term "insect powder" on a label is not such a false and misleading statement as amounts to misbranding where powder referred to is one which properly is identified or described by that name as it is applied ordinarily and customarily. *Parke v. U. S.*, (C. C. A. 5th Cir. 1919) 255 Fed. 933, in which case the court said: "The second count of the information undertook to charge that the subject of the alleged shipment was 'misbranded' within the meaning of that part of the statute's definition of that term which makes it apply to all insecticides, etc., 'the package or label of which shall bear any statement, design or device regarding such article or the ingredients or

substances contained therein which shall be false or misleading in any particular.' There was no attempt to charge that the thing shipped was misbranded within the meaning of any other clause of the statute's definition of that term. The charge as made in that count involves the assumption that the word or term 'insect powder' amounts to a statement which was false and misleading, though the thing referred to is one which properly is identified or described by that name as it applied ordinarily and customarily. That assumption is unwarranted."

**1918 Supp., p. 10, sec. 7.**

State laws.—This section makes manifest the purpose of Congress not to supersede state laws for the inspection and weighing of grain, but to co-operate with state officials charged with the enforcement of such state laws. *Merchants' Exch. v. Missouri*, (1919) 248 U. S. 365, 39 S. Ct. 114, 63 U. S. (L. ed.) —, *affirming* (1916) 269 Mo. 346, 190 S. W. 903, Ann. Cas. 1917E 871.

## ALASKA

**Vol. I, p. 255, sec. 9.** [First ed., 1914 Supp., p. 21.]

Validity of Workmen's Compensation Act. — The provision against the grant of special privileges does not invalidate a Workmen's Compensation Act applicable only to mines employing five or more persons. *Johnston v. Kennecott Copper Corp.*, (C. C. A. 9th Cir. 1918) 248 Fed. 407, 160 C. C. A. 417.

**Vol. I, p. 261, sec. 4.** [First ed., 1914 Supp., p. 36.]

Scope of jurisdiction.—The District Court of Alaska is a court with the jurisdiction of United States district courts and general jurisdiction in civil, criminal, equity, and admiralty causes. *Alaska Pac. Fisheries v. Alaska*, (1919) 249 U. S. 53, 39 S. Ct. 208, 63 U. S. (L. ed.) —.

**Vol. I, p. 294, sec. 7.** [First ed., 1909 Supp., p. 31.]

Judicial notice will be taken of the authority of the Secretary of the Interior to make a contract with a sanitarium company. *Zuckerman v. Sanitarium Co.*, (Ore. 1919) 179 Pac. 911.

**Vol. I, p. 319, sec. 15.** [First ed., vol. I, p. 54.]

Fishing grounds.—The words "the body of lands known as Annette Islands" mean that

the reservation created embraces not only the uplands of the islands but includes as well the adjacent waters and submerged land, and a fish-trap erected by a California fishing company about six hundred feet from the high tide line of the island was held to be illegally erected, as its operations would tend materially to reduce the natural supply of fish accessible to the Indians. *Alaska Pac. Fisheries v. U. S.* (1918) 248 U. S. 78, 39 S. Ct. 40, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 9th Cir. 1917) 240 Fed. 274, 153 C. C. A. 200.

**Vol. I, p. 323, sec. 1.** [First ed., vol. I, p. 38.]

Authorities construing section 8 of Act of 1884.—See *Whelpley v. Grosvold*, (C. C. A. 9th Cir. 1918) 249 Fed. 812, 162 C. C. A. 46.

**Vol. I, p. 336, sec. 1.** [First ed., vol. I, p. 7.]

Executive orders by President.—The President had power under this Act to issue the Executive order of April 10, 1915, directing the Secretary of the Interior to prepare and adopt a system of compensation for accidents to persons engaged in the work of construction of the proposed railroad in Alaska, and the Secretary of the Interior, having prepared such system, has authority to put it into effect. (1915) 30 Op. Atty.-Gen. 402.



Vol. I, p. 338, sec. 2. [First ed., vol. I, p. 8.]

Power of President to authorize expenditures.—The President is authorized under this Act to obligate the United States to ex-

pend, for the purchase of a line of railroads in Alaska necessary to complete the line designated by him, a sum in excess of the existing appropriation by Congress, but within the maximum of the cost as prescribed by the act. (1915) 30 Op. Atty-Gen. 332.

## ALIENS

Vol. I, p. 364, sec. 4067. [First ed., vol. I, p. 435.]

The constitutionality of this Act may not be attacked on the ground that it deprives alien enemies of liberty without due process of law, for they "have no rights and no privileges, unless by special favor, during time of war." *De Lacey v. U. S.*, (C. C. A. 9th Cir. 1918) 249 Fed. 625, 161 C. C. A. 535, 1. R. A. 1918E 1011, wherein the court said: "The sections under which these alien enemies were held were originally enacted as the Alien Enemy Act of July 6, 1798, and from that date to this, although occasion has seldom arisen to enforce the statute, no question has been made of its constitutionality. While, as to property rights and life and liberty, all aliens domiciled in the United States, or temporarily therein, are accorded the equal protection of the law, and due process of law, such is not the case as to alien enemies. 'Alien enemies have no rights and no privileges, unless by special favor, during time of war.' 2 C. J. 1047. Such was the common law. 'Alien enemies have no rights, no privileges, unless by the king's special favor, during time of war.' 1 Blackstone, 372. There is nothing in the Constitution or laws of the United States which in any way has changed the common law rule, or restricted the power of Congress to enact the alien enemy law. Power to enact such a law may at times be essential to the preservation of the government, and the right of all nations to exercise it is recognized in international law. In *Brown v. United States*, 8 Cranch, 110, 121 (3 L. ed.) 504, Chief Justice Marshall said:

"Respecting the powers of government no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself."

"Even in times of peace the admission of aliens to the United States and their presence here are not of right, but of favor. In *Turner v. Williams*, 194 U. S. 279, 289, 24 Sup. Ct. 719, 722 (48 L. ed. 979) it was said: 'Repeated decisions of this court have determined that Congress has the power to ex-

clude aliens from the United States, to prescribe the terms and conditions on which they may come in, to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers; that the deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law.'

"The first reported case arising under the Alien Enemy Act is *Lockington's Case*, *Brightly, N. P. (Pa.) 289*. Lockington, an alien enemy, had refused to comply with the executive order of February 23, 1813, requiring alien enemies who were within 40 miles of tidewater to retire to such places beyond that distance from tidewater as should be designated by the marshals. He was arrested, and on petition for habeas corpus attempted to test the legality of his imprisonment. Chief Justice Tilghman said of the act:

"It is a provision for the public safety, which may require that the alien should not be removed, but kept in the country under proper restraints. . . . It is never to be forgotten that the main object of the law is to provide for the safety of the country from enemies who are suffered to remain within it. In order to effect this safety, it might be necessary to act on sudden emergencies. . . . The President, being best acquainted with the danger to be apprehended, is best able to judge of the emergency which might render such measures necessary. Accordingly, we find that the powers vested in him are expressed in the most comprehensive terms."

"On the second petition for habeas corpus Judge Yeates said:

"When the vessel of the commonwealth is in danger, partial evils must be submitted to, in order to guard against a general wreck. Aliens who have come among us before a declaration of war against their sovereign, and continue to reside among us after it, cannot expect an exemption from such evils."

"And Judge Brackenridge said:

"Alien enemies, remaining in our country after a declaration of war, are to be treated according to the law of nations, and it has been so argued in this case. Shall, then, the judicial power constitute itself a judge between the executive of the general government and the nation with whom we are at war, and say whether the proceeding in the

case of their subjects remaining in our country has been according to the law of nations?'

"In *Lockington v. Smith*, 1 Pet. C. C. 466, Fed. Cas. No. 8,448, Washington, Circuit Justice, said:

"It seems perfectly clear that the power to remove was vested in the President, because under certain circumstances he might deem that measure most effectual to guard the public safety. But he might also cause the alien to be restrained or confined, if in his opinion the public good should forbid his removal.'

"In answering the contention that judicial authority must be resorted to to enforce the regulations so established by the President under the law, he said:

"Such a construction would, in my opinion, be at variance with the spirit as well as with the letter of the law, the great object of which was to provide for the public safety by imposing such restraints upon alien enemies as the chief executive magistrate of the United States might think necessary, and of which his particular situation enabled him best to judge.'

"In the Case of *Fries*, 9 Fed. Cas. No. 5,126, Circuit Justice Iredell, charging the jury concerning the provisions of the Alien Enemy Act, said:

"In cases like this it is ridiculous to talk of the crime, because perhaps the only crime that a man can then be charged with is his being born in another country and having a strong attachment to it. He is not punished for a crime that he has committed, but deprived of the power of committing one hereafter, to which even a sense of patriotism may tempt a warm and misguided mind. . . . The opportunities during a war of making use of men of such a description are so numerous and so dangerous that no prudent nation would ever trust to the possible good behavior of many of them.'

Where an arrest is made in accordance with the provisions of this section, the person arrested is not entitled to raise the objection that he is deprived of his liberty without due process of law. *Minotto v. Bradley*, (N. D. Ill. 1918) 252 Fed. 600.

Section contrasted with R. S. sec. 4069 as to methods of removal.—"The statutes of the United States provide two methods by which alien enemies may be restrained or removed. Under section 4067, R. S. . . . the President may direct the manner and degree of the restraint to which alien enemies shall be subject, and he is authorized to provide for the removal from the country of those who, not being permitted to reside in the United States, neglect or refuse to depart therefrom. Under section 4069, R. S. U. S., courts of the United States having criminal jurisdiction are authorized, after complaint and upon hearing, to cause alien enemies to be apprehended and confined or removed. This last section, however, is not a limitation or restriction upon the power given the President by section 4067, R. S., but provides an

additional method of dealing with alien enemies. It is clear that Congress did not intend that the power conferred on the President by section 4067, R. S., to remove alien enemies, should be exercised only as provided in section 4069, R. S., which requires a complaint against an alien enemy and a hearing. This latter method, with its attendant public trial, would oftentimes prove inadequate and ineffective, and the inevitable disclosing of facts would not always be best for the safety of the peace and security of the government. Congress recognized this and by the provisions of section 4067, R. S., vested the President with summary power to direct the confinement or removal of alien enemies." *Ex p. Graber*, (N. D. Ala. 1918) 247 Fed. 882.

**Natives of hostile nations as alien enemies.**

—A person who was born in Germany and lived there for a number of years, is a "native" of that country within the meaning of this section and may be arrested under a presidential warrant issued hereunder. *Minotto v. Bradley*, (N. D. Ill. 1918) 252 Fed. 600, wherein it was said: "This statute must be construed, as I stated during the argument, with the end which Congress had in view. We all appreciate the seriousness of the situation. We realize that a mistake, once made, cannot be remedied. The determination by the President whether the facts justify the internment of the petitioner, provided he is an alien enemy, is not to be investigated by the courts. The courts, in the nature of things, are precluded from discussing those facts. If the President were required to disclose the basis for his warrant, the entire purpose of the statute might be frustrated. The only question to be settled here is whether, under the construction of this statute, the petitioner is a 'native, citizen, denizen or subject' of a power with which we are at war. The petitioner could no more cease being a native of the place of his birth than I could cease being a native of the state of Illinois, when you are considering the place of birth.

"Look at the history of this case. The petitioner was born in Germany. His mother was born in Germany. His father was born in Austria. The residence of the family was in Germany until within a very short time before the petitioner came to this country. The record shows that the family of the petitioner have no property in Italy, and have never lived there for any length of time. Under these circumstances it seems to me the court is not stretching the construction of this statute by holding that this is just the kind of a case that Congress intended to reach when it used the word 'native.' All the sympathies of one who was born in Germany, and who has lived there for 22 or 23 years, may be said to be with Germany. Whether they are or not in this case is not important. Suffice it to say that the language used by Congress apparently meets such a case.

"It might be easy to find in this country thousands of men who were born in Germany and lived there for 25, 30, or 35 years,

saturated with German institutions, all of their sympathies might lie with Germany, yet, if the argument for the petitioner is right, the President is helpless, and nothing can be done with them in this country at this time. If a friendly ally of this country is offended by the action of the President, because some one tracing his lineage back to Italy, but born in Germany, was apprehended under the President's warrant, I have no doubt the matter will be brought to the attention of the State Department and diplomatically adjusted."

A native of Austria-Hungary resident in the United States at the time of the declaration of war against the government of Austria-Hungary, is an alien enemy. *Ex p. Graber*, (N. D. Ala. 1918) 247 Fed. 882, wherein it was said: "Of course, his mere declaration of intention to become a citizen of the United States, such declaration never having been carried into effect, did not confer citizenship upon him; and such declaration of intention did not absolve Graber from the allegiance which he owes to the Austro-Hungarian government. He did not by his declaration of intention renounce his allegiance, but merely declared that it was his intention to do so at some future time; and so long as his foreign allegiance continues he remains an alien. *Minneapolis v. Reum*, 56 Fed. 576, 6 C. C. A. 31; *In re Moses*, (C. C.) 83 Fed. 995. Graber has not divested himself of his alienage, and cannot do so until he becomes an American citizen by naturalization. It cannot be doubted that by the declaration of war he became in law an alien enemy, one who owes allegiance to an adverse belligerent."

"The petitioner has lived in Mississippi for about 15 years, during which time, up to the very time of his arrest, he has stated repeatedly that he was born in Hamburg, Germany. He told witnesses that he came to this country from Germany when he was about four years of age, that he remembered crossing a large body of water, and that his brother died on the way over and was buried at sea. He asked his wife, when he proposed matrimony, whether she had any objections to marrying a German. He is shown to have had a marked German accent when he first came to Mississippi. Taking the stand in his own behalf, he now claims that these statements were made by him to conceal his obscure parentage; that as a matter of fact he was born in the United States and raised by gypsies. He does not claim to have been naturalized. From the evidence as a whole, I am convinced that the petitioner was born in Hamburg, Germany, and is a German alien enemy." *Ex p. Fronklin*, (N. D. Miss. 1918) 253 Fed. 984.

**Naturalized citizens.**—A person who, at the time of his arrest under this section, was a naturalized citizen and not within the classes specified therein, is entitled to be discharged on habeas corpus. *Banning v. Penrose*, (N. D. Ga. 1919) 225 Fed. 159, wherein the court said: "The authorities all are (and it would be useless to refer specifically

to them) that a man who has become a naturalized citizen of one country, and goes back to the country of his origin, may stay there indefinitely, if his purpose is, all the time, in his mind, to retain his citizenship in the country of his adoption and to return there some time in the future. It is a question more of intention than anything else."

**Presidential warrant.**—A presidential warrant issued under this section need not disclose the grounds on which it is issued. *Minotto v. Bradley*, (N. D. Ill. 1918) 252 Fed. 600.

**Necessity of filing complaint.**—R. S. section 4069 (see vol. 1, p. 364) does not in any way limit the powers of the President under this section, and hence an enemy alien may be arrested under a Presidential warrant without the filing of any complaint before a court or judge. *Minotto v. Bradley*, (N. D. Ill. 1918) 252 Fed. 600.

**Manner and degree of restraint.**—Under this section discretion is vested in the President to determine the manner and degree of restraint to which alien enemies shall be subjected. *Ex p. Fronklin*, (N. D. Miss. 1918) 253 Fed. 984, wherein the court said: "The proof shows that the petitioner is held in custody by the marshal by virtue of an order of the President of the United States, issued under Regulation No. 12 of the President's proclamation of April 6, 1917, promulgated in pursuance of section 4067 of the Revised Statutes, which order commands the marshal to detain at the usual place of confinement in his district, or, if such usual place be not suitable, at such other place as may, in his discretion, seem hygienic and safe, the petitioner, one Willis Fronklin, on the ground that his presence at large in this district 'is a danger to the public peace and safety of the United States.' The order also reads: 'Such person is to be detained until the further order of the President.'"

**Judicial review.**—The exercise of the summary power given by the President is not subject to judicial review. *Ex p. Graber*, (N. D. Ala. 1918) 247 Fed. 882; *Ex p. Fronklin*, (N. D. Miss. 1918) 253 Fed. 984.

**Vol. I, p. 364, sec. 4069.** [First ed., vol. I, p. 436.]

See notes above under section 4067.

**Vol. I, p. 365, sec. 1.** [First ed., vol. I, p. 437.]

**Inheritance of property by aliens.**—Citizens of Russia who were next of kin of a decedent, at his death on April 6, 1912, are entitled to share in the proceeds of the sale of his real estate in the District of Columbia, by virtue of this section and article 10 of the treaty of 1832 (8 Stat. L. 450) between this country and Russia, notwithstanding the abrogation of such treaty on January 1, 1913. *Cohen v. Cohen*, (1917) 47 App. Cas. (D. S.) 129.

Vol. I, p. 367, sec. 4. [First ed., vol. I, p. 438.]

Devise of land in District of Columbia.—Under this section as amended by the Act of February 23, 1905, ch. 733, sec. 1 [see Vol. I

(2d ed.), p. 369, vol. 10 (1st ed.), p. 33] an alien has the right to devise land in the District of Columbia where no escheat proceedings have been instituted. *Freitag v. Freitag*, (1917) 47 App. Cas. (D. C.) 1.

## ANIMALS

Vol. I, p. 377, sec. 1. [First ed., 1909 Supp., p. 43.]

Connecting carrier.—It is the established rule, generally, that the time during which cattle have been confined by a connecting carrier shall be included in the computation of the period of statutory confinement. *Grand Trunk Western R. Co. v. U. S.*, (C. C. A. 6th Cir. 1918) 248 Fed. 905, 161 C. C. A. 23, wherein the time of confinement by a Canadian railroad on a shipment from Canada into the United States was added, and the act held to be violated. The court said: "The intention of the act, as indicated by its title, is to 'prevent cruelty to animals in transit.' *B. & O. S. W. R. R. Co. v. United States*, 220 U. S. 94, 106, 31 Sup. Ct. 368, 55 L. ed. 384. It also has in view the protection of the public in preventing 'injury to the public health from the sale of cattle for food made ill and feverish by hunger, thirst, and exhaustion.' *United States v. Lehigh Valley R. R. Co.*, (C. C.) 184 Fed. 971, 973; *United States v. Pere Marquette R. R. Co.*, (C. C.) 171 Fed. 586, 588. As applied to this case, the substantive offense is not the carrying of the cattle in Canada, but their detention in the United States for such time as makes a total continuous confinement in excess of the statutory period. The act is thus violated in spite of the fact that a part of the confinement necessary to make up the statutory period had occurred in Canada. *United States v. Lehigh Valley R. R. Co.*, *supra*; s. c. 187 Fed. 1006, 109 C. C. A. 211; *Grand Trunk Railway of Canada v. United States*, (C. C. A. 2) 191 Fed. 803, 112 C. C. A. 317; *Grand Trunk Ry. Co. v. United States*, (C. C. A. 7) 229 Fed. 116, 143 C. C. A. 392, Ann. Cas. 1917B 1094.

"In *United States v. Lehigh Valley*, *supra* (where the judgment below was affirmed by the Circuit Court of Appeals of the Second Circuit on the opinion of the District Judge), the shipment originated in the United States, passed through Canada, and then again into the United States; part of the previous confinement being in the United States and part in Canada. The excess was again in the United States; an offense was held to have been committed, Judge Holt saying (184 Fed. 976):

"It is, of course, true that their confinement in New York would not have constituted an offense without their previous confinement,

part of which was in Canada; but the previous confinement in Canada or elsewhere is not a part of the offense, although a fact necessary to its existence."

"In the *Grand Trunk Railway Case*, passed upon by the Circuit Court of Appeals for the Seventh Circuit, the shipment (as in this case) originated in Canada, and part of the confinement occurred there. The excessive confinement was in the United States, and this confinement was held to be within the prohibition of the act. That case differs from the instant case only in the fact that there the destination was also in Canada. The underlying principle, however, is the same.

"The *Grand Trunk Railway Case* passed upon by the Circuit Court of Appeals of the Second Circuit (above cited) is equally in point. There the shipment originated in Michigan; it was delivered by the initial carrier to the defendant at Port Huron, in that state, after a confinement of 16 hours. The cattle were then carried by defendant through Canada to Black Rock, N. Y., where they were delivered to another railroad company, 33 hours later. The confinement by the defendant in the United States was but one hour, and it is evident that there was no unlawful confinement, but for the period occupied in transporting the cattle through Canada. The defendant there, as here, contended that its action in the confinement of the cattle for a longer period than 28 hours in Canada should not be considered. This contention was rejected."

A connecting carrier which receives and further transports live stock already carried for a longer period than 28 hours by the initial carrier, without the shipper's request, is guilty of a violation of this section. The offense in such case "is in continuing the unlawful carriage." *U. S. v. Chicago, etc., R. Co.*, (C. C. A. 8th Cir. 1918) 250 Fed. 442, 162 C. C. A. 512.

Delay in unloading after delivery.—A carrier is not liable for a violation of this section because, after its delivery, within the prescribed time limit, of a shipment of live stock at the proper destination according to the car tickets, the shipment was not unloaded until after the time limit had expired owing to the consignee's refusal to accept the shipment on the ground that the car tickets, made out by a connecting carrier, were not in accordance with the bill of lading, which stipulated for delivery at another place, and

because another connecting carrier refused to accept the shipment after a government inspector had ordered it to unload the animals for feed and rest, there being no evidence of wilful disobedience or negligence on the part of the defendant. *U. S. v. Allentown Terminal R. Co.*, (E. D. Pa. 1919) 256 Fed. 855.

**Vol. I, p. 386, sec. 2.** [First ed., 1909 Supp., p. 44.]

**Allowance for cost of feeding.**—The carrier is entitled to be compensated for the value of a proper amount of hay (250 pounds per car) actually furnished, though some hay was placed in the cars by the shipper. *Pennsylvania R. Co. v. Swift*, (E. D. Pa. 1918) 248 Fed. 315, wherein it was said: "What is proper feeding within the meaning of the statute must be determined in the light of the facts. If the fact had been that the cattle had not been fed for 24 hours, the propriety of a feeding of 250 pounds would not have been questioned. Inasmuch, however, as they had already been fed 150 or 200 pounds, the propriety of feeding more than 100 pounds additional is questioned. What is proper feeding must therefore be determined in the presence of the fact of this prior feeding. If we were dealing only with the question of a proper feeding, the proposition upon which this part of the defense rests must be accepted. We are not dealing, however, with this question, but the narrower and more technical question of the feeding which is required by the statute. We assume Congress to have legislated within its powers. The requirement of the statute is that cattle in transit must be unloaded, rested, watered, and fed within every 24-hour period of their transportation in cars. This requirement must be met, and it is not met by any substitute provision for feeding in transit. The requirement of the statute is not limited to cattle which have been confined in cars without feed, but to all cattle which have been in transit for more than 28 hours. What may be termed the administrative reasons for the requirement as written are obvious. Congress, it is true, did not dictate, as is well pointed out by defendants, specifically what weight or quantity of feed should be given. The carrier is, however, required to feed, and to properly feed. The reasonable expense thus incurred it may recover. The thought is not lost sight of that the obligation which rests upon the shipper is an imposed obligation, and is limited to the command of the statute. The other command, however, to feed, rests with its full weight upon the carrier. It must feed, and is given the right to be reimbursed 'the reasonable expense' thus incurred."

**Vol. I, p. 387, sec. 3.** [First ed., 1909 Supp., p. 45.]

**Wilfulness—taking chance of delay.**—A carrier accepting a shipment of livestock

knowing generally that traffic is congested and that a slight delay will result in a violation of the Twenty-eight-hour Law, is guilty of a wilful violation of that law if the delay results. *Philadelphia, etc., R. Co. v. U. S.*, (C. C. A. 3d Cir. 1918) 247 Fed. 466, 159 C. C. A. 520, wherein the court said: "The railway contends that its conceded knowledge of general conditions was not sufficient, but should have been supplemented by further evidence to the effect that before each shipment was sent out the railway knew specifically of conditions that would either certainly or probably delay that particular shipment, and contends, further, that the government offered no such evidence, and therefore that the court was not justified in drawing the inference of wilful violation. We are unable to sustain this position. The general congestion affected the defendant's road, and, although no one could forecast precisely what kind of a situation might confront a particular train as it pursued its course, the railway's officials must have known that some difficulties, many of them unexpected, were continually arising, and that transportation was beset with hindrances and delays. We assume that the railway did its best to overcome every definite obstacle it could hear of in the path of each train now in question, but it could not foresee every contingency that was likely to arise. It did know, however, that serious congestion existed and was likely to cause unexpected delays, and this was a fact of which we think it was bound to take notice, and for which it was bound to make allowance. In every instance the risk of violating the law could have been avoided by feeding the animals before they started on the final stage of their journey, and if the railway, knowing that delays were likely to happen, chose to take the risk of getting the shipment through on time, we see no reason for relieving it from the consequences of failure. In our opinion there was evidence to support the finding of the District Court; the railway, with knowledge of the risk, encountered it deliberately, and this satisfies the requirements of the statute." To the same effect in *U. S. v. Philadelphia, etc., R. Co.*, (C. C. A. 3d Cir. 1918) 247 Fed. 469, 159 C. C. A. 523, it was said: "In the case before us we think all the elements of the offense are present. The animals left Buffalo at 6 p. m. on February 14, consigned to Philadelphia, and were received by the Reading Railway at South Bethlehem at 9:30 p. m. on February 15, having been 27½ hours on the road. The time had been extended, however, and the railway still had 8½ hours to complete the carriage. At Bethlehem there was a delay of 3 hours and 10 minutes, so that the movement was not resumed until 12:40 a. m. on February 16. This left 5 hours and 20 minutes for the run to Philadelphia, and as the normal time between these two points is 6 hours and 38 minutes it is clear that the railway took the chance of reaching Philadelphia in about

1 hour and 18 minutes less than the average time. In part, the chance fell out in the railroads favor; for three of the cars were delivered and unloaded within, or practically within, 36 hours, and the animals in these cars were released from confinement. But the animals in the other cars were still confined; they could not be released until the cars could reach the platform, and to do this the engine must move them to the proper point. The cars had no facilities for food and water, and the platform might as well have been a mile away. Meanwhile the engine departed on other business, and when it returned and moved the cars to the proper place more than 38 hours had elapsed.

"It seems to us that these facts admit of but one conclusion. South Bethlehem was a feeding point, where the command of the act could have been complied with, and we think the railway may properly be said to have violated the act knowingly and willfully when it sent the animals forward on the chance that they would complete the journey in less than the average running time. Certainly this conclusion would follow if the railway had been sure that the run could not be made within the statutory period, and we think the conclusion is also justified where the probabilities are against the company, as they were under the facts now presented, as stated herein and in the preceding case. No sufficient reason appears for taking such a chance."

**Vol. I, p. 390, sec. 1.** [First ed., vol. X, p. 35.]

State legislation is superseded by the act, and an administrative declaration of a quarantine is not necessary to abrogate such legislation. *State v. Chicago, etc., R. Co.*, (Mo. 1918) 206 S. W. 419.

**Vol. I, p. 393, sec. 4.** [First ed., vol. X, p. 36.]

Pleading setting up a quarantine to excuse a failure to ship cattle held insufficiently to allege the establishment of the quarantine. *Louisville, etc., R. Co. v. Murphy*, (1918) 182 Ky. 136, 206 S. W. 268.

**Vol. I, p. 395, sec. 3.** [First ed., vol. I, p. 449.]

Inspection as relieving packer from responsibility.—The federal inspection does not relieve a packer from civil liability for injuries resulting from the use of unwholesome meat sold by him. *Ketterer v. Armour*, (C. C. A. 2d Cir. 1917) 247 Fed. 921, 160 C. C. A. 111.

**Vol. I, p. 397, sec. 1.** [*Meat, etc.*] [First ed., 1909 Supp., p. 46.]

Validity of statute.—The enactment of the Meat Inspection Act was within the power of Congress in order to prevent interstate and

foreign shipment of impure or adulterated meat food products. *Pittsburgh Melting Co. v. Totten*, (1918) 248 U. S. 1, 39 S. Ct. 3, 62 U. S. (L. ed.) —, *affirming* on other grounds (C. C. A. 3d Cir. 1916) 232 Fed. 694, 146 C. C. A. 620, which *reversed* (W. D. Pa. 1916) 229 Fed. 214.

Meat food product.—"Oleo" oil is a meat food product within the meaning of this section, for while in itself it is seldom used as food it is largely used in the manufacture of oleomargarine. *Pittsburgh Melting Co. v. Totten*, (1918) 248 U. S. 1, 39 S. Ct. 3, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 3d Cir. 1916) 232 Fed. 694, 146 C. C. A. 620, which *reversed* (W. D. Pa. 1916) 229 Fed. 214.

A food compound of oleo oil and neutral lard, called "Creamo Oleomargarine," is subject to the provisions of the Meat Inspection Act, including the prohibition against the use of false or deceptive names, although such a product must, under the Oleomargarine Act of August 2, 1886, (see vol. 4, p. 188) bear the name "Oleomargarine," and must be packed in a particular way, which is not the same as that prescribed by the Meat Inspection Act, and although, under the Food and Drugs Act of June 30, 1906 (see vol. 3, p. 358) articles of food containing no poisonous or deleterious ingredients shall not be deemed misbranded which shall thereafter be known as articles of food under their own distinctive names, and not offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand by the name of the place where manufactured or produced. *Brougham v. Blanton Mfg. Co.*, (1919) 249 U. S. 495, 39 S. Ct. 363, 63 U. S. (L. ed.) —, *reversing* (C. C. A. 8th Cir. 1917) 243 Fed. 503, 156 C. C. A. 201.

Power to inspect as continuing beyond one exercise.—A continuing power, necessarily not exhausted by one exercise, is given to the Department of Agriculture by the provisions of the Meat Inspection Act requiring meat food products to be inspected and passed by the department, and prohibiting the sale of such products in interstate commerce under any false or deceptive name, provided, however, that established trade names which are usual to such products, and which are not false and deceptive, and which shall be approved by the Secretary of Agriculture, are permitted. *Brougham v. Blanton Mfg. Co.*, (1919) 249 U. S. 495, 39 S. Ct. 363, 63 U. S. (L. ed.) —, *reversing* (C. C. A. 8th Cir. 1917) 243 Fed. 503, 156 C. C. A. 201.

**Vol. I, p. 399.** [*Inspectors to be appointed, etc.*] [First ed., 1909 Supp., p. 47.]

Wholesome product containing deceptive name.—The Secretary of Agriculture is not imperatively required by the Meat Inspection Act to mark as "inspected and passed" a meat food product that is wholesome and does not contain dyes and chemicals, where

the word under which it is sold is, as applied to such product, false and deceptive, since the provision of the act requiring the marking of the product must be harmonized with the subsequent provision that no such product shall be sold or offered for sale under any false and deceptive name. Thus, the courts will not disturb the determination of the Secretary of Agriculture, fairly arrived at and having substantial evidence to support it, that the use of the word "sausage" in connection with the manufacture and sale in interstate commerce of a product which contained cereal in excess of two per cent and water or ice in excess of three per cent is calculated to deceive purchasers and consumers, and hence will be prohibited, where the Act forbids sales of meat or meat food products under a false or deceptive name, and empowers the Secretary to make rules and regulations for the efficient execution of that Act. *Houston v. St. Louis Independent Packing Co.*, (1919) 249 U. S. 479, 39 S. Ct. 332, 63 U. S. (L. ed.) —, *reversing* (C. C. A. 8th Cir. 1917) 242 Fed. 337, 155 C. C. A. 113, which *reversed* (E. D. Mo. 1916) 231 Fed. 779.

Vol. I, p. 400. [Marking, etc.]

[First ed., 1909 Supp., p. 48.]

**Conclusiveness of decision of Secretary of Agriculture as to deception in use of name.**—The determination of the Secretary of Agriculture, fairly arrived at, and having substantial evidence to support it, that the use of the word "Creamo" as a trademark for

oleomargarine which contains skimmed milk, but no cream, is false and deceptive, within the meaning of the prohibition of the Meat Inspection Act against the use of such names, and will only be sanctioned if not less than 10 per cent of cream be used, and then only if the trade name be changed to "Creamo Brand,"—will not be disturbed by the courts, notwithstanding the previous departmental approval of "Creamo" as a trade name, given at a time when the manufacturer used 30 per cent of cream in its product, and declared that it and other ingredients were "churned in an abundance of richest cream, resulting in a perfect substitute for butter." *Brougham v. Blanton Mfg. Co.*, (1919) 249 U. S. 495, 39 S. Ct. 363, 63 U. S. (L. ed.) —, *reversing* (C. C. A. 8th Cir. 1917) 243 Fed. 503, 156 C. C. A. 201.

**Effect of registration of trade name under Trademark Act.**—The sanction of the Patent Office to the use of the word "Creamo" as an appropriate trade name for oleomargarine under the Trademark Act (see vol. 9, p. 746) does not render inapplicable the provisions of the Meat Inspection Acts requiring inspection of meat food products and prohibiting the sale of such products in interstate commerce under any false or deceptive name, provided, however, that established trade names which are usual to such products, and which are not false and deceptive, and which shall be approved by the Secretary of Agriculture are permitted. *Brougham v. Blanton Mfg. Co.*, (1919) 249 U. S. 495, 39 S. Ct. 363, 63 U. S. (L. ed.) —, *reversing* (C. C. A. 8th Cir. 1917) 243 Fed. 503, (156 C. C. A. 201).

## BAIL AND RECOGNIZANCES

Vol. I, p. 492, sec. 1020. [First ed., vol. I, p. 492.]

**Failure of defendant to appear on advice of attorney.**—Under this section a court may exercise discretion in remitting the penalty of a forfeited recognizance only when there has been no willful default of the defendant, and the fact that a defendant fails to appear on the advice of his attorney does not change the character of his default or make it any the less willful. *U. S. v. Fabata*, (N. D. N. Y. 1918) 253 Fed. 586, wherein the court said: "In *United States v. Robinson et al.*, 158 Fed. 410, 85 C. C. A. 520, the Circuit Court of Appeals (Fourth Circuit) said, and accordingly held:

"Among other things, the foregoing section provides that the court may, in its discretion, remit the whole or a part of the penalty, whenever it appears that there has been no willful default of the party," etc. While in a case like the one at bar a surety may suffer a hardship, owing to the provisions of this statute, nevertheless its terms

are plain and unmistakable. It clearly defines the circumstances under which the court may exercise its discretion, and remit the whole or a part of the penalty, to wit, when there has been no willful default; and inasmuch as the court in this case found as a fact that the default was willful, it necessarily follows that it was not within the discretion of the court to vacate or modify the judgment in question."

"I think this the true construction of the statute, and that, to authorize a remission of any part of the penalty of the bond, it must appear there 'was no willful default of the party'—that is, of the defendant in the indictment, who failed to appear."

"In this case the claim of the Surety Company is that Fabata, the principal, went with his attorney to the United States courthouse, but outside of same, in the city of Auburn, N. Y., at the time and place and term of court where required by the bond to appear, but that Fabata, by direction of his counsel, remained outside the courthouse; that it was arranged and agreed between them that

Fabata was to remain outside, while his attorney went inside, and remain in a position where he could observe a preconcerted signal from his attorney, the attorney telling Fabata 'that in the event of his considering it advisable for him, the said Fabata, to appear before the court, a certain unmistakable signal would be given, and in the event that his attendance was deemed inadvisable at the time, that another signal, which could in no event be mistaken for the other, would be given, in which latter case the said Fabata should immediately go to the railroad station and return to New York on the first possible train;' that after waiting quite a while the said attorney, a New York city lawyer, appeared at the entrance to the courthouse and gave the agreed signal last above referred to, the one on receipt of which Fabata was to return to New York; and that Fabata, 'relying on and in compliance with the advice of his counsel, then and thereupon left Auburn on the first train and returned to New York.' The affidavit that this took place, as claimed, is not made by the attorney of Fabata, or by Fabata, but by the attorney for the Surety Company, who simply says that Fabata has so informed him. This falls short of proof that such an occurrence took place. It is the merest hearsay.

"But, even if such an arrangement was made and carried out between Fabata and his attorney from New York city, it falls far short of showing that there was no willful default on Fabata's part. On the other hand, it shows there was a willful default. Fabata and the Surety Company knew that Fabata's duty and obligation under the bond

was then and there, at Auburn, to appear and answer, and abide the order of the court. Fabata did not appear, nor did the surety produce him. He was duly called and failed to respond in person, but his attorney did appear and requested a delay or postponement, which was refused, as there had been several adjournments of the case. In open court at said time and place, as this court well remembers, and as Mr. D. B. Lucey, the United States attorney, who was present, makes affidavit, the said attorney for Fabata, when Fabata and the surety were called as set forth, stated in open court 'that on the preceding day he had made an engagement with the said Fabata to meet him the next morning, to wit, November 16, 1917, at the Grand Central Terminal to take a train from there to Auburn for the purpose of appearing in court (court then being in session at said place); that when O'Neill (the said attorney) arrived at the station in New York he looked around for the said Fabata, and he was unable to see or find him: and that he had no knowledge of where he then was.' Fabata was not in court, and this is not disputed. The surety did not produce him, when called and required so to do, and this is not disputed. That he was not in Auburn, remaining outside the courthouse, is shown by what occurred in the courtroom at the time. Plainly, in either event, it was a willful default and failure to appear on Fabata's part, and a failure to produce the defendant on the part of the surety. Such practice, even if it occurred as now claimed, cannot be encouraged or approved, or held to be other than a willful default."

## BANKRUPTCY

Vol. I, p. 504. [First ed., 1912 Supp., p. 464.]

**Power of Congress.**—Congress, in the exercise of its constitutional power to establish systems of bankruptcy, may impair the obligation of contracts. *In re Franklin Brewing Co.*, (C. C. A. 2d Cir. 1918) 249 Fed. 333.

**Suspension of state insolvency laws**—*In general.*—To same effect as first paragraph of original annotation, see *In re Grafton Gas, etc.*, Light Co., (N. D. W. Va. 1918) 253 Fed. 668.

It is only state laws which conflict with the bankruptcy laws of Congress that are suspended. *Stellwagen v. Clum*, (1918) 245 U. S. 605, 38 S. Ct. 215, 62 U. S. (L. ed.) 507, holding an Ohio statute in relation to transfers to prefer creditors not to be suspended by the federal Act; *Irwin v. Maple*, (C. C. A. 6th Cir. 1918) 252 Fed. 10, 164 C. C. A. 122, holding to the same effect.

**Certain state laws not affected by Act.**—The Bankruptcy Act recognizes, and the

federal courts in the administration of it enforce, the laws of the states affecting dower, exemptions, the validity of mortgages, priorities of payment, and the like. This plan is not objectionable because it leads inevitably to diversity of results. *Harlin v. American Trust Co.*, (Ind. App. 1918) 119 N. E. 20.

**General purposes of the Act.**—"The purpose of the Bankruptcy Act is: (1) To apply the property of the insolvent person or corporation to the payment of the debts with as little expense and delay as is consistent with their interests. (2) To relieve the honest and unfortunate debtor from his debts and give him another opportunity in the industrial life of the community." *In re Munford*, (E. D. N. C. 1919) 255 Fed. 108.

Bankruptcy courts were not created for the purpose of aiding men to delay or defraud their creditors. *In re Nash*, (D. C. S. D. W. Va. 1918) 249 Fed. 375.

**Interpretation of Act**—*Practical construction required.*—The Bankruptcy Act, being a commercial statute, should receive a practical



construction. *In re McNeil Corporation*, (D. C. Mass. 1918) 249 Fed. 765.

**Supreme Court decisions controlling.**—The decisions of the United States Supreme Court on the construction of the Bankruptcy Act are controlling on the state court. *Covington v. Rosenbusch*, (Ga. 1918) 97 S. E. 78.

**Vol. I, p. 510, sec. 1a (9).** [First ed., 1912 Supp., p. 465.]

**Power conferred on agent or attorney.**—Paragraph 9 of section 1 is said to have no force unless it means that the agent or attorney, as for instance one holding the legal title to a note as agent or trustee, may proceed in his own name as creditor. *In re Veler*, (C. C. A. 6th Cir. 1918) 249 Fed. 633.

**Surety or indorser.**—"The law is well settled that a surety or indorser is a creditor, within the meaning of the Bankruptcy Act. *Stern v. Paper*, (D. C.) 183 Fed. 228, 231; *Kobusch v. Hand*, 156 Fed. 660, 84 C. C. A. 372; *Swarts v. Fourth National Bank*, 117 Fed. 1, 54 C. C. A. 387; *National Bank of Newport v. National Herkimer County Bank*, 225 U. S. 178, 32 Sup. Ct. 633, 56 L. ed. 1042; *Landry v. Andrews*, 22 R. I. 597, 48 Atl. 1036; *Bartholow v. Bean*, 12 Wall. 635, 2 L. ed. 866." *Cohen v. Golden*, (C. C. A. 1st Cir. 1918) 250 Fed. 599, 162 C. C. A. 615.

**Vol. I, p. 515, sec. 1a (23).** [First ed., 1912 Supp., p. 515.]

**The words "secured creditor."**—"The definition of a 'secured creditor' is a creditor who directly holds as security for his debt property which would otherwise swell the assets of the bankrupt estate, or indirectly holds like property through having the debt obligation of another person who himself holds such property. The thought of there being security held by the creditor in the form of property is carried all through the provisions of the statute, and the right of the creditor to enforce the individual obligation of another person to pay the debt of the bankrupt is recognized in the provision permitting such other person to prove, in the name of the creditor, the claim against the bankrupt's estate, if the creditor does not elect to do so on his own account." *In re Shatz*, (E. D. Pa. 1918) 251 Fed. 351.

**Vol. I, p. 516, sec. 2.** [First ed., 1912 Supp., p. 469.]

**Not courts of limited jurisdiction.**—Although a creditor may disapprove of the manner in which a trustee has been discharging his duties, he cannot stand aloof from the bankruptcy proceedings because of his dissatisfaction, for there is ample provision in the Bankruptcy Act for his protection, and the jurisdiction of the federal courts in bankruptcy matters is exclusive. *DeMuth v. Faw*, (1918) 103 Wash. 279, 174 Pac. 18.

**Equitable jurisdiction.**—To same effect as original annotation, see *In re Veler*, (C. C. A. 6th Cir. 1918) 249 Fed. 633, 161 C. C. A. 543; *Bridgeton Nat. Bank v. Way*, (C. C. A. 4th Cir. 1918) 253 Fed. 731, 165 C. C. A. 325.

"It is now universally conceded that the District Court, being a court of equity in bankruptcy matters, is a court of equity for all purposes in such matters, and all the principles and rules of equity apply, and the proceedings in bankruptcy are of an equitable nature. It has been further established beyond cavil that valuable privileges are accorded bankrupts under this act, and those who desire to avail themselves of the benefits and privileges thus given must act speedily; at least, they must conform strictly to the rules and regulations governing the administration of the act." *In re Association Dairy Co.*, (D. C. Conn. 1918) 251 Fed. 749.

**Suit for accounting.**—A trustee in bankruptcy may recover, in an action for an accounting where general relief is prayed, property taken from the bankrupt under a forfeiture clause in a contract in excess of that provided for thereby. *Stennich v. Jones*, (C. C. A. 9th Cir. 1918) 252 Fed. 345, 164 C. C. A. 269, wherein the court said: "The appellees, however, take the position that even if property outside the contract was taken, there can be no recovery for such property in this suit, which is for accounting, and that the trustee's remedy is by an action at law for conversion. With this proposition we cannot agree. The suit being for accounting and general relief, and the issue as to what property was affected by expenditure under the contract having been testified to as one involved, the court may retain the cause, and require that an accounting be made by the defendants to the trustee for any and all property taken by them or any of them not embraced in the contract as we have construed it."

**Jurisdiction by consent.**—Where a creditor voluntarily submits his claims to a bankrupt's property to the jurisdiction of the bankruptcy court, agrees to allow the referee to determine his rights to the proceeds of the sale thereof, voluntarily appears and participates in the hearing before the referee concerning the dispute in question and fails to raise the question of jurisdiction until after an adverse decision by the referee, he will be regarded as having consented to such jurisdiction and to have waived his right to object thereto. *In re Drag*, (E. D. Mich. 1918) 254 Fed. 474.

Where the petition in an involuntary proceeding alleged that the debtor had admitted in writing its inability to pay its debts and its willingness to be adjudged a bankrupt, although such written admission does not appear by the record to have been made at that time, yet such omission is not material so far as it affects the validity of the adjudication where it appears that in due course the debtor by its written answer consented to

jurisdiction. *In re Veler*, (C. C. A. 6th Cir. 1918) 249 Fed. 633.

A trustee in bankruptcy waives his right to have claims against the interest of the bankrupt in a decedent's estate adjudicated in the federal court by consenting to the exercise of control over the estate by the state court. *Tripplehorn v. Cambron*, (C. C. A. 6th Cir. 1918) 250 Fed. 605, 162 C. C. A. 621.

The practice and procedure of the bankruptcy courts are prescribed exclusively by the Bankruptcy Act and the general orders and regulations pursuant thereto. *In re Veler*, (C. C. A. 6th Cir. 1918) 249 Fed. 633.

The Conformity Act (R. S. § 914; 6 Fed. Stat. Ann., 2d ed., p. 21) does not make the state rules of procedure apply to bankruptcy courts. *In re Veler*, (C. C. A. 6th Cir. 1918) 249 Fed. 633.

**Vol. I, p. 518, sec. 2 (1).** [First ed., 1912 Supp., p. 470.]

Jurisdiction as dependent on residence or domicile within the district—*Removal prior to filing petition*.—Where a member of a firm has sold his interest, removes from the state and resides in another state for more than three months prior to the commencement of proceedings, he is not subject to the jurisdiction of a bankruptcy court of the state from which he removed. *In re Fackelman*, (S. D. Cal. 1918) 248 Fed. 565.

Corporation's principal place of business—*A question of fact*.—In *In re Worcester Footwear Co.*, (D. C. Mass. 1918) 251 Fed. 760, the facts in substance were as follows: The alleged bankrupt company was organized under the law of Maine in February, 1916, to act as a selling company for the Worcester Felt Shoe Company, a Massachusetts corporation, which manufactured shoes and had its principal place of business in Worcester, Mass. It had no place of business of its own. Until the autumn of 1916 all its business, except selling its goods, was done in the offices of the shoe company in Worcester. One Pevear was treasurer of both companies until October of that year, when he was succeeded as treasurer of the respondent by one Russell. Following Mr. Russell's election as treasurer, he removed the record books and stock book to his own law office in New York; but the books of account remained in Worcester in the office of the shoe company, kept, as formerly, by one of its employees, who was also connected with the respondent. At this time Mr. Russell notified the clerk of the corporation in Maine and the internal revenue collector that the corporation had removed to New York. The court said: "The respondent's letter heads never gave any other address than that in Worcester. It never had any other post office address, and never held itself out to its trade as doing business anywhere else. So far as appears, orders for goods and remittances in payment for them were always sent to the respondent in Worcester. No business of the respondent was ever

carried on in New York, except that in connection with its bank account and its stock and corporate record. Its treasurer, who was its controlling official, resided and had his personal office there; but it does not appear that any directors' meetings were ever held there. The keeping of the record and stock books in New York was of little practical importance, because apparently there were few or no transfers of the stock, and no meetings during the period on question. . . . It is not easy, nor is it required, to lay down any general rule for determining which one of several places at which a corporation does business is its principal place of business. It is not necessarily where the manager happens to be located, or the stockbook and recordbook to be kept, although those are significant facts. It is to be gathered from a general survey of the corporation's activities. The decision depends upon a comparison of the activities at each place in respect to their character, importance, and amount."

Collateral attack.—An adjudication is, in a collateral proceeding, conclusive as to the jurisdiction of the bankruptcy court. *Riggs v. Price*, (Mo. 1919) 210 S. W. 420.

**Vol. I, p. 522, sec. 2 (3).** [First ed., 1912 Supp., p. 472.]

Appointment of receivers or marshals, in general—*Paramount jurisdiction of bankruptcy court*.—Although the paramount jurisdiction and right of possession of goods of the bankrupt are in the federal court, yet where the goods are in the possession of the state court there still exists, in the necessary change of possession, the rule of comity between courts, the application of which must be left to the good sense and good conduct of those controlling such comity related courts. *Gealey v. South Side Trust Co.*, (C. C. A. 3d Cir. 1918) 249 Fed. 189.

Appointment must be necessary for preservation of estate.—To the same effect as the original annotations, see *In re Independent Mach., etc., Corp.*, (C. C. A. 2d Cir. 1918) 251 Fed. 484, 163 C. C. A. 478.

Receiver's powers and duties in general—*Sales by receivers*.—Where mortgaged property which was in the bankrupt's possession at the time the petition against him was filed was taken possession of by the mortgagee for the purpose of foreclosure, prior to the appointment of the receiver, the court may in its discretion make an order restraining the mortgagee from proceeding with his foreclosure and allowing the receiver to take and sell the property, the proceeds of such sale to be held subject to the same valid liens that the property itself was subject to. *Charak v. Durphee*, (D. C. Mass. 1918) 252 Fed. 885.

Previous receivership proceedings in state court.—Where a stockholder of a corporation applies to a state court for a receivership of the corporation, not, however, on the ground of insolvency, and a receiver is appointed, but not until the filing of a petition

in a federal court to have the corporation declared a bankrupt, the state court has jurisdiction to enter a decree allowing the accounts of the receiver, fixing his compensation and ordering payment of the fee for the surety upon his bond.\* And a subsequent adjudication in bankruptcy does not relate back and affect the decree. But upon such adjudication and the appointment and qualification of a trustee it becomes the duty of the state court upon proper proceedings and in an orderly manner to see that the property of the bankrupt in the hands of its officers is transferred to the trustee appointed by the federal court. *Shannon v. Shepard Mfg. Co.*, (1918) 230 Mass. 224, 119 N. E. 768.

**Receiver's powers and duties—Custodian of property.**—A receiver is merely a custodian and is not vested with title. *In re Rice*, (S. D. N. Y. 1919) 256 Fed. 858.

Property in the hands of a receiver in the state court is in custodia legis. He has no power to make a surrender of it though proceedings in bankruptcy are subsequently commenced and as a rule of comity in such cases it remains for the state court to provide for a surrender. *Gealey v. South Side Trust Co.*, (C. C. A. 3d Cir. 1918) 249 Fed. 189.

The bankrupt is not divested of the title to his property by the appointment of a receiver. *Vaughn-Carlton Co. v. Studebaker Corporation*, (Ga. App. 1918) 97 S. E. 99.

**Where property is sold under a contract by which title is retained in the vendor** until payment of the purchase money, the vendor's title is not lost by a seizure of the property by a receiver in bankruptcy of the vendee. *Vaughn-Carlton Co. v. Studebaker Corporation*, (Ga. App. 1918) 97 S. E. 99.

**Remedy against adverse claimant.**—The claim of a postmaster as against the receiver to the possession of a bankrupt's mail, which has been impounded by order of the Post Office Department and is being held awaiting a decision by the department as to whether or not a fraud order should issue, is an adverse one which cannot be disposed of by summary motion. *In re Rice*, (S. D. N. Y. 1919) 256 Fed. 858.

**Right of receiver to maintain suits.**—The right to recover for injuries to the estate pending the receivership vests in the receiver when he is appointed. *In re Veler*, (C. C. A. 6th Cir. 1918) 249 Fed. 633.

**Liability of receiver.**—A receiver who has incurred debts in excess of the authority conferred on him by the court, is liable to the creditors personally and their only recourse is against him. *In re Veler*, (C. C. A. 6th Cir. 1918) 249 Fed. 633.

**Payment of necessary disbursements.**—If the alleged bankrupt consents to the appointment of a receiver without bond, he cannot object, if the petition be dismissed, to the payment of necessary disbursements out of the funds in the receiver's custody. *In re Independent Mach., etc., Corp.*, (C. C. A. 2d Cir. 1918) 251 Fed. 484, 163 C. C. A. 478.

**Termination of receivership.**—Where the appointment of receivers has been procured by misrepresentation by which the court has been misled, the order of appointment may be set aside. *In re Veler*, (C. C. A. 6th Cir. 1918) 249 Fed. 633.

**Liability for wrongful procurement of receivership.**—Where it appears that there has been a wrongful procurement of a receivership, it has been said that a complaint or petition by the trustee, addressed to the bankruptcy court in the exercise of its equity powers, asking an accounting for the damages caused to the estate by the wrongful acts committed after the filing of the petition and asking for judgment against those responsible therefor, would not go beyond the jurisdiction of the court of bankruptcy, according to the familiar principles of ancillary proceedings in equity; nor would it violate anybody's right to a jury trial, and it would enable the issues to be decided by the court personally familiar with the whole situation—unless, indeed, his personal knowledge and participation in the matter involved might appear to the judge sufficiently embarrassing to justify him in asking that another judge take charge. *In re Veler*, (C. C. A. 6th Cir. 1918) 249 Fed. 633.

Where the district judge becomes suspicious that he has been imposed on in making his appointment of a receiver, it is not only his clear right, but his duty, to proceed upon his own motion into a thorough inquiry upon the subject. In such a situation two courses are open to the trial judge: The first is to direct some procedure for the framing of issues, by which the parties charged with misconduct or liability may know the charge and have suitable opportunity to try the fact. The second is to proceed with a summary, more or less ex parte, inquiry, in order to satisfy himself whether a proceeding of the first class should be instituted. In such a case an ex parte inquiry undertaken on the motion of the court and pursued without the formulation or service of any charges or issues does not furnish the kind or degree of hearing to which the parties are entitled. *In re Veler*, (C. C. A. 6th Cir. 1918) 249 Fed. 633.

Where it appears that there was no objection to the appointment of a receiver into whose hands the entire estate came, and the court authorized the incurring of debts by him to become a charge on the property, and credit was given on the faith of this authority, it is said that when, in such a situation, it develops that the order appointing a receiver should be and is vacated, there is no principle on which the creditors petitioning for receivership can be held directly liable for the debts which the receiver incurs. *In re Veler*, (C. C. A. 6th Cir. 1918) 249 Fed. 633.

Where what occurred on the presentation to the district judge of an oral application for the appointment of a receiver does not appear, although the statement or certificate

by such judge in regard thereto is entitled to the highest respect and credence, yet it is said that it cannot import verity in the sense in which that is true of some judicial proceedings and records. *In re Veler*, (C. C. A. 6th Cir. 1918) 249 Fed. 633.

**Vol. I, p. 528, sec. 2 (5).** [First ed., 1912 Supp., p. 475.]

**Power to borrow money to continue business — Receivers' certificates.**—A creditor cannot accept a receiver's certificate as a partial payment on its debt, and, thus having notice that such certificates are to be prior to all existing liens, claim that its own lien is superior thereto: *In re Veler*, (C. C. A. 6th Cir. 1918) 249 Fed. 633.

Where it appears that each of several secured creditors acquiesced in the operation by the receiver, made no effort to enforce his lien by withdrawal of his property or otherwise, acquiesced in the sale of the entire property by the trustee free from liens, and in no form or manner attempted to make any reservation or preservation of his lien as superior to the expenses of operation or the other expenses of administration, it is said to be clear that under these conditions the receiver's debts represented by the certificates are entitled to priority in the fund derived from the property covered by liens; and though a pro rata contribution, as directed by the referee, is not wholly satisfactory, no other practicable method appears. *In re Veler*, (C. C. A. 6th Cir. 1918) 249 Fed. 633.

**Funds furnished by trustee.**—Where the creditors, who signed a trust agreement by which the trustee was to continue business, believed, as did also the trustee, that the conditions on which the trust agreement was to go into effect had been complied with and the trustee was permitted to conduct the business and to advance funds to carry it on, it was held that such creditors were estopped to contend that the agreement never went into operation and effect. *Searle v. Mechanics' Loan, etc., Co.*, (C. C. A. 9th Cir. 1918) 249 Fed. 942.

And it was also held that the creditors who signed such an agreement thereby created an equitable lien on their interest in the funds which thereafter came into the court of bankruptcy for administration, which preference claim was not affected by the question whether the trustee furnished the funds personally or obtained them from one with whom it was affiliated in business. *Searle v. Mechanics' Loan, etc., Co.*, (C. C. A. 9th Cir. 1918) 249 Fed. 942.

**Completion of contracts.**—Whether or not a bankruptcy court will authorize its trustee to complete an unperformed contract, or will permit a surety of the bankrupt to make use of the property of the estate, is a matter within the discretion of the bankruptcy court. The surety is not entitled thereto as

a matter of right. It is only when the situation warrants a belief that the bankrupt's estate will be benefited by such a course being pursued that the bankruptcy court will permit the surety to consume the supplies and materials or to use the equipment. *In re Schilling*, (N. D. Ohio 1918) 251 Fed. 966.

**Vol. I, p. 531, sec. 2 (8).** [First ed., 1912 Supp., p. 476.]

**Reopening of estate — Generally.**—A petition to reopen a bankrupt estate is addressed to the sound discretion of the court. *In re Graff*, (C. C. A. 2d Cir. 1918) 250 Fed. 997, 163 C. C. A. 247.

A bankruptcy court has power to reopen an estate where it appears that there are unadministered assets, inadvertently omitted from the schedules which should be administered for the benefit of the bankrupt. *In re Graff*, (C. C. A. 2d Cir. 1918) 255 Fed. 241, 166 C. C. A. 421.

**Nature of proceedings.**—"Proceedings upon petition to reopen need not be of a technical nature nor of any especial formality . . . ; but there must be not only a reasonable prospect of unadministered assets, but also evidence of creditors or other parties in interest making the application who would and should be benefited by its success." *In re Graff*, (C. C. A. 2d Cir. 1918) 250 Fed. 997, 163 C. C. A. 247.

**Necessity of election of new trustee.**—When the bankrupt's estate does not appear to have been fully administered the court should not, on reopening it, reinstate the former trustee but a new one should be elected. *In re Minners*, (S. D. N. Y. 1918) 253 Fed. 300.

**Jurisdiction of court.**—A court of bankruptcy in denying a motion to reopen an estate is without jurisdiction to make orders relating to property of the bankrupt which was not scheduled, as for instance directing the former trustee to execute an instrument to pass title to such property, for, except as to the power to reopen, the jurisdiction of the court in respect to such trustee is exhausted on the closing of the estate and his discharge by the court. *In re Graff*, (C. C. A. 2d Cir. 1918) 250 Fed. 997, 163 C. C. A. 247.

**Who may apply for reopening.**—An application for the reopening of a bankrupt's estate should be made by creditors. This is said to follow necessarily from the fact that the result of a reopening is the election of another trustee, a matter in which creditors alone may act in the first instance. *In re Graff*, (C. C. A. 2d Cir. 1918) 250 Fed. 997, 163 C. C. A. 247.

A purchaser of real estate from a trustee in bankruptcy may file a petition asking that the estate be reopened and the necessary steps taken to perfect the conveyance, it being claimed by him that the sale was not legally perfected. *In re Minners*, (S. D. N. Y. 1918) 253 Fed. 300.

**Vol. I, p. 535, sec. 2 (13).** [First ed., 1912 Supp., p. 479.]

**Attachment in contempt proceedings.**—A mere denial, by formal answer to a motion for attachment because of contempt, of the original concealment found against the bankrupt in turning over proceedings, and a consequent inability to deliver up the property to the trustee, will not stay the issuance of the attachment. *In re Myerson*, (E. D. Pa. 1918) 253 Fed. 510.

**Vol. I, p. 535, sec. 2 (15).** [First ed., 1912 Supp., p. 479.]

**Order for surrender of assets.**—To same effect as original annotation, see *In re Joseph R. Marquette*, (C. C. A. 2d Cir. 1918) 254 Fed. 419, 166 C. C. A. 51.

**Protection of bankrupt estate from excessive assessments.**—A court of equity has power to protect a taxpayer, whose property is in its custody, from a fraudulent and excessive assessment, and a bankruptcy court may, therefore, make an order declaring a tax assessment against the bankrupt estate to be illegal and excessive. It cannot, however, make a new assessment. *Cross v. Georgia Iron, etc., Co.*, (C. C. A. 5th Cir. 1918) 250 Fed. 438, 162 C. C. A. 508.

**Dismissing and enjoining proceedings.**—A petition in bankruptcy by a bankrupt who has failed to ask a discharge in a former proceeding should be dismissed, no new debts being scheduled, and the bankrupt should be enjoined from filing further petitions or applications for a discharge, as against creditors whose debts were scheduled and provable in the former proceeding. *In re Schwartz*, (N. D. Ohio 1918) 248 Fed. 841.

**Vol. I, p. 538, sec. 2 (18).** [First ed., 1912 Supp., p. 480.]

**Power to tax costs against opposing creditor.**—The court may allow costs against a creditor who joined with the bankrupt in opposing an involuntary petition. General Order No. 34 (see vol. I, p. 858) does not limit its power in this regard. *Kurtz Brass Bed Co.'s Petition*, (E. D. Mich. 1918) 250 Fed. 116.

**Relation to General Order No. 34.**—The provisions of this section and of General Order No. 34 (see vol. I, p. 858) should be read together, and "are merely declaratory of the general power of courts of equity, including courts of bankruptcy, over the allowance and apportionment of costs." *Kurtz Brass Bed Co.'s Petition*, (E. D. Mich. 1918) 250 Fed. 116.

**Vol. I, p. 538, sec. 2 (20).** [First ed., 1912 Supp., p. 480.]

**Territorial limits.**—In *Rogers v. Chickamauga Trust Co.*, (C. C. A. 5th Cir. 1918) 253 Fed. 541, a bill in equity was filed in the District Court by the appellees, the Chickamauga Trust Company, a Tennessee corpo-

ration, and W. R. Smith, a citizen of Georgia, against the appellants, citizens of the state of Georgia. In this suit one of the plaintiffs sought to obtain a discharge of liability for a fund in its possession on the payment of it into court, and the other to restrain the further prosecution of a suit against him instituted by the trustee in bankruptcy. In behalf of the appellees it was contended that the suit was such a one that the court's jurisdiction was not dependent on a diversity of citizenship. The decree appealed from was held erroneous and it was reversed, with direction that the bill be dismissed for lack of jurisdiction.

**Determining manner of enforcing mortgage.**—Where the court of ancillary jurisdiction takes possession of mortgaged property in aid of a bankruptcy court of primary jurisdiction, it has no authority to determine, regardless of the court of primary jurisdiction, whether the mortgage upon such property should be enforced through the bankruptcy court or in independent proceedings by the mortgagee or to release the mortgaged premises to the mortgagee for the purpose of such independent foreclosure; such proceeding obviously not being in aid of the receiver or trustee in the court of primary jurisdiction, but in derogation of the rights and authority of the court of primary jurisdiction, which is vested with sole authority to determine this question in the administration of the bankruptcy estate, and in derogation of the rights of the trustee appointed by it. *In re Patterson Lumber Co.*, (E. D. Tenn.) 247 Fed. 578.

**Discharge of bankrupt from arrest.**—A bankrupt who was arrested under an order of the state court, made prior to his filing of a voluntary petition in bankruptcy, may, if he has the substantive right to relief, be released, pending his application for a discharge, in a proceeding ancillary to the proceedings in the district in which the petition was filed. *In re Madigan*, (S. D. N. Y. 1918) 254 Fed. 221, wherein Hand, J., said: "Under the decision in *In re Von Hartz*, [C. C. A. 2nd Cir. 1905] 142 Fed. 728, 74 C. C. A. 58, I would be without jurisdiction, and the amendment of 1910 (Act July 1, 1898, c. 541, 30 Stat. 544, as amended by Act June 25, 1910, c. 412, 36 Stat. 838), which only extended ancillary jurisdiction 'in aid of a receiver or trustee,' would not avail. But that decision has been expressly disapproved by the Supreme Court in *Babbitt v. Dutcher*, (1910) 216 U. S. at page [102] 114, 30 S. Ct. 372, 54 U. S. (L. ed.) 402, 17 Ann. Cas. 969. I think, if a bankrupt has the substantive right to relief, there is, under the doctrine of *Babbitt v. Dutcher*, *supra*, a remedy in this court ancillary to the proceeding in the Eastern district."

**Vol. I, p. 541, sec. 3a (1).** [First ed., 1912 Supp., p. 481.]

**Fraudulent transfer in general—Concealment by partner.**—Where a partner has drawn from a bank money which belongs to

the firm and he admits that he has it, but refuses to produce it, to tell where it is kept, or to pay it to the creditors of the firm, such facts are held sufficient to establish a concealment of partnership funds, with intent to hinder, delay and defraud creditors. *In re Wellesley*, (M. D. Cal. 1917) 252 Fed. 854.

**Conveyance to creditor canceling debt and assuming other debts.**—Where a conveyance is made by a debtor to a creditor, consideration of which is the cancellation of all existing indebtedness of the grantor to the grantee and the assumption by the latter of all outstanding debts of the former, except one, the fact that the creditor signed a supersedeas bond in part consideration of the conveyance to him cannot, where there is a concededly large surplus in value of the property conveyed over and above the debts so discharged or assumed, be regarded as such a consideration as will relieve the transaction from its character as an act of bankruptcy in that it is a conveyance to hinder and delay a creditor. *Morrison v. Rieman*, (C. C. A. 7th Cir. 1917) 249 Fed. 97, 161 C. C. A. 149.

**Insolvency.**—To same effect as original annotation, see *In re McGraw*, (N. D. W. Va. 1918) 254 Fed. 442.

**Vol. I, p. 544, sec. 3a (2).** [First ed., 1912 Supp., p. 483.]

**Preferences in general—Absence of intent.**—The absence of an intent may relieve a transfer, which is apparently a preferential one, of its character as such. Thus it was so held where the owner of practically the entire stock of a corporation, who, however, took no part in the affairs of the company, sold all the stock of merchandise and the evidence clearly showed that he had no knowledge of any indebtedness except as told to him by the one who conducted the business, and that his purpose was to close out the business honestly. *In re Fersko*, (C. C. A. 2d Cir. 1918) 250 Fed. 357, 162 C. C. A. 427.

**Payment as preference—Payment under creditors' agreement.**—The payment by a debtor to one of his creditors of a certain percentage of his debt, which percentage was fixed by a creditors' agreement concurred in by a majority of the creditors, does not in itself constitute a preferential payment. In such a case, however, a failure to keep his accounts of what he realized for property sold, and what disposition he made of the proceeds, in definite, clear shape, so that everything can be readily scrutinized, will weigh heavily against his assertions of good faith and equality in the treatment of his creditors. *Matter of Bloomberg*, (D. C. Mass. 1918) 253 Fed. 94.

**Vol. I, p. 549, sec. 3a (3).** [First ed., 1912 Supp., p. 486.]

**Preference through legal proceedings, in general—Sale under purchase money mort-**

**gage.**—The suffering of his property to be sold in order to satisfy a special and superior lien, such as a purchase money mortgage thereon, does not constitute an act of bankruptcy. *In re McGraw*, (N. D. W. Va. 1918) 254 Fed. 442.

**Essential elements.**—To same effect as original annotations, see *In re McGraw*, (N. D. W. Va. 1918) 254 Fed. 442.

**The act of bankruptcy is complete—It is not the mere obtaining of a judgment and levying execution.**—To same effect as original annotation, see *In re McGraw* (N. D. W. Va. 1918) 254 Fed. 442.

**Execution without sale.**—It is not an act of bankruptcy to permit judgment and levy where the creditor delays for four months to sell under his execution. *In re D. F. Herlehy Co.*, (N. D. N. Y. 1918) 247 Fed. 369.

**Vol. I, p. 555, sec. 3a (4).** [First ed., 1912 Supp., p. 488.]

**II. APPOINTMENT OF RECEIVER OR TRUSTEE** (p. 558).

**The appointment of a special commissioner under a state statute to sell a debtor's real estate after an execution on a judgment against him has been returned *nulla bona*, is not equivalent to the appointment of a receiver or trustee under this section.** *In re McGraw*, (N. D. W. Va. 1918) 254 Fed. 442.

**Vol. I, p. 561, sec. 3a (5).** [First ed., 1912 Supp., p. 491.]

**In general.**—To same effect as original annotation, see *In re Wellesley*, (N. D. Cal. 1917) 252 Fed. 854.

**Trial of issue.**—Where a creditor denies that the alleged bankrupt ever admitted his inability to pay his debts he is entitled to a trial of the issue and the burden is on the petitioning creditor to prove such admission. *Albers Commission Co. v. Richter*, (C. C. A. 8th Cir. 1918) 251 Fed. 869, 164 C. C. A. 85.

**Admission by partnership.**—While it is well settled that the debtor's written admission of inability to pay his debts, and willingness on that ground to be adjudged a bankrupt, is sufficient to support an order of adjudication, such an admission made by one partner over the objection of the others is not an admission by the partnership and is therefore insufficient to sustain an order of adjudication. *In re Wellesley*, (N. D. Cal. 1917) 252 Fed. 854.

**Vol. I, p. 563, sec. 3b.** [First ed., 1912 Supp., p. 492.]

**Time of filing petition.**—Under this section a petition in involuntary bankruptcy proceedings must be filed within four months after the commission of the alleged acts of bankruptcy. *Trammell v. Yarbrough*, (C. C. A. 5th Cir. 1919) 254 Fed. 685, 166 C. C. A. 183.

**Computation of time.**—A concealment of property, made an act of bankruptcy under subdivision a(1) of this section, may be a continuing concealment and the four months period may run from the date of discovery. *In re Havens*, (C. C. A. 2d Cir. 1918) 255 Fed. 478, 166 C. C. A. 554.

**Vol. I, p. 564, sec. 3c.** [First ed., 1912 Supp., p. 493.]

The burden of pleading and proving solvency.—To same effect as original annotation, see *In re Wellesley*, (N. D. Cal. 1917) 252 Fed. 854.

**Vol. I, p. 568, sec. 4a.** [First ed., 1912 Supp., p. 495.]

**Corporations—Electric light corporations.**—A corporation whose business is that of operating a plant to generate and sell electricity, may be adjudged a voluntary bankrupt. *In re Grafton Gas, etc., Light Co.*, (N. D. W. Va. 1918) 253 Fed. 668.

A street railway operated by electricity is not within the meaning and intent of the word "railroad" used in this section, and therefore may properly be adjudicated a bankrupt. *In re Grafton Gas, etc., Light Co.*, (N. D. W. Va. 1918) 253 Fed. 668.

**Vol. I, p. 569, sec. 4b.** [First ed., 1912 Supp., p. 495.]

I. Generally.

II. Statutory exceptions.

IV. Corporations and unincorporated companies.

#### I. GENERALLY (p. 569)

**Computation of indebtedness.**—A claim against a company, paid by a transfer, which is a preference and an act of bankruptcy, should be counted in computing its indebtedness for the purpose of ascertaining whether a petition in involuntary bankruptcy may be filed against it. *In re Boston-West Africa Trading Co.*, (D. C. Mass. 1919) 255 Fed. 924.

#### II. STATUTORY EXCEPTIONS (p. 570)

**Persons engaged chiefly in farming or the tillage of the soil**—*In general.*—"Stock raising and dairying, in connection with and incidental to tillage of the soil, are in common parlance a part of farming. Therefore the word 'farming' is broader than 'tillage of the soil.' In so far as the Bankruptcy Act is concerned, the dairying and the stock and poultry raising, slaughtering, and preparing for market can only be incidental to the 'tillage of the soil,' in order to be included in the expression 'farming.'" *Cushing, J.*, in the case of *In re Brown*, (W. D. Wash. 1918) 251 Fed. 365.

In determining whether one is chiefly engaged in farming, all his activities are to be taken into consideration. It is proper to consider the relative amount of time he devotes

to the several lines of endeavor in which he is interested, and the comparative amount of revenue received from each may be taken into account, as well as the relative amount of indebtedness incurred in the different lines of business. *In re Brown*, (C. C. A. 9th Cir. 1918) 253 Fed. 357, 165 C. C. A. 139.

A retired farmer who has rented his farms to his son, having no control of the operations thereon nor any responsibility for their management, and whose indebtedness arose from speculative ventures engaged in after his retirement, is not "a person engaged chiefly in farming or the tillage of the soil" within the meaning of this section; nor does the fact that he engaged in gardening for the benefit of his own table, and under the stress of labor shortage rendered occasional assistance to his son, keep him in the exempted class. *In re Driver*, (D. C. N. J. 1918) 252 Fed. 956.

**What is not farming or tillage of the soil.**—Where the main portion of a bankrupt's debts were incurred in business ventures other than farming and where it appears that his principal interest in his farm was in developing the business of a packing house, creamery and poultry yards and in purchasing live stock and poultry from others, and selling directly to consumers the products of his plants, he is not engaged chiefly in farming or the tillage of the soil within the meaning of this section. *In re Brown*, (C. C. A. 9th Cir. 1918) 253 Fed. 357, 165 C. C. A. 139.

In *In re Brown*, (W. D. Wash. 1918) 251 Fed. 365, the statement and finding of the master was, in part, as follows: "Mr. Hill, who testifies as an expert and as having made an examination of the books, shows that the gross income from the farm and its several industries amounted to about \$222,000 from all sources, and the gross income from the farm at about \$95,900, and in that connection witness Hill states that the feed bought amounted to \$37,648, and the feed raised on the farm was \$17,600; that the cost of operating the farm was about \$22,000, and the gross expense of operation \$250,000, and that the total labor cost was \$46,391, of which the farm labor cost was \$16,000; and he further shows that the hogs produced a gross amount of \$32,000, of which \$12,000 was bought from the outside, and that they bought poultry to the amount of \$19,900, and raised poultry to the amount of \$5,500, and about \$3,000 worth of cream, all in the year 1917." The court said that this finding clearly and concisely showed that the tillage of the soil was incidental and subordinate to the other operations conducted by the alleged bankrupts at their farm.

**Burden of proof.**—While the burden is on the petitioning creditors in an involuntary bankruptcy proceeding to show that the debtor is not within an exempted class, yet where it is shown that, although he claims to be "engaged chiefly in farming," practically all of his indebtedness arose from

ventures having no connection with the farming industry, the burden shifts to him to prove that he is within the exempted class. *In re Driver*, (D. C. N. J. 1918) 252 Fed. 956.

#### IV. CORPORATIONS AND UNINCORPORATED COMPANIES (p. 574)

**Winding-up or dissolution proceedings.**—*The fact that the property of a corporation is in the possession of receivers appointed by a state court does not affect the jurisdiction of a court of bankruptcy to adjudicate such corporation a bankrupt.* *In re Grafton Gas, etc., Light Co.*, (N. D. W. Va. 1918) 253 Fed. 668.

#### Vol. I, p. 578, sec. 4b. [*Liability of officers and stockholders of corporations.*] [First ed., 1912 Supp., p. 501.]

**Assessment of stockholders.**—An order by a referee assessing all stock "to an amount equal to the par value of the stock issued to and held by said stockholders" has been reversed where he did not find what proportion of each share was liable to assessment, or the subsidiary facts that might support such finding. "We cannot agree that in place of such findings he could substitute an assessment of the largest amount that could possibly be called, and thereby shift to successive juries the burden of deciding separately, and probably with varying results, as the evidence might vary, the correct amount with which each stockholder should be charged." *In re Canister Co.*, (C. C. A. 3d Cir. 1918) 252 Fed. 70, 164 C. C. A. 182, *affirming* (D. C. N. J. 1918) 248 Fed. 587.

**Liability of stockholders for corporate debts.**—Under a state statute providing that "If the directors or other officers or agents of any stock corporation shall declare and pay any dividend when such corporation is insolvent, or any dividend the payment of which would render it insolvent, or which would diminish the amount of its capital stock, all directors, officers or agents assenting thereto shall be jointly and severally liable for all the debts of such corporation then existing, and for all that shall thereafter be contracted, while they shall respectively continue in office," a liability is created which is personal to the creditor and is not enforceable by the trustee. In such a case it is held that each creditor may of his own volition assert or refrain from asserting the liability, and against the creditor asserting it the director may make a defense peculiar to such creditor, and perhaps to none others, as for instance waiver, estoppel or set-off. *Seegmiller v. Day*, (C. C. A. 7th Cir. 1918) 249 Fed. 177.

#### Vol. I, p. 578, sec. 5a. [First ed., 1912 Supp., p. 501.]

**Existence of partnership essential.**—*Effect of assumption of debts of dissolved partner-*

*ship.*—Creditors who have claims against both a dissolved partnership and its successor which assumed the liabilities of its predecessor, and who proved their claims against the succeeding partnership, receiving their due proportion of its assets, cannot afterwards use the indebtedness of both partnerships as a foundation for an adjudication against the original partnership. *In re Eclipse Poultry Co.*, (C. C. A. 3d Cir. 1918) 250 Fed. 96, 162 C. C. A. 268.

**Necessity of showing insolvency of individuals comprising firm.**—The fact that an involuntary petition against a partnership does not distinctly allege that the firm is insolvent or that each partner is insolvent, which in strictness it should do, does not render it fatally defective where no objection appears to have been raised at any time to the form of the petition. *Houghton Wool Co. v. Morris*, (C. C. A. 1st Cir. 1918) 249 Fed. 434.

Although there was no specific proof as to the financial condition of either partner and nothing appeared in the evidence set forth in the report of the referee expressly relating thereto, as distinct from the firm, yet it has been held that a finding of insolvency may be sustained in view of the other facts appearing in the case. *Houghton Wool Co. v. Morris*, (C. C. A. 1st Cir. 1918) 249 Fed. 434.

**Individual petition seeking discharge from partnership debts.**—*Effect on right of partner to apply in another jurisdiction.*—Where a firm is adjudicated bankrupt and the proceeding is pending a member of the firm cannot by a petition in another jurisdiction, wherein he set up only the partnership liabilities involved in the first proceeding, obtain his discharge as an individual from liability for the firm debts. *Armstrong v. Norris*, (C. C. A. 8th Cir. 1917) 247 Fed. 253, 159 C. C. A. 347.

#### Vol. I, p. 583, sec. 5b. [First ed., 1912 Supp., p. 504.]

**Trustee of partnership estate.**—*Partnership trustee as entitled to appointment to estate of partner.*—The trustee of an insolvent firm does not *ipso facto* become trustee of the estate of the individual partners and need not, as a matter of law, be appointed trustee of the individual estates. *In re Wood*, (C. C. A. 6th Cir. 1918) 248 Fed. 246, 160 C. C. A. 324.

#### Vol. I, p. 583, sec. 5c. [First ed., 1912 Supp., p. 504.]

**Bankruptcy of sole surviving partner.**—While under this section the partnership assets cannot be administered in bankruptcy proceedings affecting only one or some of the partners, unless with the consent of the solvent partner or partners, where the sole surviving partner is the bankrupt, both partnership and individual assets are subject to the



control of the bankruptcy court, as in such a case there is no solvent partner to administer the partnership assets. *In re Stringer*, (C. C. A. 2d Cir. 1918) 253 Fed. 352, 165 C. C. A. 134.

**Vol. I, p. 587, sec. 5f.** [First ed., 1912 Supp., p. 506.]

**Distribution.**—To same effect as original annotation, see *Schall v. Camors*, (C. C. A. 5th Cir. 1918), 250 Fed. 6, 162 C. C. A. 178.

**Vol. I, p. 590, sec. 5g.** [First ed., 1912 Supp., p. 507.]

**Proof of claims.**—It is well settled that, in administering the estate of a bankrupt partnership and its members, partnership creditors must first be paid out of the partnership assets, and separate creditors out of the separate assets, before either class of creditors can resort to the other estate. *In re Wood*, (C. C. A. 6th Cir. 1918) 248 Fed. 246, 160 C. C. A. 324.

**Where on the dissolution of a partnership,** the remaining partner agreed with his retiring copartner to pay the firm debts, the latter cannot, having paid none of such debts, prove a claim against the surviving partner, who has become a bankrupt, for the amount of the debts. *In re Tassinari*, (D. C. Mass. 1918) 249 Fed. 990.

**Claims for torts.**—Where claimants against a bankrupt partnership were induced to purchase drafts of the bankrupt firm, through false representations, contained in forged bills of lading attached to the drafts, that they were secured by shipments of goods, and they were not paid, the partners being cognizant of the fraud and using the proceeds of the drafts for the partnership's benefit although not signing or indorsing them, the claims may be proved against the partnership estate alone and not also against the estate of the individual partners, on the ground that because of fraud the claims are for torts. *Schall v. Camors*, (C. C. A. 5th Cir. 1918) 250 Fed. 6, 162 C. C. A. 178.

**Notes.**—Where both a partnership and its individual members are bankrupt, the holder of the joint and several note of the partners and the firm may prove it as a claim against both the partnership estate and the estates of the partners. *Robinson v. Seaboard Nat. Bank*, (C. C. A. 3d Cir. 1918) 247 Fed. 667, 159 C. C. A. 569.

**Vol. I, p. 591, sec. 5h.** [First ed., 1912 Supp., p. 508.]

**Consent to administration in bankruptcy proceedings.**—By consent of the partner or partners not adjudged bankrupt the partnership property may be administered in the bankruptcy proceedings of one of the partners. *In re Stringer* (C. C. A. 2nd Cir. 1918) 253 Fed. 352, 165 C. C. A. 134.

**Vol. I, p. 592, sec. 6a.** [First ed., 1912 Supp., p. 508.]

II. Claiming exemption.

III. Matters affecting right to exemption.

IV. Recognition of state and federal exemption laws.

II. CLAIMING EXEMPTION (p. 593)

**Time and manner of claiming—Reference to state statute.**—In making a claim for exemption under the state law it is not essential to refer precisely to a particular statute, the claim being sufficient if made generally under the exemption laws of the state, since there is nothing in the Bankruptcy Act or in the general orders imposing a penalty for failure to point out in exact terms the statute relied on. *In re Dittman*, (C. C. A. 3rd Cir. 1918) 249 Fed. 606.

**Effect of setting aside exemption.**—After property has been set aside by the court as exempt it continues to belong to the bankrupt just as it did before bankruptcy, and if it were then affected by liens it continues to be so affected, in which case the bankruptcy court has no authority to decide on their validity but simply retires from the temporary control of the property and leaves other questions to be determined by the proper tribunal. *In re Dittman* (C. C. A. 3rd Cir. 1918) 249 Fed. 606.

**Burden of proof.**—On a showing by a bankrupt that he was a married man, living with his wife, and not the owner of a homestead, the burden is on the trustee to prove that there was net on hand five hundred dollars of personalty not subject to prior claims for purchase price, which may be allowed to the bankrupt in lieu of the homestead in accordance with the provisions of a state statute. *In re Stitt*, (C. C. A. 6th Cir. 1918) 252 Fed. 1, 164 C. C. A. 113.

III. MATTERS AFFECTING RIGHT TO EXEMPTION (p. 593)

**Transfer of exemption.**—Where the bankrupt transferred his homestead exemption to another party, but it was later transferred back to him, the allowance of the exemption was approved, there being no evidence that he was trying to prefer one creditor over another. *In re Nejour* (N. D. Ga. 1917) 251 Fed. 677.

**Waiver—A judgment rendered by consent on notes which contain a homestead waiver is sustainable against the exempt property.** *Williams v. American Slicing Machine Co.*, (1919) 148 Ga. 770, 98 S. E. 270.

**Review of findings as to objections to allowance.**—The finding of a referee against assertions of fraud made in opposition to the bankrupt's claim of the exemptions allowed by the state statute will be sustained unless it is clearly and manifestly erroneous. *In re Johnson*, (N. D. Ga. 1918) 247 Fed. 135.

#### IV. RECOGNITION OF STATE AND FEDERAL EXEMPTION LAWS (p. 601)

**State law adopted.**—To same effect as original annotation, see *In re Libby*, (S. D. Fla. 1918) 253 Fed. 278; *In re Solomon*, (E. D. Mich. 1918) 254 Fed. 503; *In re Bitner*, (C. C. A. 7th Cir. 1918) 255 Fed. 48, 166 C. C. A. 376; *Dunn v. Eckhardt*, (C. C. A. 5th Cir. 1919) 256 Fed. 315.

**Homestead exemptions.**—The principle heretofore announced with respect to exemptions generally, to wit, that the allowance of exemptions under the Bankruptcy Law is governed entirely by the state statutes relating thereto, has also been applied to homestead exemptions.

**Georgia.**—Where the constitution of a state gives the state courts jurisdiction over the subject matter of homestead exemptions, and as the only purpose for which such an exemption may be claimed and recognized is to protect the property from actual seizure and sale, it is declared that the power then to enforce homestead exemptions must of necessity be coextensive with the power to control such seizure and sale, and that where a United States court, lawfully vested with the power to take a person's property, is about to exercise such power and to sell the property for the benefit of that person's creditors in a bankruptcy proceeding, it would be a vain formality for a state court to recognize such property as exempt from seizure and sale under the homestead laws of the state, inasmuch as the state court would lack the power to enforce its decree or to control the action of the United States court. *Aubrey v. Guillaumin*, (1918) 144 La. 177, 80 So. 241.

A discharge in bankruptcy does not affect the lien of a general judgment nor the lien of a mortgage obtained more than four months prior to the filing of the petition in bankruptcy, relative to property set apart as exempt under the bankrupt's claim of homestead exemption, although holders of such liens may have proved their claims in bankruptcy. *McBride v. Gibbs*, (1918) 148 Ga. 380, 96 S. E. 1004.

Where in a voluntary petition in bankruptcy a claim is made for a statutory homestead exemption of money from the general estate of the bankrupt, a court of bankruptcy has jurisdiction to order a sale of land upon which liens exist, divested of liens, and to provide that the liens shall attach to the proceeds of sale. Where a part of the proceeds of such sale is set apart for the bankrupt upon his claim of exemption, liens against which the right of exemption had been waived will follow such fund. *McBride v. Gibbs*, (1918) 148 Ga. 380, 96 S. E. 1004.

Where the seller of personal property brings an action in trover against one not the original purchaser, to recover the property or its value, a money judgment therein is not a judgment for purchase money which is superior under the state law to the bank-

rupt's right of homestead under such law. *Williams v. American Slicing Machine Co.*, (1919) 148 Ga. 770, 98 S. E. 270.

**Illinois.**—Where under a statute homestead premises worth, over and above incumbrances, less than \$1,000 are absolutely free from claims of creditors, no valid sale of such premises can be made and the owner may dispose of such homestead interest as he pleases free of judgment liens. In such case no interest passes to the trustee. *In re Bitner*, (C. C. A. 7th Cir. 1918) 255 Fed. 48, 166 C. C. A. 376.

**New York.**—Under the provision of section 1397 of the Code of Civil Procedure a claim for homestead exemption can have effect only from the time of designation or date of register, and it is therefore inoperative against debts contracted before that time. *In re Lightstone*, (N. D. N. Y. 1918) 253 Fed. 456.

**Ohio.**—The manner and time of making, in the course of bankruptcy administration, the statutory claims for exemption, is a matter of procedure only, and where the exemption is claimed out of the proceeds of the sale of real estate, the court is not precluded from allowing the claim out of the proceeds of the sale of personalty, in the event of the real estate failing to sell for more than enough to pay off a valid prior mortgage. *In re Matter of Stitt*, (C. C. A. 6th Cir. 1918) 252 Fed. 1, 164 C. C. A. 113.

**Texas.**—*Dunn v. Eckhardt*, (C. C. A. 5th Cir. 1919) 256 Fed. 315, wherein the court said: "The question for determination is whether any part of this homestead had been abandoned prior to the bankruptcy. The question is to be determined solely by a consideration of the Texas decisions. No general principles of jurisprudence are applicable. The efforts of this court will be directed to an ascertainment of the law as developed by the courts of Texas."

**Partnership exemptions—Sale.**—Where under a state statute each partner is entitled to his exemptions in the stock of merchandise owned by the partnership, the sale thereof may rightfully be made, and the purchaser is entitled to enforce his rights as such in bankruptcy proceedings against the partnership. *In re Solomon*, (E. D. Mich. 1918) 254 Fed. 503.

### Vol. I, p. 612, sec. 7a (8). [First ed., 1912 Supp., p. 520.]

I. Schedule of assets.

III. Form, verification and amendment.

#### I. SCHEDULE OF ASSETS (p. 612)

**Effect generally of filing.**—Filing the schedule in a proceeding in bankruptcy is an ex parte act on the part of the bankrupt and in that proceeding is a solemn admission which, unless corrected, binds him. It is, in no proper sense, *res adjudicata*, either as to the creditors or the bankrupt.

In another and independent proceeding it has no other force against the bankrupt than evidence of the truth of the statement. *Horner v. Hammer*, (C. C. A. 4th Cir. 1918) 249 Fed. 134.

### III. FORM, VERIFICATION AND AMENDMENT (p. 617)

Where it appears from the evidence that at the time permitted by the Bankruptcy Act a creditor, inadvertently omitted from the schedule, was, by duly allowed amendment, added, and was served with proper notice as such creditor, and it further appears that the bankrupt was allowed his discharge in bankruptcy from the debt sued upon, and properly so pleaded, it was not error for the court to direct a verdict in favor of the defendant. *Almond v. Coalson*, (Ga. App. 1919) 99 S. E. 707.

### Vol. I, p. 618, sec. 7a (9). [First ed., 1912 Supp., p. 524.]

Subsequent use of evidence—*Admissibility of evidence in subsequent proceedings.*—Where the testimony of a bankrupt was elicited by a creditor's attorney on the examination of the bankrupt before the referee, and in the presence of the trustee and his attorney and of attorneys representing parties having claims against the bankrupt's estate, it is admissible in subsequent proceedings, in which the creditor's claims are contested, although it is not shown that notice was given of the examination of the bankrupt as required by section 58 of the Bankruptcy Act. In such a case it will be inferred that the referee's action in permitting the examination was based on his knowledge that the proper notice had been given. *Beaven v. Stuart*, (C. C. A. 5th Cir. 1918) 250 Fed. 972, 163 C. C. A. 222.

### Vol. I, p. 624, sec. 8a. [First ed., 1912 Supp., p. 527.]

Proceedings cannot be instituted after death.—After the death of an insolvent, bankruptcy proceedings cannot be instituted to bring the administration of his estate into the bankruptcy court. *In re Fackelman*, (S. D. Cal. 1918) 248 Fed. 565.

### Vol. I, p. 625, sec. 8a. [*Dower and allowance for widowed children.*] [First ed., 1912 Supp., p. 528.]

Inchoate right of dower.—Where the wife of a bankrupt has joined him in the execution of a mortgage on his real estate, thereby releasing her dower right to that extent, she is entitled to dower in the surplus only ensuing from the sale under foreclosure and not in the entire proceeds. *In re Munford*, (E. D. N. C. 1919) 255 Fed. 108.

### Vol. I, p. 627, sec. 9a (2). [First ed., 1912 Supp., p. 530.]

Arrest for dischargeable debt.—A judgment for negligence is a dischargeable debt, and therefore a bankrupt who has been arrested for such a judgment by order of a state court prior to the filing of his voluntary petition, may be released pending his application for a discharge in bankruptcy. *In re Madigan*, (S. D. N. Y. 1918) 254 Fed. 221.

### Vol. I, p. 630, sec. 11a. [First ed., 1912 Supp., p. 531.]

I. In general.

III. Stay as dependent on dischargeability of debt.

IV. Stay of proceedings on valid liens.

V. Where state court has complete jurisdiction.

#### I. IN GENERAL (p. 630)

Limitation on right to proceed in state court.—The Bankruptcy Act of 1898, unlike that of 1867, does not contain a provision restraining a creditor from pursuing his claim against a bankrupt debtor until the question of his discharge has been determined. The commencement of the bankruptcy proceeding does not, therefore, stop or toll the running of the statute of limitations. And the payment of dividends on the plaintiff's claim by the trustees in bankruptcy is not an acknowledgment of the debt by the defendants and promise to pay it, which take the debt out of the statute. *American Woolen Co. v. Samuelsohn*, (1919) 226 N. Y. 61, 123 N. E. 154.

Injunction after discharge.—“The power of the bankruptcy court to protect a bankrupt against claims in another court is limited to the period before the question of his discharge has been decided. . . . If the bankrupt desires to obtain the benefit of his discharge in an action brought against him for the recovery of a debt affected by such discharge, he may, by properly pleading and proving the discharge, in the court where the action against him is pending, secure a permanent stay of proceedings in such action, even after judgment therein.” *In re Weisberg*, (E. D. Mich. 1918) 253 Fed. 833.

Failure to ask stay.—The filing of a petition in bankruptcy does not divest a state court of jurisdiction to sell the land of the bankrupt where no application for a stay is made. *Houston v. Shear*, (Tex. 1919), 210 S. W. 876.

Construction of order.—An order “abating” an action pending on appeal, on a plea that the defendant had been adjudged a bankrupt, will be construed as an order for a stay, since that is the limit of the power of the court. *Tutt v. Fighting Wolf Min. Co.*, (Mo. 1919) 209 S. W. 304.

### III. STAY AS DEPENDENT ON DISCHARGEABILITY OF DEBT (p. 632)

**Stay of actions on dischargeable debts.**—To same effect as original annotation, see *In re Lilienthal*, (C. C. A. 9th Cir. 1919) 256 Fed. 819, 168 C. C. A. 165.

**Judgment.**—A judgment for injury to property though simple as distinguished from malicious negligence is dischargeable in bankruptcy and the bankruptcy court will begin proceeding on it in the state court pending the application of the bankrupt for a discharge. *In re Cunningham*, (N. D. N. Y. 1918) 253 Fed. 663.

**Claim evidenced by judgment.**—The bankruptcy court has the right to pass upon the character of the claim to be stayed, in determining whether a stay should issue pending the determination of the discharge application; but, if the claim is evidenced by a judgment, it will not, in passing upon that question, go behind the judgment as shown by the record of the action in which the judgment resulted. *In re Lusch*, (E. D. N. Y. 1918) 251 Fed. 316, wherein the court denied a motion to discharge a stay against a judgment rendered in a state court for negligence in operating an automobile upon affidavits charging that the bankrupt willfully and maliciously caused the injury for which the judgment was given, by deliberately running down the judgment creditor, after knocking him down in the street.

### IV. STAY OF PROCEEDINGS ON VALID LIENS (p. 635)

**Stay allowed.**—Under this section a bankrupt court may issue an order staying the prosecution of suits against a corporation, instituted by creditors in state courts many months prior to its adjudication as a bankrupt, for the purpose of determining and enforcing liens on its property. *In re Grafton Gas, etc., Light Co.*, (N. D. W. Va. 1919) 253 Fed. 668.

**A suit to foreclose** definitely described mortgage and deed of trust liens begun in a state court will not generally be stayed on the petition of the debtor filed therein based on the pendency of a proceeding in bankruptcy against him instituted in a federal court six months thereafter. *Abney-Barnes Co. v. Davy-Pocahontas Coal Co.*, (W. Va. 1919) 98 S. E. 298.

When mortgaged property in another state is in possession of a trustee in bankruptcy before proceedings were instituted for a foreclosure under the mortgage, a summary proceeding may be had in the court of original jurisdiction to restrain the proceedings for foreclosure provided it had jurisdiction over the person of the mortgagee. *In re United States Chrysotile Asbestos Co.*, (S. D. N. Y. 1918) 253 Fed. 294.

### V. WHERE STATE COURT HAS COMPLETE JURISDICTION (p. 636)

**The court of bankruptcy will not stay proceedings** instituted in a state court where it

does not have the property or subject matter of the litigation in its custody or possession, and the state court is competent to determine the questions involved. Thus it was so held where, on the death of a bankrupt some time after his discharge in bankruptcy, an action was begun in a state court by his executor on policies of insurance which had a cash surrender value at the time of the bankruptcy proceedings, but were not scheduled, and shortly after the trustee in bankruptcy, who had not been discharged but who had been made a party in the action in the state court, brought suit in the federal court involving the same subject matter. *Doolittle v. Mutual Life Ins. Co.*, (N. D. N. Y. 1918) 249 Fed. 491.

**Stay of decree in federal court.**—Where a receiver of an insolvent corporation appointed by a state court has been summarily deprived of possession of the bankrupt's property by a trustee in bankruptcy proceedings in a federal court, in violation of the principle of comity existing between state and federal courts, the property will be returned to him and an order of sale by the federal court under a decree of foreclosure on the property will be stayed pending the action in the state court. *Brown v. Crawford*, (D. C. Ore. 1918) 254 Fed. 146.

**Vol. I, p. 643, sec. 12a.** [First ed., 1912 Supp., p. 540.]

**Offer of composition—Nature.**—The tests for confirmation of an offer of composition fixed by section 12d of the Bankruptcy Act do not presuppose any particular kind or form of offer, but relate to any offer of composition; and whatever its form or kind, if the judge is satisfied that it meets the required statutory tests, he confirms it, otherwise he rejects it. *In re Graham*, (C. C. A. 7th Cir. 1918) 252 Fed. 93, 164 C. C. A. 205.

**The advantages and disadvantages of an offer of composition** need not be set out in the offer in order that the judge may investigate the merits of the offer and of the objections thereto. It need only be that which it purports to be, and that which the statute provides for—a statement of the proposed terms of composition. *In re Graham* (C. C. A. 7th Cir. 1918) 252 Fed. 93, 164 C. C. A. 205.

**Effect of composition on rights of vendor to lien on property sold to vendee.**—A composition by the bankrupt with his creditors where it is made before the adjudication and appointment of a trustee does not oust the vendor of his title to property sold to the bankrupt under a contract by which he retains title until the payment of the purchase money, unless the vendor becomes a party to, and accepts the terms of, the composition. *Vaughn-Carlton Co. v. Studebaker Corporation*, (Ga. App. 1918) 97 S. E. 99.

**Withdrawal of offer of composition.**—After an offer of composition has been accepted by a majority of the creditors the bankrupt

may not withdraw it. *In re Agree* (E. D. Mich. 1918) 247 Fed. 591.

**Costs.—Attorneys' fees.**—A bankrupt may not pay as part of a composition the expenses of a creditor who had employed an attorney to investigate the bankrupt's affairs, unless he acts at the request expressly implied of the receiver, and this is true even though the investigation resulted in a benefit to the estate. *In re Siegel*, (S. D. N. Y. 1918) 252 Fed. 197.

**Vol. 1, p. 647, sec. 12c.** [First ed., 1912 Supp., p. 542.]

**Hearing—Persons entitled.**—Objecting creditors, as well as the proponents of a composition offer, are entitled to a hearing and to the judgment of the court upon the merits. *In re Graham*, (C. C. A. 7th Cir. 1918) 252 Fed. 93, 164 C. C. A. 205.

**Vol. 1, p. 648, sec. 12d (1).** [First ed., 1912 Supp., p. 543.]

**Creditors' interests prevail.**—To same effect as first paragraph of original annotation, see *In re Kligerman*, (E. D. Pa. 1918) 253 Fed. 778.

**Evidence.**—"The facts and circumstances which bear upon the advisability of confirming the offer are no part of the offer itself, but are properly presentable at the hearing of the offer and of the objections thereto, for which the law makes provision; and it is for the judge then to determine under all the facts and circumstances then appearing, including the nature of the offer itself, whether he is satisfied that the composition 'is for the best interests of the creditors.'" *In re Graham*, (C. C. A. 7th Cir. 1918) 252 Fed. 93, 164 C. C. A. 205.

**Effect of refusal to confirm.**—Refusal of a petition in bankruptcy on a composition by the bankrupt with his creditors operates to discharge the receiver and to replace possession of the property in the bankrupt. *Vaughn-Carlton Co. v. Studebaker Corporation*, (Ga. App. 1918) 97 S. E. 99.

When on the refusal of a petition in bankruptcy on a composition with creditors property in the possession of a receiver is redelivered to the bankrupt, a vendor, holding the title to property sold to the bankrupt until the purchase money is paid, on proof that he was not a party to the composition has the same legal rights open to him as if there had been no bankruptcy proceeding. *Vaughn-Carlton Co. v. Studebaker Corporation*, (Ga. App. 1918) 97 S. E. 99.

**Vol. 1, p. 650, sec. 12d (3).** [First ed., 1912 Supp., p. 544.]

**Good faith.**—To same effect as original annotation, see *In re Bloomberg*, (D. C. Mass. 1918) 253 Fed. 94.

**Vol. 1, p. 651, sec. 12e.** [First ed., 1912 Supp., p. 545.]

**Effect of confirmation.**—The confirmation of a composition has the same effect as the granting of a discharge in bankruptcy, the word "discharge," as used in section 14c of the Act, meaning a discharge of the bankrupt after adjudication. Accordingly, the lien of a judgment obtained more than four months prior to the filing of a petition in bankruptcy is not affected by the confirmation of a composition prior to adjudication. *Oilfields Syndicate v. American Imp. Co.*, (S. D. Cal. 1919) 256 Fed. 979.

**Jurisdiction of court terminated** the approval of an offer of composition by the court and its sanction of the assignment by the receiver and bankrupt of all the bankrupt estate to a trustee who had been selected by the creditors to act in their behalf in carrying out the terms of the composition, put the property of the bankrupt outside of the court's power and terminated the jurisdiction of the court over both the property and the assignee thereof. *Guaranty Trust Co. v. McCabe* (C. C. A. 2nd Cir. 1918) 250 Fed. 699, 163 C. C. A. 31. See also *In re Siegel* (C. C. A. 2nd Cir. 1919) 256 Fed. 226.

**Estate reverts in bankrupt.**—Where a composition has been accepted by the creditors and confirmed by the court the estate thereupon reverts in the bankrupt. *In re McNeil Corporation* (D. C. Mass. 1918) 249 Fed. 765; *In re Siegel* (C. C. A. 2nd Cir. 1919) 256 Fed. 226.

**Indorser of bankrupt's note not released.**—The confirmation of a compromise by a bankrupt with his creditors does not have the effect of releasing the indorser of a note given by the bankrupt where the holder did not prove his claim until persuaded to do so by the defendant who recognized the indorsements and urged that the filing of the claim and acceptance of dividends would not release him from his liability as indorser. *Bromberg v. Self*, (Ala. App. 1918) 80 So. 631.

**Liens of attachments.**—Such a confirmation, however, has been held to have the effect of dissolving liens of attachments made within four months prior to the commencement of the bankruptcy proceedings, in view of §§ 67(c), 67(f) and 70(f) of the act. *In re Lillenthal*, (C. C. A. 9th Cir. 1919) 256 Fed. 819, 168 C. C. A. 165.

**Effect of refusal to confirm.**—When the bankruptcy court enters its order, predicated on a referee's report, refusing confirmation of a composition, it amounts to an overruling of a demurrer to the specifications of objection. *In re Graham*, (C. C. A. 7th Cir. 1918) 252 Fed. 93, 164 C. C. A. 205.

**Property sold under plan for composition.**—Where a confirmation is rejected, a sale made thereunder conditioned on its confirmation by the court is void, but in such a

case the court has no jurisdiction on petition for confirmation of the composition and on exceptions to the report of a special referee relative to an increased offer for the property, to order that the deed of the trustee be expunged from the records in the office of the recorder of deeds. *In re Kligerman*, (E. D. Pa. 1918) 253 Fed. 778.

**Necessity of meeting of creditors to close estate.**—Where a composition has been accepted by the creditors and confirmed by the court, there is said to be some doubt whether a final meeting is necessary in order to close the estate. The calling of such a meeting is largely a matter of practice and must be left largely to the discretion of the referee, and where there is nothing to show that the discretion has been improperly exercised a charge for sending notices in regard thereto will be allowed. *In re McNeil Corporation*, (D. C. Mass. 1918) 249 Fed. 765.

**Vol. I, p. 652, sec. 13a.** [First ed., 1912 Supp., p. 546.]

**Modification of composition after confirmation.**—On confirmation of a composition the estate vests in the bankrupt and the jurisdiction of the court comes to an end, except that under this section a party in interest may move to set aside the composition within six months on the ground of after discovered fraud. Accordingly an item included in a composition, for the payment of the fees of an attorney employed by a committee of creditors cannot be set aside after the confirmation except on the ground of fraud. *In re Siegel*, (C. C. A. 2d Cir. 1919) 256 Fed. 226.

**Vol. I, p. 653, sec. 14a.** [First ed., 1912 Supp., p. 547.]

**When application must be made.**—If the application is not made within the time limited, the bankrupt is forever barred from obtaining a discharge as against the debts scheduled and provable in that proceeding. *In re Schwartz*, (N. D. Ohio 1918) 248 Fed. 841.

A bankrupt is chargeable with only reasonable diligence in filing his application for a discharge. *In re Waller*, (C. C. A. 7th Cir. 1918) 249 Fed. 187.

**Effect of failure to make application.**—A failure to apply for a discharge has the same force and effect as if a discharge had been denied. *Horner v. Hammer*, (C. C. A. 4th Cir. 1918) 249 Fed. 134.

**Extension of time discretionary with court.**—A motion to enlarge the time to file an application for discharge is one addressed to the reasonable discretion of the court. *In re Waller*, (C. C. A. 7th Cir. 1918) 249 Fed. 187.

**Extension allowed because of unavoidable delay.**—A bankrupt may claim the benefit of such unavoidable causes as excuse the

failure to make such application within the twelve months' period succeeding adjudication. *In re Waller*, (C. C. A. 7th Cir. 1918) 249 Fed. 187.

**Effect of denial of discharge generally.**—The denial of an application for a discharge not reviewed or reversed is a final judgment equally binding on the bankrupt and his creditors. *In re Schwartz*, (N. D. Ohio 1918) 248 Fed. 841.

**Effect of denial of discharge on subsequent bankruptcy proceedings.**—*In re Spangler*, (D. C. Mass. 1919) 256 Fed. 62, regarding this question it was said: "Inasmuch as the bankrupt failed to obtain his discharge on his previous voluntary petition, the debts scheduled in that proceeding will not be affected by any discharge granted in this proceeding, if the creditors interested appear and assert their rights. Under such circumstances, the discharge would be restricted to debts incurred since the filing of the former petition and would expressly exclude debts scheduled in or covered by the former petition. As to such debts the pendency of the present petition affords no reason for any stay of action in the state courts, and, if pleaded for that purpose, the plea could be met, I should suppose, by a replication setting up the complete facts."

**Effect of withdrawal of application.**—An application made within due time but voluntarily withdrawn "is the legal effect the same as a failure to apply for a discharge within the time limited by law." *In re Schwartz*, (N. D. Ohio 1918) 248 Fed. 841.

**Vacation of order of extension.**—A motion to vacate an order extending the time in which a bankrupt may file his petition for a discharge is addressed to the judicial discretion of the court and unless made seasonably and in good faith it will be denied. Thus it has been held that where the petition for extension was filed five days before the expiration of the time limit, a motion to vacate filed twenty days thereafter came too late. *In re Maier*, (D. C. Me. 1919) 256 Fed. 60.

**Vol. I, p. 661, sec. 14b.** [First ed., 1912 Supp., p. 549.]

I. Generally.

II. Objections to bankrupt's discharge.

III. Hearing and proof.

IV. Determination.

**I. GENERALLY (p. 662)**

**Construction.**—*Statute to be liberally construed.*—There has been a growing tendency in the direction of liberality in favor of a bankrupt's discharge, and it has come to be recognized that the provisions of the law relating to discharge are not to be construed against a bankrupt, and if his discharge is to be denied it must be because there has been strict proof of the existence of some one of the bars which the statute has set up

against the discharge. *In re Braus*, (C. C. A. 2d Cir. 1917) 248 Fed. 55, 160 C. C. A. 195.

**Discharge as a matter of right.**—To same effect as original annotation, see *In re Whitney*, (D. C. Mass. 1918) 250 Fed. 1005; *In re Walsh* (C. C. A. 7th Cir. 1919) 256 Fed. 653, 168 C. C. A. 47.

## II. OBJECTIONS TO BANKRUPT'S DISCHARGE (p. 664)

**Who may object—Parties in interest—Creditors are "parties in interest."**—To same effect as original annotation, see *In re Walsh*, (C. C. A. 7th Cir. 1919) 256 Fed. 653, 168 C. C. A. 47.

A creditor holding a provable claim may object, though he has not proved his claim. *In re Armstrong*, (S. D. Cal. 1918) 248 Fed. 292.

**Objections by court.**—A bankruptcy court should not on its motion interpose objections to a discharge, as courts do not sit to create issues but to try and determine them on the presentation of the evidence by the interested parties. *In re Walsh*, (C. C. A. 7th Cir. 1919) 256 Fed. 653, 168 C. C. A. 47.

The court on its own motion may not refuse a discharge, as the grant of a discharge does not lie within its discretion and the bankrupt is absolutely entitled to it, unless it is proved that he has committed one or more of the acts which the statute provides shall bar the discharge. It may, however, direct that a creditor's meeting be called to consider whether the trustee should be authorized to file objections, but this is as far as the court of its own motion can go. *In re Whitney*, (D. C. Mass. 1918) 250 Fed. 1005.

**Grounds for refusal generally.**—The refusal of a discharge must be predicated on one of the six grounds mentioned in the statute. *In re Epstein*, (S. D. Fla. 1917) 248 Fed. 191.

**Specification of objections.**—*Facts stated on mere information and belief*, and which do not enter into details of the property, etc., are insufficient as specifications of objection to discharge both as to the form in which they are filed and the matter stated therein. *In re Abramovitz*, (S. D. Fla. 1918) 253 Fed. 299.

**Verification.**—To same effect as original annotation, see *In re Abramovitz*, (S. D. Fla. 1918) 253 Fed. 299.

Specifications of objections are made by the creditor. If an individual it must be signed by him and if a corporation it should not only be signed but the corporate seal should also be affixed by the proper authority. *In re Abramovitz*, (S. D. Fla. 1918) 253 Fed. 299.

**Demurrer to specifications of objections—Effect of master's report.**—A master's report stating that no demurrer to the specifications of objections was filed will prevail over averments by the bankrupt in his exceptions to the report, to the effect that his counsel had dictated to the stenographer of the

master in his presence and in the presence of the attorneys of the bankrupt's trustee, certain stated exceptions to the sufficiency of the objections, especially where the allegations concerning the circumstances attending the dictation of the demurrer to the objections are not verified. *In re Frostig*, (S. D. Ga. 1918) 252 Fed. 199.

## III. HEARING AND PROOF (p. 670)

**Scope of inquiry on hearing.**—Discharge is a statutory matter and the court, as well as objecting creditors, is confined to the specifications of objections. *In re Newmark*, (C. C. A. 2d Cir. 1918) 249 Fed. 341.

**Specifications of objection must be proved—In general.**—To the same effect as original annotation, see *In re Garrity*, (C. C. A. 2d Cir. 1917) 247 Fed. 310, 159 C. C. A. 404; *Horner v. Hamner*, (C. C. A. 4th Cir. 1918) 249 Fed. 134; *In re Newmaker*, (C. C. A. 2d Cir. 1918) 249 Fed. 341; *In re Troutman*, (W. D. Ky. 1917) 251 Fed. 930; *In re Lally*, (N. D. N. Y. 1919) 255 Fed. 358.

**Proof need not be beyond reasonable doubt.**—Objections grounded on section 29a need not be proved beyond a reasonable doubt, but, as in civil cases, a fair preponderance suffices. *In re Garrity*, (C. C. A. 2d Cir. 1917) 247 Fed. 310, 160 C. C. A. 404.

**Reference to referee.**—Where the report of the referee gave only the testimony with no definite conclusion thereon it was held that the better practice was to refer the matter back to the referee with instructions to find and report the ultimate facts on the testimony and the applicable rules of law. *In re Troutman*, (W. D. Ky. 1917) 251 Fed. 930.

**Reference to special master—Findings made by.**—Where specifications in opposition to a bankrupt's discharge are referred to a special master, his findings should be sustained, unless clearly improper or without evidence to support them. *In re Amster*, (D. C. N. D. Ohio 1918) 249 Fed. 256.

## IV. DETERMINATION (p. 673)

The discharge of a bankrupt is a judicial act.—*Gage v. Penfield*, (C. C. A. 7th Cir. 1918) 249 Fed. 961.

**Vol. I, p. 677, sec. 14b (1).** [First ed., 1912 Supp., p. 557.]

**Making false oath.**—A specification of objection to a discharge because the bankrupt swore falsely as to his place of residence is insufficient where it states merely that the bankrupt is a "citizen" of another state. *In re Greer*, (W. D. Ky. 1918) 248 Fed. 131.

**Omissions and inaccuracies in the schedule.**—Mere inadvertence and omissions from the schedule of debatable items by ignorant persons will not be deemed within the false oath and concealment sections of the statute. *In re Garrity*, (C. C. A. 2d Cir. 1917) 247 Fed. 310, 159 C. C. A. 404.

The omission by a school teacher to schedule the salary due to her, which constituted her sole asset, is ground for the refusal of a discharge. *In re Garrity*, (C. C. A. 2d Cir. 1917) 247 Fed. 310, 159 C. C. A. 404.

**Vol. I, p. 683, sec. 14b (2).** [First ed., 1912 Supp., p. 558.]

**Concealment of financial condition.**—To same effect as original annotation, see *In re Schultz*, (C. C. A. 2d Cir. 1918) 250 Fed. 103, 162 C. C. A. 275.

Where it appears that the failure to keep anything in the way of accounts or memoranda during the important interval just preceding the failure was associated in the bankrupt's mind with his intention to go into bankruptcy in such a way as to benefit his relatives and himself at the expense of his creditors, and was, in part at least, for the purpose of having no statements or accounts which would prove troublesome, a discharge should be denied. *In re Sternburg*, (D. C. Mass. 1918) 249 Fed. 980.

**Intention to conceal—Effect of amendment of 1903.**—Prior to the amendment of 1903 this section contained, before the word "intent," the word "fraudulent"; before the words "financial condition" the word "true"; before the word "destroyed" the words "and in contemplation of bankruptcy"; and in place of the word "such," before the words "condition might be ascertained," the words "his true." Obviously, the meaning of the original act has been much limited by these amendments. It is no longer necessary to prove intentional fraud, or that the concealment was in contemplation of bankruptcy. It is, of course, necessary to prove that the bankrupt shall fail to keep books of account or records, and that this failure must have been with intent to conceal his financial condition. *In re Amster*, (D. C. N. D. Ohio 1918) 249 Fed. 256.

**Failed to keep books of account.**—*The reckless manner in which a bankrupt bought goods on credit* during the time he was greatly in debt and while his cash receipts were being dissipated in living or personal expenditures, is a circumstance entitled to weight in characterizing his conduct or inferring intent in respect to his failure to keep books. *In re Amster*, (D. C. N. D. Ohio 1918) 249 Fed. 256.

**Intention presumed.**—The rule that a person must be held to intend the material and necessary consequences of his acts has been applied in the case of a failure of the bankrupt to keep books. *In re Amster*, (D. C. N. D. Ohio 1918) 249 Fed. 259.

**The specification of objections.**—An objection based on a failure of the bankrupt to keep books must allege that the failure was with intent to conceal his financial condition. *In re Epstein*, (S. D. Fla. 1917) 248 Fed. 191.

**Vol. I, p. 689, sec. 14b (3).** [First ed., 1912 Supp., p. 560.]

**False statement in writing—In general.**—To same effect as original annotation, see *In re Baldwin*, (S. D. N. Y. 1918) 253 Fed. 836.

**Necessary elements.**—The statutory elements of the grounds for opposing the discharges in this case, and which elements must all be shown to exist and to coexist, are: (1) That the bankrupts obtained the property from the objecting creditor; (2) on credit; (3) upon a materially false statement; (4) in writing; (5) to said creditor; (6) for the purpose of obtaining such property on credit; and (7) that the writing so made by the bankrupts was that which is set forth in the specifications. *In re Troutman*, (W. D. Ky. 1917) 251 Fed. 930.

**Extension of credit on faith of statement.**—Where the bankrupt made a false statement to secure credit but the creditor noted "caution" upon the statement, intrusted its local branch to limit the credit to a certain amount, and presented no direct testimony that it relied upon the statement, it was held, nevertheless, that as the statement was false, and was the only information upon which the credit was based, the burden was on the bankrupt to overcome the inference that the credit was induced by reason of the false statement. *In re Neuman*, (D. C. Mont. 1917) 251 Fed. 667.

**Worthless check.**—The giving of a worthless check for property purchased is held not to be a "false statement . . . for the purpose of obtaining credit," within the meaning of that phrase as used in this subdivision. *In re Rea*, (D. C. Mont. 1917) 251 Fed. 431.

In another district, however, it is held that the giving of a worthless check by a bankrupt is a "false statement" within the meaning of this section, but that the mere giving of such a check alone is not sufficient to justify a refusal of his discharge, unless it also appears that he actually "obtained money or property on credit" by means thereof, and the burden is on the objecting creditors to establish that fact. *In re Robinson*, (D. C. Mass. 1919) 256 Fed. 55.

**Effect of omissions.**—The omission by the bankrupt in his statement of his financial condition of certain assets and the liability therefor is not as a matter of law a "materially" false statement within the meaning of this section, and in the absence of anything appearing in the record to show that credit would have been refused if such statement had been included it will not bar his discharge or sustain an objection to an offer of compromise. *In re Kerner*, (C. C. A. 2d Cir. 1918) 250 Fed. 993, 163 C. C. A. 243.

But it has been held that where in a statement made to a bank as a basis for a requested loan, the omitted liability consisted of a debt due a usurious money lender, though practically offset by the omission of an asset of equal amount, constituted a "materially



false statement," particularly in view of the character of the debt, as it was reasonable to conclude that if knowledge of the debt had been brought home to the bank it would have refused the loan. *In re*, Reed, (N. D. Ga. 1919), 256 Fed. 412.

**Property—Obtaining renewal of note.**—The obtaining of a renewal of a note is an obtaining of "money or property on credit." *Samet v. Farmers, etc., Nat. Bank*, (C. C. A. 4th Cir. 1917) 247 Fed. 669, 159 C. C. A. 571.

**Intent—Guilty knowledge essential.**—To same effect as original annotation, see *In re* Goldberg, (D. C. Mass. 1919) 256 Fed. 541.

To the same effect as second paragraph of original annotation, see *In re* Kemp, (S. D. N. Y. 1919) 255 Fed. 125.

**Who may object.**—The creditor defrauded may object to the discharge, though by reason of the fraud practiced on him a discharge would not bar the liability of the bankrupt to him. *In re* Armstrong, (S. D. Cal. 1918) 248 Fed. 292.

**Specification of objections.**—The specification of objections to discharge under this paragraph should show what property was thus obtained. *In re* Troutman, (W. D. Ky. 1917) 251 Fed. 930.

An objection based on the making of a false statement must show what the statement was, to whom it was made and from whom goods were obtained thereby. *In re* Epstein, (S. D. Fla. 1917) 248 Fed. 191.

**Evidence—Burden of proof.**—To same effect as original annotation, see *In re* Perlmutter, (D. C. N. J. 1919) 256 Fed. 862.

**Preponderance of evidence sufficient.**—A violation of this section being civil in its nature need not be proved beyond a reasonable doubt: proof by a preponderance of evidence is sufficient. *In re* Perlmutter, (D. C. N. J. 1919) 256 Fed. 862.

**Presumptions.**—A bankrupt who issues a financial statement for the purpose of obtaining property or credit, is presumed to have intended the effect it produces on the person from whom such property or credit is sought. The latter has a right to assume that the statement is true, and if untrue, the person responsible for the untruth, in the absence of proof showing the contrary, will be presumed to have intended to hide from the lender his true financial condition. *In re* Perlmutter, (D. C. N. J. 1919) 256 Fed. 862.

While the presumption that a bankrupt knew the truth or falsity of the statement which he signed and meant what it said, is one of fact and not conclusive, it is one of the weightiest presumptions known to law and one of the most important. *In re* Matter of Goldberg, (D. C. Mass. 1919) 256 Fed. 541.

**Prima facie case.**—When objecting creditors show that a financial statement is untrue in a material respect, which was within the knowledge of the bankrupt, and that he has obtained money on the credit of it, they make out a prima facie case disentitling him

to a discharge. *In re* Perlmutter, (D. C. N. Y. 1919) 256 Fed. 862.

**Conclusiveness of referee's report.**—Where a bankrupt lists in his financial statement certain property at its supposed "assessed" value when in reality he gives the actual cost to him, a referee's conclusions that there was no intentional false statement cannot be said to be erroneous, where it appeared that previous similar statements covering several years were not used in any fraudulent way, and the bankrupt testified that the lender knew that the figures contained in the statements, although purporting to be assessed values, really represented what he had paid for the properties. *In re* Goldberg, (D. C. Mass. 1919) 256 Fed. 541.

**Vol. I, p. 694, sec. 14b (4).** [First ed., 1912 Supp., p. 562.]

**Concealment, etc., of assets—In general.**—To same effect as original annotation, see *In re* Baldwin, (S. D. N. Y. 1918) 253 Fed. 836.

**Necessity of transfer being within four months period.**—To same effect as original annotation, see *Gill v. White*, (C. C. A. 9th Cir. 1918) 249 Fed. 50, 161 C. C. A. 1108.

**What constitutes fraudulent transfer.**—A colorable transfer which does not put the property of the bankrupt beyond the summary power of the bankruptcy court to seize it, is not such a transfer as will warrant the refusal of a discharge. *W. A. Lillier Bldg. Co. v. Reynolds*, (C. C. A. 4th Cir. 1917) 247 Fed. 90, 159 C. C. A. 308.

The incorporation of a successful department of a firm's business, and the transfer by the partners of its capital stock to relatives for what were apparently nominal considerations, when the firm was obviously insolvent, together with the various and unsatisfactory explanations made for the incorporation and the transfer of the stock, indicates an intent to keep this branch of the firm's business for the benefit of the bankrupts and to deprive the firm's creditors of its assets and is therefore a transfer with the intent to hinder, delay, and defraud creditors, and the fact that the shares of the capital stock of the corporation were subsequently, upon demand, surrendered by the transferees to the trustee in bankruptcy, in no way changes the result. *In re* Singer, (C. C. A. 2d Cir. 1918) 251 Fed. 51, 163 C. C. A. 301.

**Adjudication as to fraudulent transfer.**—The decision of a referee that a bankrupt had canceled assets and that a prima facie case had been made out for denying a discharge, based on a state statute permitting a creditor to object to the allowance of a homestead for any kind of fraud and at any time, is not res adjudicata with respect to the right to a discharge, since under this section of the Bankrupt Act it is ground for objection to a bankrupt's discharge that he at any time

subsequent to the first day of the four months immediately preceding the filing of the petition, concealed any of his property with intent to defraud any of his creditors. Accordingly though a fraudulent transfer of assets made more than four months before the filing of the petition for bankruptcy, may under the state statute defeat a homestead, it would not defeat a bankrupt's right to a discharge. *In re Frosteg*, (S. D. Ga. 1918) 252 Fed. 199.

**What constitutes concealment, removal or destruction of property—Transfer to bankrupt's wife.**—The omission from his schedules by a bankrupt of property turned over to his wife, and the inclusion therein as one of his liabilities the money advanced by his wife with which the property was bought, justifies a denial of a discharge but without prejudice pending a determination of the title to the property in dispute. *In re Bishop*, (E. D. N. Y. 1918) 253 Fed. 454.

**Concealment of valueless property.**—Where the payment of a note due his father's estate consumes the entire interest of the bankrupt therein, his failure to include such interest in his schedule will not justify a refusal of his discharge. *Anderson v. Frost City National Bank*, (C. C. A. 7th Cir. 1918) 254 Fed. 793, 166 C. C. A. 239.

**Intent.**—If the intent to hinder and delay creditors exists it is sufficient to justify a denial of discharge; it is not necessary that intent to defraud be proved. *In re Perlmutter*, (D. C. N. J. 1919) 256 Fed. 862.

**Fraud as question of fact.**—A conveyance by a bankrupt is not per se fraudulent. *In re Braus*, (C. C. A. 2d Cir. 1917) 248 Fed. 55, 160 C. C. A. 195, wherein the court said: "An insolvent debtor has the *jus disponendi* of his property until the commencement of proceedings in bankruptcy against him. And the fact that a transfer operates incidentally to hinder or delay creditors is not in itself sufficient to make it void. Every conveyance of a debtor's property may have that effect in some degree. 20 Cyc. 464, and cases there cited. It is also the law that it is not every intent to hinder or delay creditors in collecting their debts that avails to avoid a transfer under section 67e of the Bankruptcy Act. It is every intent to hinder, delay, and defraud creditors unlawfully only, not every intent to hinder or delay them in collecting, or to prevent them from collecting, their claims, that avails to avoid a transfer under that section."

In the case of *In re Braus*, (C. C. A. 2d Cir. 1917) 248 Fed. 55, 160 C. C. A. 195, a transfer by a bankrupt of a large part of his property to a corporation in return for stock which he kept in his possession was held not to show fraudulent intent as a matter of fact.

**Presumption of intent to hinder and delay.**

—The effect of a withdrawal of assets by a bankrupt is to hinder and delay his creditors in securing the payment of their debts, and in the absence of proof to the contrary it is

presumed that it was so intended. *In re Perlmutter*, (D. C. N. J. 1919) 256 Fed. 862.

**Evidence—Shifting of burden of proof.**—Where the creditors of a bankrupt establish facts from which the intent to deceive is presumed, the burden to remove such presumption is cast on the bankrupt. *In re Perlmutter*, (D. C. N. J. 1919) 256 Fed. 862.

**Preponderance of evidence sufficient.**—To same effect as original annotation, see *In re Lally*, (N. D. N. Y. 1919) 255 Fed. 358; *In re Perlmutter*, (D. C. N. J. 1919) 256 Fed. 862.

**Where a bankrupt fails to schedule or surrender.**—To the same effect as the original annotation, see *In re Edelman*, (D. C. Md. 1918) 251 Fed. 429.

**Sufficiency.**—The bold statement of the bankrupt that he used money withdrawn from his assets to pay a gambling debt and had no intention of deceiving his creditors is not sufficient to overcome the presumption of wrongful intent arising from such withdrawal. *In re Perlmutter*, (D. C. N. J. 1919) 256 Fed. 862.

**Vol. I, p. 701, sec. 14b (5).** [First ed., 1912 Supp., p. 567.]

**Discharge by means of composition.**—Where a bankrupt has filed a voluntary petition in bankruptcy, availed himself of the provisions of the law, offered composition which has been accepted by his creditors, approved and confirmed by the court, and the proceeding thus closed, he has received a discharge in bankruptcy, and under the provisions of this section is not entitled to a second within a period of six years therefrom. *In re Radley*, (N. D. N. Y. 1918) 252 Fed. 205.

**Vol. I, p. 701, sec. 14b (6).** [First ed., 1912 Supp., p. 567.]

**Refusal to produce books and papers.**—In the case of *In re Rea*, (D. C. Mont. 1917) 251 Fed. 431, it appeared that a few days before referee's hearing on objections to discharge, the objectors noticed the bankrupts to produce certain contracts, all related letters, and all accounts and bank books and canceled checks for three years before adjudication and afterwards. At the hearing, counsel for the objectors asked that "it appear" that the bankrupts "admit receiving" said notice. Thereupon the bankrupts' counsel stated that they refuse to produce any of the said papers and books, for the reason that they have at all times been subject to the trustee's orders, who "has had perfect liberty to examine them at any time," and that they are at the bankrupt's office, and for the further reason that the most thereof were prior to four months prior to bankruptcy. The referee was not moved to compel production of said papers and books. It was held that this ambiguous situation was not, as contended, a refusal to answer any material question approved by the court.

**Vol. I, p. 702, sec. 14b (6).** [*When trustee may interpose objections.*]

[First ed., 1912 Supp., p. 568.]

**Meeting by whom called.**—To same effect as original annotation, see *In re Whitney*, (D. C. Mass. 1918) 250 Fed. 1005.

**Scope of trustee's authority.**—The trustees can object to the granting of a discharge only when authorized to do so by a meeting of creditors called for that purpose, and failure of the record to show such an authorization is not waived by going to trial. *In re White*, (C. C. A. 9th Cir. 1918) 248 Fed. 115, 160 C. C. A. 255.

**Vol. I, p. 703, sec. 15a.** [First ed., 1912 Supp., p. 568.]

**Revocation of discharge judicial act.**—The revocation of a judgment of discharge is a judicial act, authorized when a trial shall have established the facts prescribed as necessary, by the statute which is the source of the court's power to revoke the judgment of discharge. *Gage v. Penfield*, (C. C. A. 7th Cir. 1918) 249 Fed. 961.

**Application for revocation.**—The petition should state facts which warrant the conclusion that the petitioner was diligent or free from laches; general conclusions are not sufficient. *Gage v. Penfield*, (C. C. A. 7th Cir. 1918) 249 Fed. 961.

**Persons entitled to ask revocation.**—A discharge will not be revoked at the instance of a creditor whose claim is not barred by the discharge. *In re Groodzinky*, (N. D. Ga. 1918) 248 Fed. 753.

**Vol. I, p. 706, sec. 16a.** [First ed., 1912 Supp., p. 569.]

**The manifest purpose of this provision.**—To the same effect as the original annotation, see *Hamilton First Nat. Bank v. Hoffman*, (1918) 102 Kan. 465, 171 Pac. 13.

**The discharge of an endorser from liability through the composition of his principal with his creditors in bankruptcy proceedings is a discharge by operation of law and not by the voluntary act of the party.** Therefore, a release through composition of the principal discharges the liability of the surety notwithstanding the provisions of a state statute that the liability of a person who is a surety for a bankrupt shall not be altered by the discharge of such bankrupt. *In re American Paper Co.*, (D. C. N. J. 1919) 255 Fed. 121.

**Contractor's bond to United States.**—As to the discharge of the liability of a surety on a bond given to the United States by a contractor it has been said: "If Congress found it necessary, as it did, to expressly except taxes due the United States, etc., from the operation of a discharge, it would seem that, if it intended that other debts due the United States should be excepted, it would have so

declared. The omission of any exception of such debts is significant. The insertion of the provision with respect to taxes, without a like provision in regard to ordinary debts due to the United States, must be attributed to some purpose on the part of the lawmaking body. The purpose in view, we think, was that a bankrupt should be discharged from provable debts, to whomsoever owed, except as specified. Ascribing this meaning to the language is in keeping with the purpose and spirit of the Bankruptcy Act. The purpose of such acts, it has been frequently declared, is to relieve the honest debtor from the weight of oppressive indebtedness and to permit him to start afresh, free from the obligations and responsibilities consequent upon business and misfortunes. *Burlingame et al. v. Crouse*, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148. "The United States, when it engages in business enterprises, should be subject to the same laws and occupy no different position than individuals when so engaged. The judgment in favor of Orman is affirmed." *McRhee v. United States*, (Colo. 1918) 174 Pac. 808.

**Forthcoming bonds.**—A discharge in bankruptcy of a principal on a forthcoming bond has, under the facts of the case, been held not to release the sureties on the bond and to be no defense as to the sureties in a suit on the bond. *DeLeach v. Kennedy*, (Ga. App. 1919) 99 S. E. 314.

**Vol. I, p. 708, sec. 17a.** [First ed., 1912 Supp., p. 569.]

**Effect of discharge generally.**—A discharge of personal liability under this section arises by force of the statute, not from any act of the creditor. *McBride v. Gibbs*, (1918) 148 Ga. 380, 96 S. E. 1004.

**All provable debts released—Judgments.**—A judgment of a state court for damages in a negligence case is dischargeable in bankruptcy. *In re Madigan*, (S. D. N. Y. 1918) 254 Fed. 221.

**A judgment rendered against a bankrupt after the commencement of bankruptcy proceedings is not void and his discharge is simply a bar to the enforcement thereof if pleaded.** *Alabama Great Southern Ry. Co. v. Crawley*, (Miss. 1918) 79 So. 94.

**A discharged bankrupt may, in the absence of any statute providing for relief against a judgment rendered against him prior to his discharge, obtain relief by a motion in the court rendering the judgment for a perpetual stay of execution or by a motion to quash any process issued thereon.** *Alabama Great Southern Ry. Co. v. Crawley*, (Miss. 1918) 79 So. 94.

**Liens.**—A discharge of a lien from property to which it has attached never occurs, but may be satisfied or otherwise lost by the conduct of the creditor. If he proves his claim in bankruptcy he invites application of the doctrines of waiver and estoppel, and will be concluded by the action of the court

of bankruptcy so far as it disposes of property affected by his lien. It is similar to the effect of a sale by a sheriff in virtue of a lien. In such a case the creditor cannot again assert his lien on the same property as against the purchaser. *McBride v. Gibbs*, (1918) 148 Ga. 380, 96 S. E. 1004.

*Note secured by mortgage.*—The maker of notes gave a chattel mortgage to secure their payment, and afterward filed a petition in bankruptcy. The holder of the notes procured their allowance as a claim against the estate of the bankrupt. All the property covered by the chattel mortgage, except certain exempt property, was sold by the trustee under an agreement between the trustee, the bankrupt and the holder of the notes. The bankrupt was finally discharged, although the notes were not paid in full. It was held that the discharge released the bankrupt from further payment on the notes, and released all the unsold mortgaged property from the lien of the chattel mortgage. *Hamilton First Nat. Bank v. Hoffman*, (1918) 102 Kan. 465, 171 Pac. 13.

*Discharge of partnership debts.*—Where a partnership is adjudicated bankrupt, the individual partners are entitled to a discharge from their liability for firm debts. *Armstrong v. Norris*, (C. C. A. 8th Cir. 1917) 247 Fed. 253, 159 C. C. A. 347, wherein it was said:

"Ordinarily it is true that a discharge in bankruptcy implies a prior adjudication of the person discharged, but the rule should not be applied too literally. When a partnership alone has been adjudged bankrupt, the individual partners and their estates are drawn in to the proceeding and are subject to the jurisdiction of the court; and when all the conditions and requirements of the Bankruptcy Act have been observed by them, jointly and severally, there is no sound reason why the court should not, upon their application in the same proceeding, discharge them from further liability for the partnership debts. That is a natural and logical outcome of such a proceeding, and is consistent with the long-established practice in equity. An adjudication against the partnership, the necessary relation of the partners thereto, and the jurisdiction of the court over them, empowers the court to award them, if they so desire, the relief which from their standpoint is in the nature of a final decree. To remit them to another proceeding for relief would be unnecessarily vexatious, and to permit them to resort to another jurisdiction would aid them in avoiding an obstacle to their discharge on account of misconduct in the first."

*The proper time and place to test the effect of a discharge.*—*The defense of a discharge in bankruptcy is personal to the bankrupt.* *Alabama Great Southern Ry. Co. v. Crawley*, (Miss. 1918) 79 So. 94.

*Pleading discharge*—*Necessity of pleading.*—To same effect as original annotation, see

*In re Weisberg*, (E. D. Mich. 1918) 253 Fed. 833.

A bankrupt who does not plead his discharge in an action in a state court is not entitled to have the action enjoined by the bankruptcy court. *In re Broadway*, (N. D. N. Y. 1918) 248 Fed. 364.

*Sufficiency.*—Where a suit was brought on a debt dischargeable in bankruptcy, and the defendant debtor filed her plea setting up the facts that she had been adjudicated a bankrupt pending the suit but had not then obtained her discharge, that the debt was duly scheduled, and that the plaintiff was served and appeared at the first meeting of creditors and examined the bankrupt, and where at a subsequent term, while the plea was still pending, the court overruled a motion for a continuance, and the case was tried and verdict and judgment were rendered against the debtor, such judgment could not be enforced after the discharge of the bankrupt, where she properly set up, in an equitable petition to restrain the enforcement of the judgment and execution, the fact of her discharge. *Morris v. Perkins*, (Ga. 1918) 97 S. E. 526.

*Evidence of discharge*—*Burden of proof.*—A defendant in an action on a debt who pleads a discharge in bankruptcy has the burden of proving it. *Smith v. Hill*, (1919) 232 Mass. 188, 122 N. E. 310, 2 A. L. R. 1667.

**Vol. I, p. 716, sec. 17a (2).** [First ed., 1912 Supp., p. 573.]

I. False pretenses or representations.  
II. Wilful and malicious injuries.

#### I. FALSE PRETENSES OR REPRESENTATIONS (p. 716)

*Liability for obtaining property by false pretenses or false representations*—*In general.*—A judgment entered on defendant's filing consent thereto based on a contract by which the plaintiff paid a certain sum to defendant, who subsequently became bankrupt, on the agreement by the latter to divide profits in a venture in real estate which was to be transferred by a third party to the defendant but which was not so conveyed, is not a debt which is not discharged under section 17a(2), there being nothing disclosed to show that the defendant was guilty of fraud in obtaining money. *Bowman v. Provident Realty Inv. Co.*, (Cal. App. 1919) 180 Pac. 18.

*Effect of resistance to discharge.*—The fact that the creditor unsuccessfully resisted the application for a discharge does not alter the rule that the discharge is not a bar to claims based on fraud. *In re Grodzinsky*, (N. D. Ga. 1918) 248 Fed. 753.

*Action for purchase price on breach of contract.*—The defendant sold a second hand automobile to the plaintiff. The plaintiff claimed that the defendant agreed to take it back and repay the purchase price if certain representations or warranties made as a

part of the contract of sale were untrue, and that they were untrue. The defendant refused to repay the purchase price. Suit was brought and the plaintiff had judgment. Upon an examination of the pleadings and charge of the court it was held that the action was on contract, and that the judgment was not excepted from the operation of the defendant's discharge in bankruptcy as representing a liability "for obtaining property by false pretenses or false representations." *Guindon v. Brusky*, (Minn. 1919) 170 N. W. 918.

**Constructive fraud.**—To the same effect as the original annotation, see *Gregory v. Pierce*, (Ia. 1919) 172 N. W. 288.

**Burden of proof.**—The burden of proof is upon the creditor who claims that his duly scheduled debt is excepted from the operation of the discharge in bankruptcy because of fraud; and when under the pleadings and charge the creditor's judgment might be based upon contract, or upon fraud, or upon both, and there is nothing but the pleadings and charge from which to determine the fact, the creditor does not sustain the burden. *Guindon v. Brusky*, (Minn. 1919) 170 N. W. 918.

## II. WILFUL AND MALICIOUS INJURIES (p. 720)

**Wilful and malicious injuries—Disposal of property without authority of owner.**—Where an employee, in good faith and for a valuable consideration, sells, transfers, and assigns his title and right to possession of a stipulated amount of salary due him by his employer, and thereafter collects the money thus transferred, he cannot, as against a suit for the recovery of the money, avail himself of a discharge in bankruptcy as a defense. The instrument of transfer is an assignment of title. One who thus disposes of property without the authority of its owner is guilty of a wilful or malicious injury to property within the meaning of the Bankruptcy Act and consequently his liability is not released by a discharge in bankruptcy. *Covington v. Rosenbusch*, (Ga. 1918) 97 S. E. 78; *Covington v. Rosenbusch*, (Ga. App. 1918) 97 S. E. 462.

**Injuries caused by negligence.**—A judgment against a bankrupt for negligent injury to the property of another when not the result of wilful malice is a provable debt and as such dischargeable in bankruptcy. *In re Cunningham*, (N. D. N. Y. 1918) 253 Fed. 663.

**Running car at unlawful speed.**—In *Ex p. Cote*, (Vt. 1918) 106 Atl. 519, it was held that the facts set forth a case of "wilful and malicious injury to the person" of the intestate, it appearing that he was killed while in an automobile by a passing automobile being driven at an unlawful rate of speed on the wrong side of the road.

**Declaration as determining whether injuries were wilful and malicious.**—In *Ex p. Cote*, (Vt. 1918) 106 Atl. 519, which was a

habeas corpus proceeding by *Cote*, it appeared that judgment was obtained against him in a tort action and that at the time of its rendition the court adjudged and certified that the cause of action arose from the wilful and malicious act of the relator. Later the relator was adjudged a bankrupt and after a discharge in bankruptcy he was committed to jail upon an execution issued upon the judgment. Habeas corpus proceedings were instituted to secure his relief on the ground that the discharge in bankruptcy discharged him from the judgment. But the court took a different view.

## Vol. I, p. 724, sec. 17a (3). [First ed., 1912 Supp., p. 577.]

**Debts not duly scheduled.**—The discharge of a bankrupt is not operative against a creditor, who had no notice or actual knowledge of the proceedings in bankruptcy, and whose claim was not duly scheduled; but mere want of such notice or knowledge will not prevent the discharge from becoming operative if the debt was duly scheduled. *Travis v. Sams*, (Ga. App. 1919) 99 S. E. 239.

**Knowledge of bankruptcy proceedings.**—If a creditor has knowledge or notice, however acquired, of proceedings in bankruptcy against his debtor in time to prove his claim, and does not do so the claim is barred by the bankrupt's discharge whether it was scheduled or not. *Davis v. Findley*, (Ala. 1918) 78 So. 869.

Actual notice as distinguished from imputed or constructive notice is necessary to discharge an unscheduled claim. *Lynch v. McKee*, (Tex. Civ. App. 1919) 214 S. W. 484, holding notice to the creditor's attorney, not communicated by him, to be insufficient.

Where the evidence in a case showed that the plaintiff creditor did not have notice or actual knowledge of the proceedings in bankruptcy but it was silent as to whether his claim was duly scheduled therein, it was held that the trial court erred in rendering a judgment in his favor. *Travis v. Sams*, (Ga. App. 1919) 99 S. E. 239.

**Burden of proof of knowledge.**—To the same effect as the original annotation see *Smith v. Hill* (1919) 232 Mass. 188, 122 N. E. 310, 2 A. L. R. 1667.

## Vol. I, p. 734, sec. 18a. [First ed., 1912 Supp., p. 579.]

**Commencement of proceedings.**—The filing of the petition, while not divesting the bankrupt of title to his property, constitutes him in effect a trustee for the benefit of his creditors from that time until adjudication when that follows, and although he may have power to dispose of his property in the ordinary course of business in the interval, and even though he may do so by making preferential payments not tainted with actual fraud (which in this case was not decided),

he certainly has no right to use his property for gambling after the petition is filed. *In re Sternburg*, (D. C. Mass. 1918) 249 Fed. 980.

**Amendment of petition.**—A bankruptcy court being rightfully possessed of a cause, enjoys the power of amendment which is incidental to all judicial administration, and therefore authorizes a petition, which is too vague and general, to be made certain. *In re Havens*, (C. C. A. 2d Cir. 1918) 255 Fed. 478, 166 C. C. A. 554.

Ordinarily an act of bankruptcy not set forth in the original petition cannot be introduced into a pending proceeding by amendment made more than four months after its commission. But where the act of bankruptcy is a continuing one, such for instance as the continued concealment of property, it may be brought in by amendment made within four months from the date of discovery. *In re Havens*, (C. C. A. 2d Cir. 1918) 255 Fed. 478, 166 C. C. A. 554.

**Mode of service—Sufficiency of order for publication of subpoena.**—By mistake of the printer the following line was omitted from the printed copy of the order directing that the subpoena be served by publication: "be made by publishing this order together with said subpoena." This omission did not make the order misleading or unintelligible. It is therefore immaterial, and certainly could not be made the basis for such fundamental action as setting aside the adjudication. *Hunter v. J. G. Cherry Co.*, (C. C. A. 8th Cir. 1917) 247 Fed. 458, 159 C. C. A. 512.

**Vol. I, p. 738, sec. 18b.** [First ed., 1912 Supp., p. 581.]

**Time to plead—Extension of time to answer petition.**—A creditor coming in after the petition and making no answer is entitled to notice of an application by another creditor for extension of time to answer. *In re D. F. Herlehy Co.*, (N. D. N. Y. 1918) 247 Fed. 369.

**Propriety of refusing extension.**—It is not an abuse of discretion to refuse to permit a creditor after the lapse of several weeks to file an answer to the petition, and "the provisions of section 59f were not intended to allow creditors to come in and answer at any time." *In re D. F. Herlehy Co.*, (N. D. N. Y. 1918) 247 Fed. 369.

**Erroneous recital in adjudication.**—The return day fixed by the order of publication and the subpoena was October 30th. By section 18b of the Bankruptcy Act the bankrupts and their creditors "may appear and plead to the petition within five days after the return day." The adjudication, therefore, could not have properly been entered until November 5th. The referee who entered the judgment recites that the matter came on to be heard on the 4th day of November. This was a clerical error, as the proceeding was not referred to him until the 5th. His order of adjudication actually bears date on November 5th. It is plain,

therefore, that the recitation of November 4th was a clerical error, and affords no ground for such relief as the petitioners are seeking. *Hunter v. J. G. Cherry Co.*, (C. C. A. 8th Cir. 1917) 247 Fed. 458, 159 C. C. A. 512.

**Vol. I, p. 741, sec. 18d.** [First ed., 1912 Supp., p. 583.]

**Answer—Sufficiency and effect.**—Where the petitioning creditors had alleged in their original petition for the adjudication and in the amendments thereto eleven acts of bankruptcy committed by the bankrupt, one of which was that he had admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt, and another creditor had answered the original petition and the amendments, and had denied all the alleged acts of bankruptcy and the insolvency of the bankrupt, and had stood upon its answer and demanded a trial of the issues between itself and the petitioning creditors, and it further appeared that the bankrupt had answered and denied the acts of bankruptcy alleged in the original petition, but had later withdrawn his answer, it was held that the opposing creditor was entitled to a trial of the issues between it and the petitioning creditors. *Albers Commission Co. v. Richter*, (C. C. A. 9th Cir. 1918) 251 Fed. 869, 164 C. C. A. 85.

**Evidence—Burden of proof.**—To the same effect as the original annotation, see *Albers Commission Co. v. Richter*, (C. C. A. 8th Cir. 1918) 251 Fed. 869, 164 C. C. A. 85.

**Effect of adjudication—Adjudication as res judicata.**—An adjudication in bankruptcy, so far as it establishes the status of the debtor as a bankrupt, is conclusive even as to strangers to the decree. But like other judgments in rem, an adjudication in bankruptcy is not res judicata as to the facts or as to the subsidiary questions of law on which it is based, except as between those who were parties or privies to the proceeding. *Gratiot County State Bank v. Johnson*, (1919) 249 U. S. 246, 39 S. Ct. 263, 63 U. S. (L. ed.) —, reversing (1916) 193 Mich. 452, 160 N. W. 544.

**Vacating adjudication.**—Where the adjudication is questioned, the filing of a motion, with notice, for the vacating of the order of adjudication is recognized as the proper practice. *In re Nash*, (D. C. S. D. W. Va. 1918) 249 Fed. 375.

**Vol. I, p. 746, sec. 18g.** [First ed., 1912 Supp., p. 586.]

**Dismissal after adjudication.**—Where it appears that a person filing a voluntary petition has no assets, and no purpose can be perceived in his action except to hinder, delay or defraud his creditors, as no discharge can be granted owing to the want of the required period since the filing of a prior

voluntary petition, the court should dismiss the petition. *In re Nash*, (D. C. S. D. W. Va. 1918) 249 Fed. 375.

**Vol. I, p. 748, sec. 19a.** [First ed., 1912 Supp., p. 586.]

**Burden of proof.**—To the same effect as the original annotation, see *Albers Commission Co. v. Richter*, (C. C. A. 8th Cir. 1918) 251 Fed. 969, 164 C. C. A. 85.

**Vol. I, p. 749, sec. 19c.** [First ed., 1912 Supp., p. 588.]

**Submission of matters in controversy to jury.**—To same effect as original annotation, see *Morrison v. Rieman*, (C. C. A. 7th Cir. 1917) 249 Fed. 97, 161 C. C. A. 149.

**Vol. I, p. 751, sec. 21a.** [First ed., 1912 Supp., p. 589.]

**Purpose and scope of examination.**—*Scope of examination.*—In *In re Madero*, (S. D. N. Y. 1919) 256 Fed. 859, it was held that this section did not apply to an examination before a referee regarding an alleged contract concerning the bankrupt's property made by his trustee in bankruptcy with a third person. "So far as I have found, this is a case of first impression. It is quite true that it is no valid objection to an examination under section 21a that the evidence elicited may be pertinent to a suit pending between the trustee and the witness. *In re Cliffe*, (D. C.) 97 Fed. 540, 542.

**Adjudication as condition precedent to examination.**—To same effect as original annotation, see *In re Weidenfeld*, (C. C. A. 2d Cir. 1918) 254 Fed. 677, 166 C. C. A. 175.

**Who may be examined.**—If a bankrupt removes into another district ancillary proceedings are open to his creditors, but when he is in attendance upon the court lawfully engaged about the business of his adjudication, he must submit to all the lawful orders of that court, including examination under this section, and cannot claim immunity because of such change of residence. *In re Havens*, (C. C. A. 2d Cir. 1918) 255 Fed. 478, 166 C. C. A. 554.

**Review of order for examination.**—The power to require any designated person, including the bankrupt's wife, to submit to examination concerning the affairs of the bankrupt, is discretionary with the court, therefore an order for such examination is not reviewable, even on the application of the person aggrieved, except for an abuse of discretion. *In re Weidenfeld*, (C. C. A. 2d Cir. 1918) 254 Fed. 677, 166 C. C. A. 175.

**Right of witness to counsel.**—"One of the fundamental rights of every person compelled or entitled to appear in court to defend himself or his property is the right to be attended by counsel. Creditors, therefore, having interests in bankruptcy proceedings

vitaly affecting themselves and their property certainly should not be deprived of this fundamental and valuable right. The fact that a creditor entitled to thus appear and be represented by counsel at this examination is summoned to attend as a witness surely cannot so affect the situation that a creditor who might otherwise have attended the hearing with counsel loses this right merely because, instead of appearing voluntarily, he attends in response to a subpoena. No good reason for this distinction has been presented to me and I can perceive none. Nor does the fact that a creditor has not actually proved his claim render him any the less a creditor of the bankrupt within the meaning of the Bankruptcy Act. Furthermore, this right of the creditor in the present case to have counsel present at his examination before the referee, cannot, in my opinion, be lost or affected by the fact that his attorney happened also to be the attorney for the bankrupt." *In re Prussian*, (E. D. Mich. 1919) 255 Fed. 857.

**Right to copies of testimony.**—Where, in the course of an investigation under this section, the testimony of a large number of witnesses has been taken stenographically before the referee, without notice to and in the absence of the bankrupt, the latter is entitled to a copy thereof on payment of the required fees. *Petition of Moulthrop*, (C. C. A. 6th Cir. 1918) 249 Fed. 468.

**Vol. I, p. 757, sec. 22a.** [First ed., 1912 Supp., p. 593.]

**Jurisdiction of referee.**—Where a bill brought by a trustee under section 70-a, *infra*, to avoid an alleged fraudulent conveyance by a bankrupt, is referred generally to a referee under this section, he has jurisdiction to determine its merits. *Graham v. Faith*, (C. C. A. 1st Cir. 1918) 253 Fed. 32, 165 C. C. A. 52; *In re Weidhorn*, (C. C. A. 1st Cir. 1918) 253 Fed. 28, 165 C. C. A. 48.

**Vol. I, p. 759, sec. 23a.** [First ed., 1912 Supp., p. 594.]

**Who is adverse claimant.**—A corporation formed for the purpose of reviewing a fraudulent conveyance of the property of an insolvent debtor is not an adverse claimant thereof whose rights must be litigated as if the bankruptcy proceeding had not been instituted, but is subject to the summary jurisdiction of the bankruptcy court. *W. A. Lillier Bldg. Co. v. Reynolds*, (C. C. A. 4th Cir. 1917) 247 Fed. 90, 159 C. C. A. 308.

**Jurisdiction of state court.**—Where the state court had no jurisdiction of claims against a bankrupt, it must dismiss the cause without attempting to determine the merits which were exclusively within the jurisdiction of the federal court. *De Muth v. Faw*, (1918) 103 Wash. 279, 174 Pac. 18.

Where in respite proceedings the judgments appealed from are not money judgments

against plaintiffs, and do not affect their property, but are merely orders to plaintiffs to furnish security to two of their creditors, the state court is not ousted of jurisdiction of the cases by the subsequent proceedings of plaintiffs in the bankruptcy court. *Cartolotta & Co. v. Their Creditors*, (La. 1919) 81 So. 399.

**Vol. I, p. 761, sec. 23b.** [First ed., 1912 Supp., p. 595.]

- I. Jurisdiction of adverse claims.
- II. Jurisdiction as affected by possession.
- III. Jurisdiction by consent.
- IV. Recovery of preferential and fraudulent transfers.
- V. Summary and plenary jurisdiction.
- VI. Jurisdiction of state courts.

**I. JURISDICTION OF ADVERSE CLAIMS (p. 761)**

**Bona fide adverse claims—Against agent or general assignee of bankrupt.**—To same effect as second paragraph of original annotation, see *Matter of Reising*, (D. C. N. D. 1918) 253 Fed. 390, also holding that the fact that the assignee claims a part of the bankrupt's funds in his hands as fees and commissions, does not make him an adverse claimant, and distinguishing *Louisville Trust Co. v. Cominger*, (1902) 184 U. S. 18, 22 S. Ct. 293, 46 U. S. (L. ed.) 413, the holding of which case is given in the third paragraph of the original annotation.

**II. JURISDICTION AS AFFECTED BY POSSESSION (p. 765)**

**Possession of property gives jurisdiction thereover.**—To the same effect as the original annotation, see *Story*, etc., *Piano Co. v. Homes*, (C. C. A. 7th Cir. 1918) 251 Fed. 565, 163 C. C. A. 559.

**Possession by adverse claimant under contract.**—Where the property in dispute is in the possession of an adverse claimant, whose claim does not rest on pretense as shown, but is real and not colorable, the bankruptcy court cannot dispose of it in a summary proceeding. Therefore, where a city has taken possession of property belonging to a contractor who has abandoned his contract, claiming the power to do so under the terms of the contract, the court cannot dispose of the claim in a summary proceeding, but the city is entitled as a matter of right to have the matter disposed of in a plenary action. *In re Dailey*, (C. C. A. 2d Cir. 1918) 255 Fed. 529, 166 C. C. A. 597.

**Surrender of possession.**—Where the trustee's watchman, having received notice that another person was to take his place, withdrew at once and peaceably, neither force nor threat being used, the charge taking place after the respective rights of both parties had fully matured, it was held that the decision of the district judge, that there had been a surrender of possession, would not be

interfered with. *In re Mid-Valley Coal Co.* (C. C. A. 3d Cir. 1918) 251 Fed. 815, 163 C. C. A. 649.

**III. JURISDICTION BY CONSENT (p. 767)**

**Filing of answer.**—Where in a plenary action by a trustee, the defendant files a full and specific answer to the charges, without suggestion or objection on his part to the jurisdiction of the bankruptcy court to hear and determine the issues, consent to jurisdiction sufficiently appears. *Seegmiller v. Day*, (C. C. A. 7th Cir. 1918) 249 Fed. 177.

**Failure to object.**—Failure to object to the jurisdiction, on the ground that the action is not one which the bankrupt might have brought, until the brief has been filed in a proceeding for review is equivalent to a consent. *In re Berry*, (E. D. Mich. 1917) 247 Fed. 700.

**IV. RECOVERY OF PREFERENTIAL AND FRAUDULENT TRANSFERS (p. 769)**

**Jurisdiction to recover property fraudulently or preferentially transferred.**—A suit by a trustee in bankruptcy to avoid a transfer which he regards as a voidable preference, within the meaning of the Bankruptcy Act, § 60-b, and to recover the property transferred or its value, may be brought in a federal District Court whose territorial limits include the property sought to be recovered, although such court is not the one in which the bankruptcy proceeding is pending, and although defendant has not given his consent, since by the amendatory Acts of February 5, 1903, and June 25, 1910, an exception was ingrafted on section 23-b which takes such suits out of the restrictive provisions of that section, and there was added to section 60-b a sentence which makes them cognizable in courts of bankruptcy as well as in such state courts as could have entertained them if bankruptcy had not intervened, and to section 2 a new clause was added, investing courts of bankruptcy with power to "exercise ancillary jurisdiction over persons or property within their respective territorial limits, in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy." *Collett v. Adams*, (1919) 249 U. S. 545, 39 S. Ct. 372, 63 U. S. (L. ed.) —.

**Pleading and practice.**—The concurrent jurisdiction of the bankruptcy courts to set aside preferences under section 60-b, and fraudulent transfers under sections 67-e and 70-e, extends to a suit in equity brought by a trustee in bankruptcy who invokes by the allegations of his bill the aid of these sections, although the evidence may show that there was no unlawful preference or fraudulent transfer, since jurisdiction must be determined not upon the conclusion on the merits of the action, but upon consideration of the grounds upon which federal jurisdiction is invoked. *Flanders v. Coleman*, (1919)



250 U. S. 223, 39 S. Ct. 472, 63 U. S. (L. ed.) — (*reversing* (S. D. Ga. 1918) 249 Fed. 757), wherein the court said: "To justify its conclusion that it was without jurisdiction the district judge cites certain decisions of this court: *Bardes v. Hawarden First Nat. Bank*, (1900) 178 U. S. 524 [20 S. Ct. 1000, 44 U. S. (L. ed.) 1175], in which this court held that under section 23 of the Bankruptcy Act the District Court could by the consent of the defendant, and not otherwise, entertain suits by the trustee against third persons to recover property conveyed by the bankrupt before the institution of the bankruptcy proceedings. It is sufficient to say of that case that it was decided under the terms of the act before the amendments of 1903 and 1910, respectively, to which we have referred, and which give concurrent jurisdiction to the state and federal courts. The District Court also cited *Harris v. Mt. Pleasant First Nat. Bank*, (1910) 216 U. S. 382 [30 S. Ct. 296, 54 U. S. (L. ed.) 528], wherein no transfer of the bankrupt's property was alleged in the petition. The suit was one by the trustee to recover securities of the bankrupt, alleged to be held by the bank for the security of an overdraft which, it is averred, had been paid; and also to recover certain notes alleged to have been paid by the bankrupt. The opinion of the District Court shows that it really considered the merits of the case in reaching the conclusion that it was without jurisdiction. As this court has not infrequently said, jurisdiction must be determined not upon the conclusion on the merits of the action, but upon consideration of the grounds upon which federal jurisdiction is invoked."

**Process running into another district.**—A suit in a federal District Court, whose territorial limits include the property, to set aside a transfer by a bankrupt as a voidable preference and to recover the property transferred, or its value, is a local one, within the meaning of the Judicial Code, § 54 (see vol. 5, p. 523), which enables the court in such suits to reach a defendant who resides in another district in the same state, by original process sent to and served in the district of his residence; and such a suit, apart from the terms of the Bankruptcy Act, is excepted by section 41 (see vol. 5, p. 486) of the Judicial Code from the general provision that a defendant may not be sued in any district other than that of which he is an inhabitant. *Collett v. Adams*, (1919) 249 U. S. 545, 39 S. Ct. 372, 63 U. S. (L. ed.) —.

**Pendency of action in state court.**—The pendency in a state court of a suit for fraud and deceit in which an attachment of defendant's property was sought does not exclude the jurisdiction of a federal District Court of a subsequent suit by the defendant's trustee in bankruptcy, not a party to the prior suit, to avoid, as a preferential transfer, a conveyance of such property to the plaintiff in such prior suit, made for the

purpose of settling that suit, but with a stipulation that if defendant was not adjudged a bankrupt on a petition presented within four months after the transfer was recorded plaintiff should dismiss the suit and pay the unpaid costs, and that if, on a petition so filed, defendant was adjudged a bankrupt, plaintiff should have the right to prosecute the suit to judgment and to enforce all liens acquired through the attachment. *Collett v. Adams*, (1919) 249 U. S. 545, 39 S. Ct. 372, 63 U. S. (L. ed.) —.

#### V. SUMMARY AND PLENARY JURISDICTION (p. 770)

**Necessity of plenary action.**—To same effect as original annotation, see *In re Phoenix Planing Mill*, (N. D. Ga. 1918) 250 Fed. 898; *In re Joseph R. Marquette*, (C. C. A. 2d Cir. 1918) 254 Fed. 419, 166 C. C. A. 51.

**Determination of title to land.**—To the same effect as the original annotation, see *In re Moose River Lumber Co.*, (N. D. N. Y. 1918) 251 Fed. 409.

**Good-faith assertion of title and right of possession** constitute an adverse claim, as distinguished from a "proceeding in bankruptcy," and entitle the claimant to a plenary hearing, but only the kind of plenary hearing that would fit the situation. *Story, et al., Piano Co. v. Holmes*, (C. C. A. 7th Cir. 1918) 251 Fed. 565, 163 C. C. A. 559.

**Summary jurisdiction.**—To same effect as first paragraph of original annotation, see *In re Joseph R. Marquette*, (C. C. A. 2d Cir. 1918) 254 Fed. 419, 166 C. C. A. 51.

**Property in possession of trustee.**—It is essential to the summary jurisdiction of the bankruptcy court to prevent interference with a lease made by the bankrupt, and to determine any adverse claims thereto, that possession of the lease was in the trustee at the time he filed his petition asking the protection of the court in making the sale of the lease and its delivery. *Lowhead v. Monroe Bldg. Co.*, (C. C. A. 6th Cir. 1918) 252 Fed. 758, 164 C. C. A. 598.

**Order for payment of surrender value of insurance policy.**—An order requiring a bankrupt to pay or secure to the trustee the cash surrender value of an insurance policy, under the terms of which the beneficiary may be changed, is not a summary proceeding against such beneficiary, as the order does not affect her rights. *Richter v. Rockhold*, (C. C. A. 5th Cir. 1918) 253 Fed. 941, 165 C. C. A. 383.

**Accounts belonging to creditor.**—The owner of accounts for goods sold through the bankrupt as agent may recover the same from the trustee by petition in the bankruptcy proceedings, and is not obliged to bring a plenary action therefor. *International Agricultural Corp. v. Sparks*, (W. D. S. C. 1917) 250 Fed. 318.

**Set-off after filing of petition.**—A bank coming into possession of funds of a bankrupt

through deposit with it after the petition against him was filed, cannot set up its claim of right to apply such sum to the bankrupt's debt to it on a note. A plenary suit is not necessary in such a case, but the delivery to the trustee of the bankrupt's property so acquired and held by the bank after the court's control of it attached, may be ordered in a summary proceeding. *Reed v. Barnett National Bank*, (C. C. A. 5th Cir. 1918) 250 Fed. 983 163 C. C. A. 233.

#### VI. JURISDICTION OF STATE COURTS (p. 772)

**Construction of will.**—A state trial court has jurisdiction to entertain a suit by a trustee in bankruptcy to construe a will under which the bankrupt is claimed to be a devisee. *Scott v. Gillespie*, (1918) 103 Kan. 745, 176 Pac. 132.

**Partition.**—A state court has jurisdiction of a partition suit by a trustee against the bankrupt's wife. *Harlin v. American Trust Co.*, (Ind. App. 1918) 119 N. E. 20.

**Recovery of land and notes given for rent.**—Where in a suit in equity by the bankrupt's trustee against an adverse claimant to recover a tract of land and certain notes given by the tenant for the rent of it, the general scope of the bill is to the effect that, many years prior to the bankruptcy, the father of the bankrupt, who is the defendant, made a parol gift of the land to the bankrupt, who entered into possession of the land, made valuable and permanent improvements thereon on the faith of the gift, and that under the laws of the state the bankrupt became vested with a complete title thereto, and the bankrupt and defendant denied that a parol gift of the land had been made and insisted that the bankrupt's possession was by permission and with the consent of the defendant, it was held that if there was a gift of the land, the title still was in the bankrupt and he had made no transfer of it which a court of equity could cancel and that the trustee's remedy was by a suit in the proper state court to recover the land. *Flanders v. Coleman*, (D. C. S. D. Ga. 1918) 249 Fed. 757.

Where it is claimed that the bankrupt's father made a gift of certain land to him, which claim is denied, and it appears that the bankrupt executed a lease of the land taking notes for the rent, the rent notes represent the mesne profits or issues of the land, and their ownership and right of possession to same follow the ownership of the land. *Flanders v. Coleman*, (D. C. S. D. Ga. 1918) 249 Fed. 757.

**Vol. I, p. 774, sec. 24a.** [First ed., 1912 Supp., p. 603.]

II. Controversies arising in bankruptcy proceedings.

III. Review by United States Supreme Court direct from United States District Court.

#### II. CONTROVERSIES ARISING IN BANKRUPTCY PROCEEDINGS (p. 776)

**Decisions held appealable.**—In the following cases decisions were expressly or impliedly held to be appealable to the Circuit Court of Appeals under this section:

An order setting aside a deed of trust on the ground that it is a voidable preference. *Bridgeton Nat. Bank v. Way*, (C. C. A. 4th Cir. 1918) 253 Fed. 731, 165 C. C. A. 325.

The question of the validity of an alleged mechanic's lien on a bankrupt's property and its priority, if valid, over the lien of a trust deed in the nature of a mortgage raised by what was properly treated by the parties as an intervening petition of the lien claimant to establish his lien and the answers thereto of the trustee in bankruptcy and the trustee under the trust deed, involves a controversy arising in a proceeding in bankruptcy, which is reviewable only by appeal under this section. *Feick v. Stephens*, (C. C. A. 6th Cir. 1918) 250 Fed. 191, 162 C. C. A. 327.

**Presentation and reservation in lower court of ground of objection.**—A claimant's failure to take steps in the District Court to secure a review of the finding of the referee master, disallowing a part of the claim, precludes the consideration thereof by the Circuit Court of Appeals on appeal. *Feich v. Stevens*, (C. C. A. 6th Cir. 1918) 250 Fed. 185, 162 C. C. A. 321.

**Time limit for appeal.**—Where brick manufactured by the bankrupt were claimed by a lessee, and his petition to be given possession was opposed by one who had made advances to the bankrupt, it was held that an appeal from an order granting the petition could be taken within six months under section 24-a and was not limited to ten days by section 25-a. *Ragland Bank v. Hudson*, (C. C. A. 5th Cir. 1918) 247 Fed. 241, 159 C. C. A. 335.

#### III. REVIEW BY UNITED STATES SUPREME COURT DIRECT FROM UNITED STATES DISTRICT COURT (p. 785)

**Jurisdiction of District Court in issue.**—In *Collett v. Adams*, (1919) 249 U. S. 545, 39 S. Ct. 372, 63 U. S. (L. ed.) —, the court determined the certified question of jurisdiction of the district of a certain suit by a trustee in bankruptcy to recover a voidable preference under section 60-b of the Bankruptcy Act; and in *Flanders v. Coleman*, (1919) 250 U. S. 223, 41 S. Ct. —, 63 U. S. (L. ed.) —, a suit by such trustee to set aside preferences under section 60-b, and transfers under sections 67-e and 70-a.

**Vol. I, p. 791, sec. 24b.** [First ed., 1912 Supp., p. 611.]

**Appeal or petition to revise as exclusive or optional right.**—An order denying a claim as a lien against a bankrupt estate, when determined on issues of fact, is not reviewable on a petition to superintend and revise,

but must be brought up by appeal. *Luck v. Staples*, (C. C. A. 4th Cir. 1918) 255 Fed. 637.

**Appeal treated as petition to revise.**—Although an appeal has not been filed within the required time it will not be dismissed if the question it raises is a question of law, and it has been filed within the time allowed for the filing of a petition to revise. In such a case the appeal may be treated as a petition to revise. *Graham v. Faith*, (C. C. A. 1st Cir. 1918) 253 Fed. 32, 165 C. C. A. 52.

**A so-called "petition for review"** filed in the District Court, reciting the proceedings and conclusions of the court and alleging that such conclusion is erroneous in law, and asking that it be reviewed by the Circuit Court of Appeals, is ineffectual to bring the case into that court for any purpose. *Bridgeton Nat. Bank v. Way*, (C. C. A. 4th Cir. 1918) 253 Fed. 41, 165 C. C. A. 665.

**Appeal united with petition.**—To same effect as original annotation, see *Luck v. Staples*, (C. C. A. 4th Cir. 1918) 255 Fed. 637.

**Questions and orders reviewable or not reviewable on petition—Order refusing to vacate adjudication.**—The refusal to vacate an adjudication on motion of a creditor is reviewable by petition to revise. *Armstrong v. Norris*, (C. C. A. 8th Cir. 1917) 247 Fed. 253, 159 C. C. A. 347.

**Order to set aside discharge.**—An order denying a motion to set aside a discharge, being reviewable on petition to revise, cannot be reviewed on an appeal from the order granting the discharge. *In re White*, (C. C. A. 9th Cir. 1918) 248 Fed. 115, 160 C. C. A. 255.

**Orders in contempt proceedings.**—An order of the District Court dismissing a rule to show cause why a bankrupt should not be adjudged in contempt for failure and refusal to comply with the order of the referee to turn a certain sum of money to the trustee, is not reviewable by a petition to revise. *Galbraith v. Rosenstein*, (C. C. A. 8th Cir. 1918) 250 Fed. 445, 162 C. C. A. 515.

An order of a court of bankruptcy concerning the commitment of a bankrupt for contempt for not complying with an order to turn over to his trustee property belonging to the bankrupt estate is reviewable only by petition to revise under this section. *Horton v. Mendelsohn*, (C. C. A. 3d Cir. 1918) 249 Fed. 185.

**Refusal of confirmation of composition.**—An order dismissing a petition for confirmation of a proposed composition, predicated wholly upon the proposition of law that the proposed offer was not a composition within the meaning of the Bankruptcy Act, and in no manner involved the right of the bankrupt to be discharged, involves a matter of law arising in the bankruptcy proceedings, and is reviewable in the Circuit Court of Appeals upon petition to review and revise, and not on appeal. *In re Graham*, (C. C. A. 7th Cir. 1918) 252 Fed. 93, 164 C. C. A. 205.

**Interlocutory orders.**—While the Circuit Court of Appeals has the power to revise interlocutory proceedings in bankruptcy, the resort to that court is not favored when the matter can be raised by appeal or petition from the order or decree finally disposing of the matter. *In re Horowitz*, (C. C. A. 2d Cir. 1918) 250 Fed. 106, 162 C. C. A. 278.

Where the question of the right of the clerk of the court to receive the rents from the property of a bankrupt is raised in both an appeal from a chancery case involving the matter and a petition for review in the bankruptcy proceedings, and it has been favorably decided on the appeal in the chancery case, it becomes a moot question and no further decision will be rendered thereon. *Ward v. Central Trust Co.*, (C. C. A. 7th Cir. 1918) 252 Fed. 127, 164 C. C. A. 239.

The surrender of leasehold premises by a trustee in bankruptcy in pursuance to a decree in proceedings on his petition to quiet his title is not a voluntary abandonment and does not render the question moot on a hearing of an appeal from the petition, as in case of a reversal he would be entitled to reobtain possession. *Towhead v. Monroe Bldg. Co.*, (C. C. A. 6th Cir. 1918) 252 Fed. 758, 164 C. C. A. 578.

**Orders of a miscellaneous character in the past few years expressly or impliedly held reviewable on petition are as follows:**

An order for the sale of a bankrupt's real estate freed and discharged from the wife's inchoate right of dower, with provision in substance that she should be paid from the proceeds such compensation as the court might thereafter determine to be just. *Relly v. Minor*, (C. C. A. 4th Cir. 1918) 252 Fed. 115, 164 C. C. A. 227.

A decree of the District Court denying a referee's jurisdiction to investigate the merits of a bill brought by a trustee in bankruptcy to avoid certain conveyances made by the bankrupt. *In re Weidhane*, (C. C. A. 1st Cir. 1918) 253 Fed. 28, 165 C. C. A. 48.

**Filing of petition.**—A petition for revision, filed only with the clerk but treated by the referee as filed with him, is as effective as if it had first been filed with that officer and later by him filed with the clerk. *In re Wood*, (C. C. A. 6th Cir. 1918) 248 Fed. 246, 160 C. C. A. 324.

**Time for filing petition—In general.**—The date of the entry of an order, not the date the order bears, is the date from which the time for the filing of a petition for revision is computed. *In re Wood*, (C. C. A. 6th Cir. 1918) 248 Fed. 246, 160 C. C. A. 324.

**Under a standing rule of court.**—A petition to revise, not filed within ten days as required by rule 38 of the Circuit Court of Appeals, Second Circuit, will be dismissed. *In re Armann*, (C. C. A. 2d Cir. 1917) 247 Fed. 483, 159 C. C. A. 537.

**Extension of time for filing.**—A petition to revise brought within an extension of the time allowed by the rules will be heard. *In re Armann*, (C. C. A. 2d Cir. 1918) 247 Fed. 954.

**"Petition by any party aggrieved."**—An alleged bankrupt has no standing in the appellate court to complain of an order for the examination of his wife, he not being the party aggrieved within the meaning of this section. *In re Werdenfeld*, (C. C. A. 2d Cir. 1918) 254 Fed. 679, 166 C. C. A. 175.

**Agreement for review by petition.**—Where the parties are agreed that a petition to revise an order relative to the trustee's title to certain leasehold property is the proper method for review and it is immaterial to the result reached, the court will adopt that view and will dismiss an appeal. *Lawhead v. Monroe Bldg. Co.*, (C. C. A. 6th Cir. 1918) 252 Fed. 758, 164 C. C. A. 598.

**Scope of review.**—On a petition to review a referee's order in bankruptcy, affirmed in the District Court, the jurisdiction of the Circuit Court of Appeals is limited to the facts as found by the referee and in the trial court. *Whitney Cent. Trust, etc., Bank v. U. S. Constr. Co.*, (C. C. A. 5th Cir. 1918) 250 Fed. 784, 163 C. C. A. 116.

**"Matter of law."**—To same effect as original annotations, see *Hunter v. J. G. Cherry Co.*, (C. C. A. 8th Cir. 1917) 247 Fed. 458, 159 C. C. A. 512; *In re Wood*, (C. C. A. 6th Cir. 1918), 258 Fed. 246, 160 C. C. A. 324; *Matter of Stitt*, (1918) 252 Fed. 1; *In re Canister Co.*, (C. C. A. 3d Cir.) 252 Fed. 70, 164 C. C. A. 182, *affirming* (D. C. N. J. 1918), 248 Fed. 587; *In re Bolognesi*, (C. C. A. 2d Cir. 1918) 254 Fed. 770, 166 C. C. A. 216; *Luck v. Staples*, (C. C. A. 4th Cir. 1918), 255 Fed. 637; *Frederick v. Silverman*, (C. C. A. 3d Cir. 1918), 250 Fed. 75, 162 C. C. A. 247, also holding that the Circuit Court of Appeals will not review on a petition to revise under this section an approved turnover order made in a proceeding in which disputed questions of fact were involved.

**Disputed question of fact.**—Questions of fact are not reviewed on a petition to revise. *Sauve v. M. L. More Invest. Co.*, (C. C. A. 8th Cir. 1918) 248 Fed. 642, 160 C. C. A. 542.

In proceedings to revise under section 24b of the Bankruptcy Act the court cannot determine questions of fact involved in the finding or order sought to be reviewed, where there is any evidence to support them. *In re Wood*, (C. C. A. 6th Cir. 1918) 248 Fed. 246, 160 C. C. A. 324.

The petition to revise authorized by section 24b of the Bankruptcy Law cannot involve controverted questions of fact arising upon the evidence, or upon inferences to be drawn from the evidence. *In re Lee*, 182 Fed. 579, 105 C. C. A. 117; *In re Frank*, 182 Fed. 794, 105 C. C. A. 226; *Hall v. Reynolds*, 224 Fed. 103, 109 C. C. A. 659. The question whether the bankrupts had their principal place of business at Cedar Rapids is such a question. There was abundant evidence to support the decision of the trial court. This is true, not only of the direct testimony, but of the inferences properly to be drawn from all the

evidence. *Hunter v. J. G. Cherry Co.*, (C. C. A. 8th Cir. 1917) 247 Fed. 458, 159 C. C. A. 512.

Where the allowance or rejection of a claim depends on the determination of a disputed question of fact, it cannot be reviewed on a petition to superintend and revise, such a method of review being confined to questions of law. *King Lumber Co. v. National Exch. Bank*, (C. C. A. 4th Cir. 1918) 253 Fed. 946, 165 C. C. A. 388.

A proceeding by the trustee to set aside a mortgage as a preference involves a determination of questions of fact, and therefore appeal is the proper remedy and a petition to revise will be dismissed. *Bassett v. Evans*, (C. C. A. 8th Cir. 1918) 253 Fed. 532, 165 C. C. A. 202.

The question whether a chattel mortgage asserted by the mortgagee against the estate of the bankrupt mortgagor is fraudulent and void is one of fact which can be reviewed by the Circuit Court of Appeals only by appeal under section 25a, and not by a proceeding to superintend and revise under section 24b. *In re Russell*, (C. C. A. 9th Cir. 1918) 247 Fed. 95, 159 C. C. A. 313.

Whether a creditor receiving a conveyance had reason to believe that a preference would thereby be created so as to invalidate the conveyance under section 60b is a question of fact which will not be reviewed on petition to revise. *In re Armann*, (C. C. A. 2d Cir. 1918), 247 Fed. 954.

**Discretionary orders.**—*An order on a petition to reopen a bankrupt estate*, involving a question of law, is properly reviewable by petition to revise, but as the proceeding is in its nature discretionary, the power of review is limited to considering whether there was an abuse of discretion. *In re Graff*, (C. C. A. 2d Cir. 1918) 250 Fed. 997, 163 C. C. A. 247.

In *In re Horowitz*, (C. C. A. 2d Cir. 1918) 250 Fed. 160, 162 C. C. A. 278, it was held that an order relieving against a trustee's default under a stipulation that the application for discharge should be heard on a certain day and on the failure of the trustee to object the referee should report in favor of the discharge, was within the discretion of the District Court, and that it was impossible to say that there was an abuse of this discretion, i. e., unreasonable departure from considered precedents and settled judicial custom, which is error of law.

**Vol. I, p. 812, sec. 25a.** [First ed., 1912 Supp., p. 623.]

**What are "bankruptcy proceedings."**—A petition by a trustee to have a deed by the bankrupt declared to be a mortgage and the land sold subject thereto is not a "bankruptcy proceeding" but is appealable under the general appellate jurisdiction of the Circuit Court of Appeals. *Sauve v. M. L. More*

Invest. Co., (C. C. A. 8th Cir. 1918) 248 Fed. 642, 160 C. C. A. 542.

**Questions considered and determined in general.**—When it is assumed on both sides that an order affirming an assessment against stockholders by the referee when they were not parties to the record in any formal way, is a final order subject to appeal, the court will not consider that question but will proceed to the events. *Thomas v. Goodman*, (C. C. A. 6th Cir. 1918) 254 Fed. 39, 165 C. C. A. 449.

The liability of petitioning creditors who have wrongfully procured the appointment of a receiver, being regarded as presenting a controversy arising in bankruptcy between them and the adverse interests, rather than a step in the administration of the estate, it has been held that an appeal is the proper remedy. The court, however, further said: "This is not to say that there might not be cases in which a petition to revise would properly present an analogous question, but only that, in this case, the issue is so far outside the ordinary administration of the estate and so far between adversary parties in interest as to constitute a real controversy. However, questions as to the distribution of the fund are necessarily involved as collateral to the other issue, and each of the petitions to revise discloses jurisdiction. All motions to dismiss are therefore denied." *In re Veler*, (C. C. A. 6th Cir. 1918) 249 Fed. 633.

Plenary actions to recover money only, which it is alleged has been paid as a preference in favor of a principal and surety, are actions at law, and therefore properly reviewable on writ of error. *Turner v. Schaeffer*, (C. C. A. 6th Cir. 1918) 249 Fed. 654.

**Presentation and reservation in lower court of ground of review.**—A claim that a specification of objections to a discharge was insufficient because of generality may not be made on appeal where no exception was taken on that ground in the court below, and the questions intended to be raised were fully gone into before the special master and the District Judge. *In re Singer*, (C. C. A. 2d Cir. 1918) 251 Fed. 51, 163 C. C. A. 301.

**Questions of fact—Findings of referee or master.**—The decision of a master or referee should not be interfered with unless it is clearly and manifestly erroneous. One who sees the witnesses and hears them is better able to judge of their credibility than one who reviews their testimony as it appears only after having been reduced to writing. *In re Nejour*, (N. D. Ga. 1917) 251 Fed. 677.

**Concurrent findings of referee or jury and court below.**—Where a finding of fact by a referee has been concurred in by the District Court, it will be affirmed by the Circuit Court of Appeals unless it is clearly shown to be wrong. *In re Turpin Hotel Co.*, (C. C. A. 9th Cir. 1918) 248 Fed. 25, 160 C. C. A. 165; *In re Model Incubator Co.*, (C. C. A. 2nd Cir. 1918) 255 Fed. 76, 166 C. C. A. 404; *Dothan Nat. Bank v. Jones*, (C. C. A. 5th Cir. 1918) 255 Fed. 332, 166 C. C. A. 502.

**Vol. I, p. 824, sec. 25a (1).** [First ed., 1912 Supp., p. 632.]

**Exclusiveness of remedy.**—In *In re Greer*, (W. D. Ky. 1918) 248 Fed. 131, it was said: "It was distinctly held by the Circuit Court of Appeals of this circuit, in the Case of *Ives*, 113 Fed. 911, 51 C. C. A. 541, that there is no way open to creditors to contest an adjudication in a voluntary proceeding except as the act gives it. This ruling was followed by this court in the case of *R. H. Pennington & Co.*, (D. C.) 228 Fed. 388, 35 Am. Bankr. Rep. 832, and we suppose, when the adjudication of bankruptcy was made on October 3d, the question of jurisdiction was finally adjudged, subject to allowable appellate proceedings, either by petition for a review under section 24 or appeal under section 25a of the act. We say this because it may be conceivable that within a reasonable time a creditor might show grounds upon which an adjudication might be set aside, if there had been a fraud upon the jurisdiction of the court, and through this means or otherwise it might be that grounds for a review or for an appeal might be made available."

**Instructions to jury as error.**—Error is not predicable on the court's remarks or its charge to the jury, where the calling of the jury was on the court's own motion. In such a case, the verdict of the jury is not of binding force, but is advisory to the court as in issues of chancery. *Morrison v. Riegan*, (C. C. A. 7th Cir. 1917) 249 Fed. 97, 161 C. C. A. 148.

**Vol. I, p. 826, sec. 25a (2).** [First ed., 1912 Supp., p. 633.]

**Findings of referee or master.**—In *In re Lally*, (N. D. N. Y. 1919) 255 Fed. 358, in confirming a report of a special master recommending discharge, the court said: "The findings of fact of a special master, or of a referee, in bankruptcy matters, stand in substantially the same position before the court as does the verdict of a jury. They are not to be disturbed, unless unsupported by the evidence or against the weight thereof."

**Vol. I, p. 826, sec. 25a (3).** [First ed., 1912 Supp., p. 634.]

**Exclusiveness of remedy by appeal.**—To same effect as original annotation, see *King Lumber Co. v. National Exch. Bank*, (C. C. A. 4th Cir. 1918) 253 Fed. 946, 165 C. C. A. 388.

**What constitutes a "debt or claim."**—**Judgment rejecting lien.**—A proceeding to establish a lien on a bankrupt's property is a regular proceeding in bankruptcy under section 2, clause 7 of the Bankruptcy Act, and within the meaning of this section regulating appeals in bankruptcy proceedings; and a judgment rendered therein is not a

judgment "allowing or rejecting a debt or claim," and is not an independent ground of appeal. *Whitney Cent. Trust, etc., Bank v. United States Constr. Co.*, (C. C. A. 5th Cir. 1918) 250 Fed. 784, 163 C. C. A. 116.

An order disallowing a debt and disallowing it as a secured claim was reviewed and affirmed on appeal in *Luck v. Staples*, (C. C. A. 4th Cir. 1918) 255 Fed. 637.

**Validity of chattel mortgage.**—The question whether a chattel mortgage asserted by the mortgagee against the estate of the bankrupt mortgagor is fraudulent and void is one of fact which can be reviewed by the Circuit Court of Appeals only by appeal under section 25a, and not by a proceeding to superintend and revise under section 24b. *In re Russell*, (C. C. A. 9th Cir. 1918) 247 Fed. 95, 159 C. C. A. 313.

**Vol. I, p. 829, sec. 25a (3).** [*Time for taking appeal—hearing.*] [First ed., 1912 Supp., p. 635.]

**Order not within section.**—Where brick manufactured by the bankrupt were claimed by a lessee, and his petition to be given possession was opposed by one who had made advances to the bankrupt, an appeal from an order granting the petition may be taken within six months under section 24a and is not limited to ten days by section 25a. *Ragland Bank v. Hudson*, (C. C. A. 5th Cir. 1918) 247 Fed. 241, 159 C. C. A. 355.

**Vol. I, p. 838, sec. 25c.** [First ed., 1912 Supp., p. 641.]

**Necessity of giving supersedeas bond.**—Although an appellate court may consider an appeal or writ of error by a trustee to review a judgment or decree, even if he gives no supersedeas bond, yet this section does not relieve him of the obligation of giving such a bond as required by R. S. secs. 1000 and 1007, and if given, it is enforceable. *Pacific Coast Casualty Co. v. Harvey*, (C. C. A. 9th Cir. 1918) 250 Fed. 952, 163 C. C. A. 202.

**Vol. I, p. 838, sec. 25d.** [First ed., 1912 Supp., p. 641.]

### III. WRITS OF CERTIORARI (p. 840)

**Cases in Circuit Court of Appeals "to superintend and revise."**—Decisions in such cases were reviewed on certiorari in *Cohn v. Malone*, (1919) 248 U. S. 450, 39 S. Ct. 141, 63 U. S. (L. ed.) —; *Richmond v. Bird*, (1919) 249 U. S. 174, 39 S. Ct. 186, 63 U. S. (L. ed.) —.

**Vol. I, p. 844, sec. 29b (1).** [First ed., 1912 Supp., p. 646.]

**Continuing concealments.**—To the same effect as the original annotation, see *Conetto*

*v. U. S.*, (C. C. A. 9th Cir. 1918) 251 Fed. 42, 163 C. C. A. 292.

**Concealment of firm assets.**—If a member of a partnership, with the knowledge and consent of his associates in the firm, withdraws assets belonging to it, intending to make the assets so withdrawn a part of his individual estate, they become so far a part of that individual's estate that upon his bankruptcy individually and as a member of the firm the trustee appointed to administer the estate would be entitled to take possession of such property and the proceeds thereof as "property belonging to his estate in bankruptcy" and a concealment of such assets constitutes a violation of this section. *Malvin v. U. S.*, (C. C. A. 2d Cir. 1918) 252 Fed. 449, 164 C. C. A. 373.

A partnership is a "person" within the meaning of this section and the members thereof are answerable for the concealment of partnership property although they have not been individually adjudged bankrupts. *Conetto v. U. S.*, (C. C. A. 9th Cir. 1918) 251 Fed. 42, 163 C. C. A. 292.

**Conspiracy to conceal.**—To same effect as original annotation, see *Malvin v. U. S.*, (C. C. A. 2d Cir. 1918) 252 Fed. 449, 164 C. C. A. 373.

**Indictment—Allegation of exemption under state laws.**—An indictment under this section need not allege that the property concealed was not exempt from execution under a state law as it does not contain any express exception or refer to the exemptions of the bankrupt, and it is well settled that unless the statute enacting an offense so defines such defense that the latter cannot properly be described without negotiating an exception, an indictment charging a violation of such section need not negative the exception. The fact that section 6 of the Bankruptcy Act allows the exceptions provided for by the state laws does not alter the rule. *U. S. v. Greenbaum*, (E. D. Mich. 1918) 252 Fed. 259.

**Description of property concealed.**—Where an indictment under this section describes the property alleged to have been fraudulently concealed as "a certain large portion of his property . . . consisting of money and merchandise," stating the value and alleging that a more particular description is unknown, and the bill of particulars shows that the property is all of the property belonging to him on a certain date, except the portion which he subsequently turned over or accounted for to the trustee, the description is sufficient reasonably to inform the defendant as to what particular property is meant, and to protect him, in the event of an acquittal, from a subsequent prosecution on the same charge. *U. S. v. Greenbaum*, (E. D. Mich. 1918) 252 Fed. 259.

**Continuing concealment after bankruptcy.**—An indictment is sufficient which describes the property and charges that the same belonged to the bankrupt estate of the defendants, and was in their possession and under

their control and was concealed by them, and that "neither they nor either of them have disclosed to the trustee the possession of the said merchandise by them, and have not turned over and delivered the same to the trustee or accounted to him for the same; that at the time of concealment they well knew the same to be the property of the bankrupt estate, and that no accounting has been made to the trustee thereof." *Conetto v. U. S.*, (C. C. A. 9th Cir. 1918) 251 Fed. 42, 163 C. C. A. 292.

*The mode of the alleged concealment is immaterial and need not be set forth in the indictment. Hence, it is sufficient to allege a concealment by using the word "conceal," without stating how and in what manner the alleged concealment was accomplished, this though section 1a(22) of the Act provides that the word "conceal" shall include secrete, falsify, and mutilate.* *U. S. v. Greenbaum*, (E. D. Mich. 1918) 252 Fed. 259.

*Indictment as compulsory accounting.*—Where it is shown that shortly before the filing of a petition in bankruptcy, the bankrupt owned certain property, and that such property was not subsequently accounted for as turned over to the trustee, the inference that such property has been concealed by the bankrupt is justified. Hence, an indictment alleging that on a certain date the bankrupt had in his possession certain property, having a certain value, and that when he became a bankrupt a few months later the aggregate of all the property which he turned over to his trustee was much less than that which he owned on the date first mentioned, states a case and is not open to the objection that it merely seeks to compel the defendant to make an accounting and does not charge a crime. *U. S. v. Greenbaum*, (E. D. Mich. 1918) 252 Fed. 259.

**Vol. I, p. 849, sec. 29b (2).** [First ed., 1912 Supp., p. 650.]

*Exclusion of other prosecutions.*—False swearing in a proceeding in bankruptcy is punishable under section 29b(2) of the Bankruptcy Act and not under section 125 of the Penal Code. *Rosenthal v. U. S.*, (C. C. A. 8th Cir. 1918) 248 Fed. 684, 160 C. C. A. 584.

*False oath — Failure to state all of assets.*—When a bankrupt undertakes to answer a question by which it is sought to ascertain the nature and amount of his assets, and fails to state all of his assets, such failure is equivalent to swearing to a statement of assets which is incomplete. *U. S. v. Gray*, (E. D. N. Y. 1918) 255 Fed. 98.

**Vol. I, p. 852, sec. 29d.** [First ed., 1912 Supp., p. 652.]

*Proof avoiding limitation.*—It must appear that the offense was committed within one year before the indictment. *Rosenthal v. U.*

*S.*, (C. C. A. 8th Cir. 1918) 248 Fed. 684, 160 C. C. A. 584, where no evidence was given as to the date when the accused testified.

**Vol. I, p. 852, sec. 30a.** [First ed., 1912 Supp., p. 652.]

Rule XXI, (vol. I, p. 856) requires that "all such depositions" (to prove debts existing in open account) "shall contain an averment that no note has been received for such account, nor any judgment rendered thereon."

**Vol. I, p. 898, sec. 38a.** [First ed., 1912 Supp., p. 655.]

*Referees are judicial officers exercising the powers of the court to a large extent.* *In re McNeil Corporation*, (D. C. Mass. 1918) 249 Fed. 765.

*Mode of review.*—To same effect as original annotation, see *In re Petersen*, (D. C. Nev. 1917) 252 Fed. 846.

*Taking exceptions before referee.*—Exceptions are special demurrers to the report and must point out, article by article, the matter objected to and the cause of objection. Vagueness and generality are good grounds for overruling them. Cases are referred to a master to economize time, and if general exceptions are permitted the court would have to review the whole case, and the effect of the reference thus be lost. *In re Association Dairy Co.*, (D. C. Conn. 1918) 251 Fed. 749.

*Scope of review.*—An order referring a matter to a referee is not subject to review on a petition to review the referee's finding and order, as such a procedure would in effect be making an order to review an order already made. *In re Graff*, (E. D. N. Y. 1918) 255 Fed. 239.

On a petition by the trustee to review an order of the referee allowing the bankrupt certain exemptions in wages, certain other exemptions claimed by the bankrupt out of his wages in lieu of other property exempted to the head of a family which were disallowed will also be considered. *In re French*, (W. D. Wash. 1918) 250 Fed. 644.

*Determination on review — Evidence not properly a part of the record.*—Testimony given by a bankrupt before the referee which was not properly made a part of the record, may be disregarded by the court on the hearing of a petition to review the order of the referee disallowing claims. *In re Anderson*, (D. C. R. I. 1918) 252 Fed. 272.

*Weight of referee's findings of fact.*—To the same effect as the original annotation, see *In re Association Dairy Co.*, (D. C. Conn. 1918) 251 Fed. 749; *In re Schilling*, (N. D. Ohio, 1918) 251 Fed. 972; *In re Mullings Clothing Co.*, (D. C. Conn. 1918) 252 Fed. 667; *Hagan v. McNeil*, (C. C. A. 4th Cir. 1918) 253 Fed. 716, 165 C. C. A. 310; *In re Caledonia Coal Co.*, (E. D. Mich. 1918) 254 Fed. 742; *Mansion v. Mesirov*, (C. C. A. 3d

Cir. 1919) 254 Fed. 799, 166 C. C. A. 245; *In re Campion*, (N. D. N. Y. 1919) 256 Fed. 902; *In re Wilson-Nobles-Barr Co.*, (W. D. Wash. 1918) 256 Fed. 966; *Sternburg v. Cohen*, (C. C. A. 1st Cir. 1918) 254 Fed. 1, 165 C. C. A. 411.

**Weight dependent on character of evidence.**—To same effect as original annotation, see *In re Blanchard*, (D. C. N. J.) 1918) 253 Fed. 758.

Where the question before a referee for determination is mainly if not entirely one of deduction from established facts and does not turn chiefly upon questions of credibility arising from conflicting evidence, his conclusion in a second report differing from that in an earlier report, the district judge is warranted in drawing his own conclusions from admitted facts and evidence, little influenced by the last report of the referee. *Sterling v. Cohen*, (C. C. A. 1st Cir. 1918) 354 Fed. 1, 165 C. C. A. 411.

**Presumptions on review of order.**—An order of a referee in bankruptcy implies a fact finding adequate to support the order made. Therefore it will be presumed from an order of a referee holding that a lien based on the levy of an execution which was attempted to be asserted eight months after the levy could not be recognized, that there was a finding of fact that the delay was unusual and that nothing was shown to justify it. *In re Rayford Truck Co.*, (E. D. Pa. 1918) 250 Fed. 634.

#### Vol. I, p. 902, sec. 38a (2). [First ed., 1912 Supp., p. 568.]

**Examination of witnesses—General rule.** To the same effect as the original annotation, see *In re Neuman*, (D. C. Mont. 1917) 251 Fed. 667.

**Weight of evidence.**—The credit which should be attached to oral testimony of witnesses appearing before a referee, and the weight which he should attach to sweeping denials of actual knowledge of matters concerning which knowledge or inquiry are to be expected, are matters to be finally determined by the referee. *In re Anderson*, (D. C. R. I. 1918) 252 Fed. 272.

#### Vol. I, p. 904, sec. 38a (4). [First ed., 1912 Supp., p. 659.]

**Authority to perform duties of court—Discharges of bankrupts.**—A referee in bankruptcy has no power under this section to interfere in regard to matters of discharge, but the court may, notwithstanding this section, refer matters arising out of a bankrupt's application for discharge to the referee. In such cases, however, the referee acts only as a special master and not as referee. *In re Walsh*, (C. C. A. 7th Cir. 1919) 256 Fed. 653.

**Review of order appointing trustee.**—The court, while disinclined to set aside the

order of a referee approving the appointment of a trustee, will do so in case of clear error, and in so doing will remand the case for further action by the referee rather than make the appointment itself. *In re Parsons Mfg. Co.*, (D. C. Mass. 1917) 247 Fed. 126.

**Costs—Authority to tax.**—The prevailing party on an order to a common law assignee to show cause why he should not pay over certain money alleged to be improperly withheld, is not entitled to costs, unless the other party is "in mercy" so that the court can require the payment of costs as a condition of granting its further aid, and the referee is without authority to tax the cost bill or to order it paid out of the bankrupt's estate. *In re Reisswig*, (D. C. N. D. 1918) 253 Fed. 390.

#### Vol. I, p. 910, sec. 39a (3). [First ed., 1912 Supp., p. 664.]

**Furnishing copies of testimony.**—Where in the course of an investigation under section 21a of this act, the testimony of a large number of witnesses has been taken stenographically before the referee, without notice to and in the absence of the bankrupt, the latter is entitled to a copy thereof on payment of the required fees. *Petition of Moulthrop*, (C. C. A. 6th Cir. 1918) 249 Fed. 468.

#### Vol. I, p. 910, sec. 39a (5). [First ed., 1912 Supp., p. 664.]

**Making up records.**—The Bankruptcy Act contemplates that the record on review shall be made up by the referee, and certified by him to the bankruptcy court. *In re Petersen*, (D. C. Nev. 1917) 252 Fed. 846.

**Summary of evidence.**—On the review of an order of a referee denying the claim of the bankrupt's wife alleged to have been based on fraud, if the existence of fraud is still an issue in the case, there should be a detailed summary of the evidence, and not a mere statement of legal conclusions in relation to the alleged fraud. And an agreement as to what conclusions should be drawn from the evidence does not afford sufficient data for the court to determine whether there has been a misstatement of the evidence, in the absence of such summary. *In re Petersen*, (D. C. Nev. 1917) 252 Fed. 846.

#### Vol. I, p. 912, sec. 40a. [First ed., 1912 Supp., p. 666.]

**Services of referee as special master.**—In the absence of a stipulation of the parties providing for a higher rate of compensation than that allowed by the court rules to a referee when acting as special master concerning matters not devolving upon him by virtue of his office, his compensation is



limited to that prescribed by the rules, and the court will not approve any additional charges. *In re Grove Construction Co.*, (N. D. N. Y. 1918) 253 Fed. 961.

**Referee's expenses.**—The determination of the referee's expenses under this act is within the general jurisdiction of the court which has the power on investigation to determine the actual expenses and to authorize a charge therefor. *In re McNeil Corporation*, (D. C. Mass. 1918) 249 Fed. 765.

**Clerical assistance.**—In regard to the employment of clerks, it has been said: "It would be wholly impossible for a referee, whose duties require the constant employment of two clerks to perform them properly, to do that work unassisted in addition to his judicial duties under the act. To limit the number of cases sent to a referee to those in which he was personally able to perform the clerical work required would be to put the referee on the basis of mere clerks, which I do not think the act intends. . . . In view of General Order 26, it seems clear that the Supreme Court understood that the referee had the power to employ clerks if necessary in the performance of his duties; and there are many decisions of lower courts to the same effect. *In re McNeil Corporation*, (D. C. Mass. 1918) 249 Fed. 765.

**Maintenance of office.**—The expense of the maintenance of an office by a referee is ordinarily a proper one, dependent on the conditions in the particular locality. *In re McNeil Corporation*, (D. C. Mass. 1918) 249 Fed. 765.

**Method of computing general expenses.**—The charge for clerical or general expense may be arrived at on the basis of a general average, covering numerous cases. *In re McNeil Corporation*, (D. C. Mass. 1918) 249 Fed. 765.

**Collateral attack on allowance to referee.**—Orders made by the court for charges for referee's costs and expenses cannot be collaterally attacked and the clerk is bound to obey and recognize them. *In re McNeil Corporation*, (D. C. Mass. 1918) 249 Fed. 765, wherein the court further said: "If the Department of Justice desires to question such orders or expenses, it should do so by intervening in a bankruptcy case and attacking them directly, if it has standing to do so—which I doubt. It would seem to me that the questions are to be dealt with by the Supreme Court under General Orders if it sees fit to do so; otherwise, by the District Courts."

An order fixing and allowing compensation to a referee in bankruptcy is a judicial order, and like any other order allowing a claim against a bankrupt estate is subject to review for error therein. Consequently even though error was committed in making an order granting an allowance it cannot be corrected in a purely collateral action at law to recover from the referee and his bondsmen. *U. S. v. Brainard*, (E. D. Okla. 1918) 250 Fed. 1011.

Vol. I, p. 916, sec. 41a (1). [First ed., 1912 Supp., p. 668.]

**Contempt for failure to turn over assets.**—To same effect as original annotation, see *In re Joseph R. Marquette*, (C. C. A. 2d Cir. 1918) 254 Fed. 419, 166 C. C. A. 51.

**Turn-over proceedings and proceedings for contempt distinguished.**—Turn-over proceedings and proceedings for contempt for violating a turn-over order were distinguished in *Frederich v. Silverman*, (C. C. A. 3d Cir. 1918) 250 Fed. 75, 162 C. C. A. 247. In a turn-over proceeding the issue is whether the bankrupt had property within his possession or control at the date of bankruptcy which he had retained and concealed from his trustee. Being fundamental, this issue must be raised and decided first. When the court has determined this issue against the bankrupt, and when the bankrupt has failed to comply with the court's order to turn over, the next proceeding is one of contempt. In the contempt proceeding, the question of the bankrupt's possession and concealment of property having previously been determined is not in issue. The only question is, whether the bankrupt is presently able to comply with the court's order previously made, and, accordingly, whether he is defying its order. The difference in the issues of the two proceedings and the dependence of the latter upon the former compel their separate consideration and determination.

**Improper interference with assets.**—When an alleged bankrupt, who is in fact bankrupt, and he is conscious of the fact, after a petition has been filed against him, deliberately appropriates the money belonging to the bankrupt estate to his own use, spends it in living expenses for himself and family, and in the purchase of clothing for himself, and in payments on claims against himself, debts owing by him, and then shows his financial inability to return it, he may be punished for criminal contempt. *In re Mardenfeld*, (N. D. N. Y. 1919) 256 Fed. 920.

**Institution of suit as contempt.**—A creditor of the bankrupt, though having a dischargeable claim against the latter, does not become guilty of contempt of the bankruptcy court merely by taking proceedings in another court to enforce such claim, even with knowledge that the bankrupt has obtained his discharge. The bankruptcy court not having forbidden such creditor to institute and carry out such proceedings, it cannot be said that a creditor who takes such action has committed a contempt. Certainly he would not be guilty of contempt of this court in disregarding its orders or proceedings of which he was without knowledge. *In re Weisberg*, (E. D. Mich. 1918) 253 Fed. 833.

Vol. I, p. 926, sec. 44a. [First ed., 1912 Supp., p. 677.]

**Review by judge.**—*Approval by referee of trustee.*—The court, while disinclined to set

aside the order of a referee approving the appointment of a trustee, will do so in case of clear error, and in so doing will remand the case for further action by the referee rather than make the appointment itself. *In re Parsons Mfg. Co.*, (D. C. Mass. 1917) 247 Fed. 128.

"The practice of permitting individual creditors, who conceive themselves aggrieved by the action of the referee in approving the election of a trustee, to take review in their own names, is too well settled in this district to be disregarded (see *In re Kellar, infra*; *In re Rosenfeld-Goldman Co.* [D. C. Mass.] 36 Am. Bankr. Rep. 520, 228 Fed. 921; *In re William J. Snow* [No. 20983] 248 Fed. 295; *In re Max Grat* [D. C. Mass.] 36 Am. Bankr. Rep. 524, 228 Fed. 925), especially as it has received the silent approval of the Court of Appeals for this circuit (*In re Kellar* [C. C. A. 1st Cir.] 27 Am. Bankr. Rep. 715, 192 Fed. 830, 113 C. C. A. 154)." *In re Parsons Mfg. Co.*, (D. C. Mass. 1917) 247 Fed. 128.

**Improper or irregular vote for trustee—Solicitation of claims.**—Where both parties to a controversy over the appointment of a trustee have gone beyond the bounds of propriety in soliciting claims but neither has been guilty of fraud, it is error to disfranchise the claims of one party while permitting those of the other to be voted. *In re Parsons Mfg. Co.*, (D. C. Mass. 1917) 247 Fed. 128.

**Amendment of claims.**—Postponement of a meeting for the election of a trustee to permit applications to amend claims to be filed, made after the election, is within the discretion of the referee. *In re Eisenberg*, (S. D. N. Y. 1918) 251 Fed. 427.

**Adjournment of meeting.**—The referee may in his discretion adjourn the first meeting from time to time, for the purpose of investigating disputed claims before the voting for trustee is completed. *In re Snow*, (D. C. Mass. 1915) 248 Fed. 295.

**Review of facts.**—Where the evidence is not on the record, the findings of the referee as to the claims must be affirmed. *In re Snow*, (D. C. Mass. 1915) 248 Fed. 295.

### Vol. I, p. 931, sec. 45a (1). [First ed., 1912 Supp., p. 680.]

**Competency of trustee—Attorney for creditors.**—It is not improper to appoint as a trustee the attorney of a petitioning creditor. *W. A. Lillier Bldg. Co. v. Reynolds*, (C. C. A. 4th Cir. 1917) 247 Fed. 90, 159 C. C. A. 308.

**Votes for interested candidate.**—The fact that a candidate for trustee disputes a large claim made against him by the bankrupt may be a good reason for refusing to appoint him but it does not justify a refusal to receive votes of creditors cast for him. *In re Parsons Mfg. Co.*, (D. C. Mass. 1917) 247 Fed. 128.

### Vol. I, p. 933, sec. 47a (2). [First ed., 1912 Supp., p. 682.]

**Rights of trustee generally.**—This section gives to the trustee a lien or the rights of a lienholding creditor, but it does not profess to affect any existing valid lien. The order of priority of valid liens, if any, including the lien or title of the trustee, remains, as before, a matter for the adjudication of the court, according to the settled rules and principles of law and equity. *American Laundry Machinery Co. v. Everybody's Laundry*, (la. 1919) 171 N. W. 161.

The rights of the trustee are not affected by the fact that there are no judgment creditors. *Baldwin v. Kingston*, (D. C. N. J. 1918) 247 Fed. 163; *Bakersfield Bank v. Moore*, (C. C. A. 9th Cir. 1918) 247 Fed. 913, 160 C. C. A. 103; *Riggs v. Price*, (Mo. 1919) 210 S. W. 420.

The trustee has, under this provision, exactly the same standing as an attaching or other lien creditor and no more. *Reeves v. York Engineering Supply Co.*, (C. C. A. 5th Cir. 1918) 249 Fed. 513.

**Trustee's right to collect assets.**—Since the amendment of 1910.—To the same effect as the original annotation, see *In re Schilling*, (N. D. Ohio, 1918) 251 Fed. 966; *In re Schilling*, (N. D. Ohio, 1918) 251 Fed. 972; *Brown v. Crawford*, (D. C. Ore. 1918) 252 Fed. 248.

**General creditors in a bankruptcy proceeding** are represented by the trustee in bankruptcy. *In re Imperial Textile Co.*, (N. D. N. Y. 1919) 255 Fed. 199.

**Chattel mortgagee as pledgee.**—A trustee in bankruptcy may recover property from the possession of one holding it under an alleged chattel mortgage which is invalid as against creditors because unrecorded as required by a state law, or as pledgee where there was no delivery of possession which is essential to the pledge of chattels. *In re P. J. Sullivan Co.*, (C. C. A. 2d Cir. 1918) 254 Fed. 660, 166 C. C. A. 158.

**Unrecorded "trust receipt."**—Where property is delivered under a "trust receipt" according to the rule in Ohio, which governs such a transaction in that state, if the trust receipt was neither verified nor filed in the recorder's office, the effect of the appointment of a receiver by the state court and his seizure of the defendant's property is to fasten the claims of creditors upon it and to give that officer control over it for the benefit of creditors as effectually as the creditors would have held it by attachment or levy and the status of the trustee in bankruptcy is similar to that of the receiver appointed by the state court. A trustee is vested, under this section, as to property delivered under a "trust receipt," in whatever form existing and as to the proceeds of the sale of such property, with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon. *In re Bettman-Johnson Co.*, (C. C. A. 6th Cir. 1918) 250 Fed. 657.

**Right to possession.**—Since the trustee has the rights of an execution creditor a bill of sale by the bankrupt gives no right to the transferee while the bankrupt retains possession of the property. *Herritt v. Clark*, (C. C. A. 3d Cir. 1918) 247 Fed. 100, 159 C. C. A. 318.

A bill in equity may be maintained by the trustee in bankruptcy to obtain possession of property in the custody of another and to restrain a claimant to a part of the property from taking action to prevent the delivery of the property to the trustees, and the fact that in order to determine to what extent the claimant's action was justified it is necessary to decide the controversy does not oust the jurisdiction. *Atherton v. Beaman*, (D. C. Mass. 1919) 256 Fed. 871.

**Rights as to fixtures.**—Even though a trustee in bankruptcy has the rights of an attaching creditor and does not stand in the place of the bankrupt mortgagor, his rights in the property did not accrue before bankruptcy, and, if prior to that event the property had become annexed to the mortgaged property, his rights would not be different, whether he stood as an attaching creditor or as the bankrupt. *Keefe v. Worcester Trust Co.*, (C. C. A. 1st Cir. 1918) 253 Fed. 536, 165 C. C. A. 206.

A mortgagee of lands belonging to the bankrupt who consents to the removal by the bankrupt of a logging railroad thereon loses his lien, as against the trustee, on the railroad and its appurtenances. *Herritt v. Clark*, (C. C. A. 3d Cir. 1918) 247 Fed. 100, 159 C. C. A. 318.

Where a bankrupt so joins store fixtures which he has bought on a conditional sale contract with other fixtures belonging to him that they cannot be severed without partial destruction, his trustee cannot sever them without paying to the seller an amount sufficient to restore the fixtures belonging to him to the same state they were in prior to the changes made by the bankrupt. *In re Dana*, (S. D. Fla. 1918) 250 Fed. 268.

**Rents of mortgaged property collected by trustee.**—In construing a mortgage the federal court will give the same meaning to its words as that adopted by the state court. Therefore where the state court has laid down the rule that a mortgagee is not entitled to rents and profits of the mortgaged premises unless he takes actual possession or until possession is taken in his behalf by a receiver, the federal court will allow the receiver in bankruptcy to retain in his possession all rents due or collected by him, on property mortgaged by the bankrupt, prior to the time when the receiver appointed in the foreclosure proceedings acquired the right to possession of the premises by entry of the order of his appointment. *In re Brose*, (C. C. A. 2d Cir. 1918) 254 Fed. 664, 166 C. C. A. 162.

**Recovery of property not scheduled or surrendered.**—Where a trustee brings proceeding to compel the bankrupt to turn over property

not scheduled or surrendered, he lays a foundation when he shows by any competent evidence, including the claims or assertions of the bankrupts themselves, that they had unscheduled property a reasonable time before petition filed; the bankrupt must then account for said property, or otherwise rebut the trustee's prima facie case by credible testimony. *In re Chavkin*, (C. C. A. 2d Cir. 1918) 249 Fed. 342.

Where a trustee brings proceedings to compel the bankrupt to turn over to him property not scheduled or surrendered, a financial statement made by the bankrupt for the purpose of obtaining credit prior to bankruptcy is admissible and is persuasive though not conclusive. *In re Chavkin*, (C. C. A. 2d Cir. 1918) 249 Fed. 342.

**Diverted property.**—A trustee may maintain an action for the recovery of property of the bankrupt which was unlawfully diverted where such action could have been maintained by the bankrupt before his bankruptcy. *Miley v. Heaney*, (1918) 168 Wis. 58, 169 N. W. 64.

**Effect of judgment against mortgage trustee.**—The holders of the bonds of a bankrupt corporation, having been represented by the trustee of the mortgage issued to secure the bonds, are bound by a decree in an action against such trustee to set aside the mortgage, declaring the bonds to be illegal and void, and on motion by the trustee in bankruptcy of the mortgagor may be compelled to surrender and deliver up the bonds. *In re Franklin Brewing Co.*, (E. D. N. Y. 1918) 254 Fed. 910.

**Bond for title.**—Where by the law of the state in which land is situated there is no lienable interest in the holder of a bond for title, the lien acquired by a trustee under this section is subordinate to the claim of a creditor holding an assigned or transferred bond for title though unrecorded where recordation is not required. *In re Phenix Planing Mill*, (N. D. Ga. 1918) 250 Fed. 899.

**Property delivered to bankrupt under trust receipt.**—The status of a trustee under this section is not unlike that of a receiver appointed by a state court, and where by the state law the effect of the appointment of a receiver and his seizure of property held under an unverified and unrecorded trust receipt is to fasten the claims of creditors upon it, the trustee likewise becomes and is vested as to such property with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon. *In re Bettman-Johnson Co.* (C. C. A. 6th Cir. 1918) 250 Fed. 657, 163 C. C. A. 3.

**Property omitted from mortgage by mistake.**—Where property is not covered by any mortgage and there is nothing to show that it was intended to be included in the mortgage, the lien acquired by the trustee under this section is prior to that of one who merely claims that it was the intention

of the owner of the property to include it in the mortgage made by him. *In re Scruggs*, (S. D. Ala. 1917) 252 Fed. 322.

**Redemption of mortgaged property.**—A trustee does not stand in the right of lien creditors as it pertains to mortgaged property sold by a sheriff more than two years before the adjudication in bankruptcy, and having no lien by reason of the provisions of this section or otherwise upon the mortgaged property, he is not in a position to exercise the right of redemption from the mortgage. Without the lien, if he redeems from the mortgage, he occupies the position of a volunteer, and would be without the right of subrogation so as to avail himself of the lien of the mortgagee. *Brown v. Crawford*, (D. C. Ore. 1918) 252 Fed. 248.

**Right to sue.**—It is not necessary for a trustee in bankruptcy to obtain an order of court authorizing him to institute suit for the collection of the debts due the estate before he may sue for the collection of such debts. *Chalman v. Dodd*, (Ga. App. 1919) 99 S. E. 150.

**Right to intervene in suit in state court.**—Where a debtor was adjudged a bankrupt shortly after proceedings were commenced against him in a state court by his creditors to set aside a conveyance made by him to his wife as fraudulent, it is proper to permit the trustee in bankruptcy to intervene on behalf of all the creditors to the end that each may get a proper share of the assets belonging to the bankrupt and subject to his debts. *McCrory v. Donal*, (1918) 119 Miss. 256, 80 So. 643.

**Sale of property.**—*Sales free from incumbrances.*—To same effect as original annotation, see *Kelly v. Minor*, (C. C. A. 4th Cir. 1918) 252 Fed. 115, 164 C. C. A. 227.

*Where a tract of land, subject to an oil and gas lease*, is subdivided in a proceeding in bankruptcy, and such subdivisions sold separately by the trustee to different purchasers, the purchaser of each subdivision takes the same subject to such oil and gas lease; and should the lessee in such oil and gas lease thereafter produce oil or gas from such tract of land the royalties will be payable to the owner of the subdivision upon which the wells are drilled from which such production is had. *Pittsburgh & West Virginia Gas Co. v. Ankrom*, (W. Va. 1918) 97 S. E. 593.

**Sale subject to attachment lien.**—A company whose property had been sold by a trustee in bankruptcy and the sale confirmed, subject to an attachment lien in favor of plaintiff, was held not to be in position to complain of an order sustaining his motion for judgment on the pleadings where the judgment ran only against its property and not against anyone personally. *Strong v. Butte, etc., Corporation*, (1918) 54 Mont. 584, 172 Pac. 1033.

**Dower rights.**—To same effect as original annotation, see *Kelly v. Minor*, (C. C. A. 4th Cir. 1918) 252 Fed. 115, 164 C. C. A. 227.

“Where a creditor may sell the real estate of his debtor clear of the wife's inchoate right of dower in the state courts, it is unjust and inequitable to creditors that such rights should be denied them in a court of bankruptcy within the same state. These views are in harmony with, and not in contravention of, the provisions of section 8(a) of the Bankruptcy Act . . . providing that, in case of death, the widow and children shall be entitled to all rights of dower and allowances fixed by the laws of the state of the bankrupt's residence. The laws of the state of Pennsylvania give a lien creditor the right to sell the real estate free of dower, and the wife is therefore not deprived of any right she would have as against a creditor having a lien on her husband's real estate under the laws of Pennsylvania.” *In re Kligerman*, (E. D. Pa. 1918) 253 Fed. 778, *disapproving In re Chatiner*, (W. D. Pa. 1914) 216 Fed. 916.

**Time as of which trustee takes status of creditor.**—Where a bankrupt held property under a conditional sales contract which was recorded after the petition was filed but before the adjudication it was held that the reservation of title was void as against the trustee in view of this section and the New Jersey statute, which makes unrecorded agreements of this nature “absolutely void as against judgment creditors not having notice thereof.” *In re Capital City Cap Co.*, (D. C. N. J. 1918) 251 Fed. 664, wherein the court said: “The invoking of the Bankruptcy Act secured rights to the general creditors which, in the event of an adjudication, could not be avoided by any act of either Knowlton & Co. or the bankrupt subsequent to the filing of the original petition in bankruptcy. Adjudication having been obtained, the recording of the ‘conditional sales agreement’ after the filing of that petition, in legal effect, is the same as if a judgment had been previously recovered against the bankrupt and levy made on the property in question.”

The trustee begins to occupy the status of a judgment creditor with execution returned unsatisfied as of the date when the bankruptcy proceedings are begun. If before that date possession is taken by the mortgagee under an unrecorded chattel mortgage and no liens in favor of creditors have attached, the trustee's right is inferior to that of the mortgagee. *Jones v. Excelsior Springs Bank*, (Mo. App. 1919) 213 S. W. 892.

**Control by court.**—The court has power to order the trustee to accept a payment on account of a debt to the bankrupt secured by mortgage, and to release part of the property from the mortgage in consideration thereof. *In re East Stroudsburg Supply, etc., Co.*, (M. D. Pa. 1918) 248 Fed. 356.

**Accounting for gains unlawfully made out of estate.**—The trustee's paramount duty is to conserve and advance the interests of the estate intrusted to him by keeping himself

clear of alliances which tempt him to make the estate's interest subordinate to his own. If he fails in this particular, he must account, not only for losses sustained by the beneficiaries, but for gains made by him in dealing with the trust estate. Consequently where it appeared that a trustee, through the medium of his wife, entered into a partnership with a salesman employed by him while he was continuing the bankrupt's business, and paid to such partnership considerable sums as commission, the share of such commission received by his wife was held to have been paid to himself and his account was surcharged by that sum. *In re Webster Loose Leaf Filing Co.*, (D. C. N. J. 1918) 252 Fed. 959.

**Vol. I, p. 947, sec. 48a.** [First ed., 1912 Supp., p. 689.]

**Commissions on reclaimed property.**—A trustee's commissions where the bankrupt is a stockholder should not be calculated on funds which include either securities or their proceeds which claimants have successfully reclaimed. *In re Wilson*, (S. D. N. Y. 1917) 252 Fed. 631.

**Vol. I, p. 950, sec. 48d.** [First ed., 1912 Supp., p. 690.]

**Receiver's expenses**—*Court may order expenses paid out of assets in first instance.*—

"Ordinarily, when the receivership ends and the assets are turned over to the trustee, the current expenses of the receiver have been paid out of the current receipts and any lawful indebtedness may be deducted from the assets which go to the trustee. There can be no doubt that such debts are a charge on those assets at that time, and if they are not paid, the assets clearly remain subject to that charge. Not only does this charge result from the nature of the case, but it is expressly recognized by the distribution section (section 64) which gives priority to those expenses which were necessary for the preservation of the property; and the expenses of the receivership fall under this class by the very language which is used with reference to the creation of the receivership. No receiver can be appointed excepting as a step in what is absolutely necessary for the preservation of the property. It follows that, in this case, the lawful debts of the receiver must be paid out of the assets in the hands of the trustee, excepting so far as claims with priority may prevail." *In re Veler*, (C. C. 6th Cir. 1918) 249 Fed. 633.

**Court may compel petitioners to pay receiver's expenses.**—In cases where the receiver had never come into possession of the estate, or where there was no fund in court, excepting that which was the property of those who had always and successfully resisted the appointment of a receiver, it has been held that those who procure his appointment must

pay his compensation and expenses. This doctrine apparently rests on the rule of necessity. Since there is no estate or fund which can rightly be charged, and since the expenses must be paid by some one, those causing the receivership must respond. *In re Veler*, (C. C. A. 6th Cir. 1918) 249 Fed. 633.

**Vol. I, p. 954, sec. 50h.** [First ed., 1912 Supp., p. 693.]

**Referees' bonds in and of themselves** neither create nor give any right of action to the obligee therein named or to the use of the persons for whom they are given but are in the nature of a collateral security given by the referees to insure their faithful performance of the duties imposed by law. Accordingly the United States cannot recover from referees in bankruptcy, for the benefit of private individuals, sums allowed and retained by them out of bankrupt estates in excess of the compensation provided for in this Act. *U. S. v. Brainerd*, (E. D. Okla. 1918) 250 Fed. 1011.

**Vol. I, p. 957, sec. 52a.** [First ed., 1912 Supp., p. 696.]

**Charges by clerk for preparing and sending notice to creditors.**—In regard to charges by the clerk in respect to notices it has been declared in one case: "There is one provision in the General Orders which relates solely to the clerk. General Order No. 35 (89 Fed. xii, 32 C. C. A. xii) explicitly provides that the statutory compensation of the clerks shall 'not include \* \* \* expenses necessarily incurred in publishing or mailing notices or other papers.' It seems to follow that the clerk is entitled to charge the reasonable expense of preparing and sending notices required to be sent by him including the expense of clerical assistance. The present rate therefor, five cents each, represents as nearly as can be ascertained the actual cost of that work. The clerk may properly make that charge for it and it may be collected for him by the referee. The question is immaterial so far as the clerk's personal interest is concerned, because his office returns each year to the government a large surplus over and above all its expenses, including his own compensation." *In re McNeil Corporation*, (D. C. Mass. 1918) 249 Fed. 765.

**Vol. I, p. 960, sec. 56a.** [First ed., 1912 Supp., p. 698.]

**Defective claims.**—To the same effect as the first paragraph of the original annotation, see *In re Eisenberg*, (S. D. N. Y. 1918) 251 Fed. 427, wherein the court said: "In each case the date was given, but this represented the date the statement was prepared, and while, in some instances, the date is given

in the body of the bill or statement, the year is not given, and it cannot be presumed, as claimed by the objecting creditor, that the month indicated a purchase during that month in the year 1917. The objection may be considered technical, still I think it has legal force. Depositions to prove claims against a bankrupt estate should be correctly prepared, and indicate a date of obligation which, of necessity, excludes the possibility of the defense of the statute of limitations."

**Vol. I, p. 962, sec. 57a.** [First ed., 1912 Supp., p. 700.]

**Necessity and manner of proving claims.**—Creditors must file their claims with the trustee, and seek protection by appeal to the referee, rather than prosecute independent actions because of dissatisfaction with the trustee's acts. *De Muth v. Faw*, (1918) 103 Wash. 279, 174 Pac. 18.

**Amendment of proofs.**—To the same effect as original annotation, see *In re Keller*, (E. D. Mich. 1918) 252 Fed. 942.

**Proofs filed by trustee under a mortgage in behalf of bondholders.**—Where a deficiency arises on a sale under foreclosure of a mortgage given to secure an issue of bonds, and the trustee under the mortgage files, in behalf of the bondholders, a claim in bankruptcy for such deficiency, an amendment to the claim, ratifying the action of the trustee and making it a direct one by the bondholders themselves, may be allowed, it being declared that in such a case it is proper to permit the real parties in interest to take the trustee's place on the record. *In re Ellis*, (C. C. A. 3d Cir. 1918) 252 Fed. 483, 164 C. C. A. 399. As to the filing of the claim by the trustee the court, however, while expressing no opinion said: "The claim set forth all the facts with particularity, and expressly stated that the company was acting for the bondholders. Every one knew the facts and was aware that the company did not own the bonds and could not benefit by the balance still due on the mortgage debt. Whether it had a formal legal right to use its own name while collecting the money for the bondholders was a matter of dispute; if it had, the bondholders did not need to file individual claims, and we see no reason why they might not safely wait until that question should be finally decided. *In re Standard Co.*, (D. C.) 186 Fed. 586. Instead of waiting, however, the bondholders assumed that the company might be wrong, and (pending the final decision) took steps to amend the claim, thus acquiring the second string for their bow. Save in the disputed point, the company's proof was complete; the objection made to it was wholly based on a rule of procedure, and had no support in the merits, for the balance was undoubtedly due to the bondholders, and the company had authority to make the claim as agent."

**Who may prove claim—Former ward of bankrupt.**—The mere pendency of proceedings by a ward against her guardian for the opening of the settlement of his guardianship does not preclude her from filing claims against his estate in bankruptcy, as there is no inconsistency in seeking to have the guardianship settlement opened and claiming that her former guardian or his bankrupt estate is liable on a note which he had given her for an amount admitted to be due her. *Beavan v. Stuart*, (C. C. A. 5th Cir. 1918) 250 Fed. 972, 163 C. C. A. 222.

**Effect of proving claims—In general.**—Where a contractor for school district work prior to his entering into the contract assigned all amounts coming to him from the school district to a bank and carried that assignment into effect by delivering the warrants to the bank, a subcontractor's right under state laws to maintain an action to enforce payment out of the moneys coming to the contractor, warrants on which had been assigned, is not lost by his filing proof of his claim in the estate of the bankrupt contractor as an unsecured debt and his receiving dividends from such estate. *Baker Lumber Co. v. A. A. Clark Co.*, (Utah, 1919) 178 Pac. 764.

**Vol. I, p. 966, sec. 57b.** [First ed., 1912 Supp., p. 702.]

**Claims founded on written instruments—Loans made by checks.**—Loans made to the bankrupt in the form of checks cannot be said to be founded on an instrument in writing so as to require the filing of the checks with proof of the claim for such loan, as the check is merely a medium by payment. *In re Keller*, (E. D. Mich. 1918) 252 Fed. 942.

**Claims founded on note.**—The note of a bankrupt indorsed by a claimant, with payments made to the payee also indorsed thereon, filed in the cause in connection with the proof of claim of such payee, must be held to have been filed in behalf of both the payee and indorser, as it is obvious that it could not have been filed by both of them. *In re Keller*, (E. D. Mich. 1918) 252 Fed. 942.

**Claims for rent.**—A claim for rent due and payable on a written lease from the claimant to the bankrupt, must be supported by filing the lease or a verified statement of its loss or destruction. *In re Keller*, (E. D. Mich. 1918) 252 Fed. 942.

**Vol. I, p. 967, sec. 57d.** [First ed., 1912 Supp., p. 703.]

**Allowance of claims—Effect of formal proof.**—To same effect as original annotation, see *In re Arthur E. Pratt Co.*, (N. D. N. Y. 1918) 252 Fed. 917.

**Claims of relatives of a bankrupt** should be closely and carefully scrutinized, and not

allowed unless the evidence is clear and convincing. *In re Blanchard*, (D. C. N. J. 1918) 253 Fed. 758.

**Allowance a matter of discretion.**—A claim for rent for a period of time in which the possession of property was withheld from the claimant because of his unwarranted assertion to ownership of certain property on the premises belonging to the bankrupt presents a case for administrative exercise of discretion which could have been met by either the trustee or landlord or both calling to the attention of the court. In such a case the creditors will not be made to suffer through the fault, at least in part, of the landlord and it is within the discretion of the court to refuse to allow the claim for rent. *Reynolds v. Harrigan*, (C. C. A. 3d Cir. 1918) 254 Fed. 690, 166 C. C. A. 182.

**Objections to allowance—Evidence.**—On objection to the allowance of a claim for the unpaid balance of a note given by the claimant to the bankrupt corporation on the ground that it was given for the purchase of stock in the corporation, evidence is admissible to show that the note was given merely as a loan to the company and that the stock was taken as security, and further, that the stock was pledged to the bank discounting the note as additional security for its loan on the note. *In re Arthur E. Pratt Co.*, (N. D. N. Y. 1918) 252 Fed. 917.

**Form of objection.**—It is not necessary for creditors to present their objections to the allowance of a claim by the referee in writing in order to secure a review of the proceedings before the referee, where it appears that they seasonably appeared before the referee by counsel, and not only objected to the claim but also contested it and reserved exception to the ruling of the referee. *Irwin v. Maple*, (C. C. A. 6th Cir. 1918) 252 Fed. 10, 164 C. C. A. 122.

## Vol. I, p. 969, sec. 57e. [First ed., 1912 Supp., p. 704.]

**Law governing validity of security.**—The validity of a mortgage given by the bankrupt must be determined on objection by the trustee, by the law of the state in which the mortgage was made and where the property was situated. *In re Petersen*, (D. C. Nev. 1917) 252 Fed. 849.

**Proof of secured claim not obligatory.**—A secured creditor is not required to file a formal proof of his claim, though where the trustee has taken possession of the property and sold it he may file a petition to obtain the proceeds of the lien in the hands of the trustee. *In re North Star Ice, etc., Co.*, (E. D. Tenn. 1918) 252 Fed. 301.

**Effect of proving secured claim—Formal proof.**—Where the proof of a secured claim is entirely formal and contains no prayer for the enforcement of the petitioner's security by the bankruptcy court, nor any allegation

of insufficiency in the security, and the petitioner took no steps as provided by this section to have the value of its security determined in order that its claim might be allowed for any excess of the value of the securities, it is not entitled to have its claim allowed in any amount in order that it may participate in the creditors' meetings. *In re North Star Ice, etc., Co.*, (E. D. Tenn. 1918) 252 Fed. 301.

**Express waiver of security.**—To same effect as original annotation, see *Morrison v. Rieinan*, (C. C. A. 7th Cir. 1917) 249 Fed. 97, 161 C. C. A. 149.

## Vol. I, p. 972, sec. 57g. [First ed., 1912 Supp., p. 706.]

**Surrender essential—Surrender optional.**—Under section 57(g) of the Act, the creditor may keep a preference, if reasonable cause for belief that it was intended as a preference does not exist, but if he elects to do so he is debarred from having any balance on his debt allowed as a participating claim in the estate of the bankrupt. *De Forrest v. Crane & Ordway Co.*, (1919) 55 Mont. 489, 178 Pac. 291.

In case of a preference which extinguished entirely an unsecured debt of the defendant, leaving in its place a debt secured, if the defendant is not satisfied with the security he may surrender the same to the bankruptcy court and share equally with the other creditors in the dividends declared. *McAleer v. Peoples' Bank*, (Ala. 1918) 80 So. 94.

## Vol. I, p. 976, sec. 57h. [First ed., 1912 Supp., p. 709.]

**Sale of mortgaged property.**—Where a fourth mortgagee, after adjudication of the mortgagor as a bankrupt, with permission of the federal court, brought suit in the state court to foreclose the mortgage, which proceeding resulted in a deficiency judgment, and filed a proof of debt in bankruptcy, relying on the deficiency judgment as a liquidation by him of his claims under section 57-h of the Bankruptcy Act, it was held that the claim was properly disallowed on the ground that the trustee not having been made a party, the deficiency judgment did not constitute a liquidation of the claim by the mortgagee under the mortgage. It was, however, held that the judgment roll, while not sufficient to support a liquidation of the mortgage, was some evidence of value. *In re Soltmann*, (C. C. A. 2d Cir. 1918) 249 Fed. 455.

**Allowance for balance only—Proof against indorser.**—Where a bank held an indorsed note which was not due at the time of the bankruptcy of both the maker and indorser, and on which it had received a payment from the estate of the maker prior to the bankruptcy of the indorser, it was held that it could prove against the estate of the in-

dorser only for the amount due after crediting the payment received. *In re Shatz*, (E. D. Pa. 1918) 251 Fed. 351.

**Vol. I, p. 980, sec. 57k.** [First ed., 1912 Supp., p. 711.]

**Conditional allowance of claim.**—On the reconsideration of a claim under this section it must be re-allowed or rejected in whole or in part. Accordingly an order of a referee allowing a claim in favor of an insolvent bank, provided its receiver makes a payment to the bankrupt's trustee of money deposited by the receiver of the bankrupt in such bank, is improper. *In re United Grocery Co.*, (S. D. Fla. 1918) 253 Fed. 267.

**Laches.**—Formal compliance with the rule regulating the extension of time in which a petition for the re-examination of claims may be filed is not absolutely essential where the delay does not result in injury to a complainant. *In re Caledonia Coal Co.* (E. D. Mich. 1918) 254 Fed. 742, wherein it was said: "Rule 32 of the Bankruptcy rules for this district. This rule provides that—

"Petition for re-examination of claims shall be filed within sixty days after the filing thereof, unless the time therefor shall be extended by the court upon cause shown and after such notice to the claimant of the hearing of the said application as the court may direct."

"As already stated, the petition of the trustee was filed about a year after the filing of the claims in question, and it does not appear that there has been any formal compliance with the rule just quoted. In view, however, of the fact that due notice was sent to all of the claimants of the hearing on such petition, and as one of the questions raised by claimants and argued by both parties here is whether the petition of the trustee can be filed after the lapse of the time mentioned, I am disposed to consider this petition as if it included an application for the extension of time contemplated by the rule referred to. No motion to dismiss the petition as improperly filed was made, and the merits of the case have been fully argued. Reasons for the delay have been explained by the attorney for the trustee and are now before the court, so that no good purpose would be served by insisting upon the presentation of a formal application for an extension of time. Treating the petition, then, as involving such an application, I am of the opinion that the delay of the trustee has been satisfactorily explained, and that sufficient cause has been shown for the necessary extension of time."

**Vol. I, p. 982, sec. 57n.** [First ed., 1912 Supp., p. 712.]

The phrase liquidated by litigation is to be construed in connection with section 63-b and contemplates liquidation under the direc-

tion of the bankruptcy court. *In re Edelen*, (W. D. Ky. 1918) 248 Fed. 580.

**Time of proving claims liquidated by litigation.**—The clause applies only to claims liquidated by litigation within thirty days; in other words one year and ninety days is the utmost possible extension of time. *In re Edelen*, (W. D. Ky. 1918) 248 Fed. 580.

**Form of judgment obtained after discharge in bankruptcy.**—This section intended to permit proof of claim, after the discharge of debtors and after the expiration of a year subsequent to the adjudication, in every case where the debt was unliquidated at the time of adjudication but had become thereafter by a final judgment "liquidated by litigation." It is equally manifest that the permission of the statute would be but a vain and empty form if by reason of the discharge before judgment a final judgment in liquidation could not be obtained. It would seem to follow as a necessity of the situation, that a final judgment establishing the amount of the debt or claim should be framed in such a limited form as not to involve a judgment in personam, but be adequate to enable the creditor to reap the benefit of a proof of claim under the Act. *Barry v. New York Holding, etc., Co.*, (1918) 229 Mass. 308, 118 N. E. 639.

**Vol. I, p. 987, sec. 58 (a) (9).** [First ed., 1912 Supp., p. 717.]

**Notices essential.**—The requirement of this section regarding the giving of notice is positive and should be strictly complied with, and where such notice is not given an order of discharge is unauthorized and without the jurisdiction of the court to make. *In re Langfeldt*, (E. D. Fla. 1918) 253 Fed. 458.

**Vol. I, p. 990, sec. 59b.** [First ed., 1912 Supp., p. 718.]

- I. Who may file petition in involuntary bankruptcy.
- II. Form, averments, and amendment of petition.

**I. WHO MAY FILE PETITION IN INVOLUNTARY BANKRUPTCY (p. 990)**

**Creditors having provable claims—Assignee of creditor.**—An assignee of a creditor who was a creditor at the time of the act of bankruptcy may sign a petition in involuntary bankruptcy, unless the assignment was taken as part of an unlawful and oppressive scheme, and there is no requirement of law that a copy of the assignment be annexed to the petition. *In re H. E. Page Motor Car Co.*, (D. C. Mass. 1918) 251 Fed. 318.

**Secured creditor waiving security.**—A creditor who holds security rendering his claim improbable and who is therefore disqualified to be petitioning creditor may by voluntarily surrendering the security qualify



himself to proceed as an unsecured creditor. *Morrison v. Rieman*, (C. C. A. 7th Cir. 1917) 249 Fed. 97, 161 C. C. A. 149.

**Preferred creditors.**—To same effect as original annotation, see *Morrison v. Rieman*, (C. C. A. 7th Cir. 1917) 249 Fed. 97, 161 C. C. A. 149.

## II. FORM, AVERMENTS AND AMENDMENT OF PETITION (p. 994)

**Averment of facts.**—"Involuntary proceedings in bankruptcy, being in theory prosecuted against the will of defendant, necessarily vary greatly from voluntary ones, as regards the allegations of their pleadings; therefore it has been settled by numerous precedents: (1) that the essential facts necessary to give the bankruptcy court jurisdiction in such cases must appear affirmatively and distinctly; (2) that general averments of legal conclusions are not sufficient; (3) nor are averments of the acts of bankruptcy in the language of the statute, unaccompanied by a statement of facts affirmatively and distinctly showing them to exist; (4) such statement should state the specific facts relied on, with time, place, and circumstances, so that the alleged bankrupt may be distinctly apprised of what he is required to answer; and (6) it must be based upon something more than hearsay, rumors, or suspicion." *In re McGraw*, (N. D. W. Va. 1918) 254 Fed. 442.

**Time petitioners became creditors.**—It is not necessary that an involuntary petition show on its face that the petitioners were creditors at the time of the act of bankruptcy alleged. The proceedings date from the filing of the petition, and, *prima facie* at least, it is sufficient if a petitioner is alleged to be a creditor on that date. *H. E. Page Motor Car Co.*, (D. C. Mass. 1918) 251 Fed. 318.

**Averment of commission of act of bankruptcy.**—To same effect as original annotation, see *In re McGraw*, (N. D. W. Va. 1918) 254 Fed. 442.

A petition showing on its face an act of bankruptcy is essential to jurisdiction. *In re D. F. Herlehy Co.*, (N. D. N. Y. 1918) 247 Fed. 369.

**Sufficiency of petition.**—A petition alleging an act of bankruptcy through suffering, while insolvent, a creditor to obtain a preference through legal proceedings, which fails to show that execution was issued and levied on the property, with sale thereof advertised, and a failure to vacate and discharge five days before such sale, together with the fact that the judgment was obtained within the four months period within which it could be assailed, is insufficient. *In re McGraw*, (N. D. W. Va. 1918) 254 Fed. 442.

**Language of Act insufficient.**—To same effect as original annotation, see *In re McGraw*, (N. D. W. Va. 1918) 254 Fed. 442.

**Amendment of petition.**—The amendment of a petition in involuntary bankruptcy more than four months after an alleged act of

bankruptcy occurred does not preclude the consideration of such act. *In re C. W. Bartleson Co.*, (S. D. Fla. 1918) 253 Fed. 296.

**Amendment to bring in omitted creditor.**—Omitted creditors may be added to a schedule of creditors contained in a petition, but such amendment relates to the date of the filing of the petition. *Bramham v. Lanier*, (1917) 138 Tenn. 702, 200 S. W. 830.

**Amendment to establish set-off.**—Amendment of the petition may be made in order to a correction of schedules for the purpose of establishing a set-off against the demand of a creditor who filed a petition in bankruptcy proceedings (*In re Progressive Wallpaper Corp.* (D. C. N. Y. 1917) 240 Fed. 807) and equally, it seems, to defeat a claim of set-off put forward in a suit such as the one before us. *Bramham v. Lanier*, (1917) 138 Tenn. 702, 200 S. W. 830.

**Verification.**—While it is better practice for proposed amendments to a petition in bankruptcy to be prepared, signed and sworn to in strict conformity with the terms of the Bankrupt Act, it is a sufficient verification when by a consent order the court has made the amendments a part of the petition for amendment, which was properly signed and sworn to by the petitioning creditors. *In re C. W. Bartleson Co.*, (S. D. Fla. 1918) 253 Fed. 296.

## Vol. I, p. 1001, sec. 59f. [First ed., 1912 Supp., p. 727.]

**Purpose of section.**—The provisions of this section were not intended to allow creditors to come in and answer at any time. *In re D. F. Herlehy Co.*, (D. C. N. D. N. Y. 1918) 247 Fed. 369.

**Joining in petition—Intervention after dismissal.**—To same effect as original annotation, see *Trammell v. Yarbrough*, (C. C. A. 5th Cir. 1919) 254 Fed. 685, 166 C. C. A. 183.

**Conclusiveness of adjudication against creditor failing to intervene.**—An adjudication in bankruptcy, based upon a master's finding in involuntary proceedings that the debtor had been insolvent for four months or more before the filing of the petition, and, while so insolvent, had made certain preferences, is not conclusive, as against a creditor receiving payments during that period who was not a party to the proceedings and took no part therein, as to the fact of insolvency at the time such payments were made, despite the provisions of this section and section 18b, under which any creditor may intervene in the bankruptcy proceeding, since these sections are permissive, not mandatory, and until the right is exercised the creditor remains a stranger to the litigation, and as such is unaffected by the decision of even essential subsidiary issues. *Gratiot County State Bank v. Johnson*, (1919) 249 U. S. 246, 39 S. Ct. 263, 63 U. S. (L. ed.) —, *reversing* (1916) 193 Mich. 452, 160 N. W. 544.

**Vol. I, p. 1003, sec. 59g.** [First ed., 1912 Supp., p. 729.]

**Reinstatement of petition.**—An order dismissing a petition in bankruptcy in pursuance of an agreement for settlement consented to by the creditors, will not be reopened on the ground that the order was obtained by fraud and was not faithfully carried out by the bankrupt. In such a case the jurisdiction of the court is lost, a complainant must seek his remedy in the state court, or in new bankruptcy proceedings. *In re Kaufman*, (S. D. N. Y. 1918) 253 Fed. 301.

**Vol. I, p. 1004, sec. 60a.** [First ed., 1912 Supp., p. 729.]

- I. Creation of preferences.
- II. Constituent elements.

**I. CREATION OF PREFERENCES (p. 1005)**

**Construction.**—The word "required" as used in this and the following section does not mean required for any purpose, and where a state statute provides that a mortgage as between the parties, though unrecorded, shall be valid, the failure to record a mortgage given by the bankrupt cannot be regarded as sufficient evidence in the absence of other circumstances, of a tacit agreement between him and the mortgagee to withhold it from record for improper purposes, thereby making it in effect a fraudulent transaction. *In re Anderson*, (D. C. R. I. 1918) 252 Fed. 272.

**A trustee's right of recovery of property transferred is not limited to the bankruptcy law**, but it has been held that if the transfer is preferential and void under the law of the state in which made he is entitled to recover under the trust fund doctrine as recognized and enforced in the state tribunals. In this connection it is said: "The trust fund doctrine from first to last is to the effect that the property and assets of an insolvent corporation constitute a trust fund in the hands of the managers of the corporation for the benefit of each and all of its creditors ratably, and although a private debtor may prefer creditors, even to the exhaustion of all his assets, an insolvent corporation will not be permitted to do or suffer anything which will permit one or more creditors to obtain a preference, no matter what the good faith of such creditor may be." *Williams v. Davidson*, (1918) 104 Wash. 315, 176 Pac. 334.

Under the trust fund doctrine, a creditor of an insolvent corporation who in good faith purchases all the assets, assuming all debts under misrepresentations, is liable to the trustee in bankruptcy although not liable under the Bankruptcy Act, and is not protected by compliance with the sales in bulk statutes. In such case, the liability on securing the preference is limited to the pro rata share which excluded creditors would have been entitled to upon a ratable distribution

of the assets. *Williams v. Davidson*, (1918) 104 Wash. 315, 176 Pac. 334.

In an action by a trustee to recover the value of property alleged to have been transferred as a preference it has been held that, under the statutes of Washington, the taking of the property, being unlawful under the Bankruptcy Act, becomes a conversion from which an implied promise to pay arises, and that where the value of the property converted is certain, known and properly alleged the writ of garnishment may issue. *State v. Superior Court*, (Wash. 1919) 178 Pac. 827.

**Preference created by transfer.**—See to same effect as original annotation, *Farmer's State Bank v. Freeman*, (C. C. A. 8th Cir. 1918) 249 Fed. 579.

**Injunction against resale by purchaser at sheriff's sale.**—In an action by a trustee to obtain an order temporarily restraining the purchaser at a sheriff's sale, and certain banks alleged to be the real purchasers, from removing, or transferring, the title to said property or any portion thereof, it being alleged that such a transfer would result in a preference, relief was refused on the grounds set forth in the following extract from the opinion:

"This application must be decided upon the bill of complaint, the exhibits thereto, and the affidavits filed at the hearing. The only allegations in the bill connecting the two banks with any claim to the property sold, or any intent to sell or dispose of same, is made upon information and belief, and no affidavit filed with the bill from any one having personal knowledge of those facts. Nor does the bill contain any allegation which would tend to show irremediable damage, in that the defendants were unable to respond in any amount equal to the value of the property, or that the property had some peculiar value which could not be compensated for in damages. The bill fails to show any necessity for the drastic remedy by injunction, and, failing to do this, a court of chancery will deny the application. For these several reasons, the application for a temporary restraining order will be denied." *Lile v. Perry*, (D. C. S. D. Fla. 1918) 250 Fed. 307.

**Transfer of corporate assets to officer.**—It is a rule that if a corporation has creditors to the knowledge of any of its officials or agents, by whose knowledge it would in ordinary business affairs be bound, it is held to that knowledge, and is presumed to act in the light of it, in the case of transfers by which it is alleged a preference has been created. *In re Boston-West Africa Trading Co.*, (D. C. Mass. 1919) 255 Fed. 924, so holding where a person as treasurer of a corporation paid to himself out of the corporate funds a sum equal to the amount of a claim which he held against the corporation, where, although he believed the claim of another creditor to be impounded, such belief was not shared in by another officer of the corporation.

**Conveyance to prefer surety.**—When a surety or indorser on the note of a person or corporation who is insolvent knows of such insolvency within four months of bankruptcy, filing the petition, causes or procures him or it to pay the note or notes upon which he is indorser, in whole or in part, for the purpose of or with the intent of relieving or exonerating himself from liability, and thus obtaining a preference over other creditors of the same class, he receives a preference, which may be recovered by the trustee in bankruptcy. *Chapman v. Hunt*, (N. D. N. Y. 1918) 248 Fed. 160.

**Taking back property from debtor.**—Where it appears from the evidence that a creditor, who took back property from the debtor, had, at the time, actual knowledge of the latter's financial condition and that he contemplated going into bankruptcy, a recoverable preference is created. *Egner v. Parshelsky Bros.*, (D. C. E. D. N. Y. 1918) 254 Fed. 907.

**Transfer in performance of prior valid agreement.**—Acts done in performance of a prior valid contract, as for instance the transfer of security to which the creditor was entitled at the time the agreement was executed, to secure him against loss for accommodation indorsements, do not amount to a preference though the creditor had reasonable cause to believe the debtor was insolvent at the time such transfer was actually made. *Chapman v. Hunt*, (C. C. A. 2d Cir. 1918) 254 Fed. 768.

Where a person has the right to act, not as a general creditor but under a contract, a voluntary transfer of possession by the bankrupt to such person in accordance with a provision of that contract is not a preferential transfer. *Stennick v. Jones*, (C. C. A. 9th Cir. 1918) 252 Fed. 345.

**A surrender of leased premises to the lessor on the forfeiture of a leasehold, for nonpayment of rent, the property being at that time, in fact and in law, the property of the lessor, is not a preference.** *Hills v. Stimson Co.*, (1918) 102 Wash. 1, 172 Pac. 1181.

**Payment by contractor of subcontractor's debts with money due him.**—Where contractors, in order to clear of liens buildings which they were under contract to deliver free from all claims, paid the debts of a subcontractor with money due to him, a preference was held to have been made. *De Forrest v. Crane-Ordway Co.*, (1919) 55 Mont. 489, 178 Pac. 291.

**Conditional sale — Property transferred to a person under a valid conditional contract of sale.**—To the same effect as the original annotation see *Delaval Separator Co. v. Jones*, (1918) 117 Me. 95, 102 Atl. 968, wherein it was held that certain conditional sale notes called in Maine "Holmes notes" were not voidable preferences where it appeared that they were recorded prior to the filing of the maker's petition in bankruptcy, because, first, Holmes notes did not consti-

tute a transfer by the bankrupt of any of his property, and secondly, because there was nothing to show that the maker was insolvent on the day when the notes were recorded.

**Preference created by mortgage.**—To same effect as original annotation, see *Irwin v. Maple*, (C. C. A. 6th Cir. 1918) 252 Fed. 10, 164 C. C. A. 122.

**Unrecorded chattel mortgage.**—A chattel mortgage given more than four months before bankruptcy and which under the state law need not be recorded does not constitute a preference. *Bonner v. Athens First Nat. Bank*, (C. C. A. 5th Cir. 1918) 248 Fed. 692, 160 C. C. A. 592.

**Banking transactions — Transfer to pay overdraft.**—Where there was evidence that accounts were assigned by the bankrupt and that the assignee, a bank, received the proceeds, not in the usual course of banking business, but with the specific understanding that they were to be applied to the reduction of an overdraft and there was no previous agreement between the bank and the depositor that the latter should assign accounts to the bank for collection to pay overdrafts as they might occur, a preference was held to have been created. *First Nat. Bank v. Harper*, (C. C. A. 9th Cir. 1918) 254 Fed. 641.

**Deposit by bankrupt's receiver.**—A deposit in a checking account by a receiver of a bankrupt to his credit as receiver with a bank to which the bankrupt is indebted has been held not to be a preference which is voidable under section 60b. *In re United Grocery Co.*, (D. C. S. D. Fla. 1918) 253 Fed. 267.

**Agreement maturing obligations at date prior to which they were originally due.**—An arrangement between a debtor and a bank, within four months of the filing of a petition in bankruptcy, the object of which was to change existing obligations of the former to the latter, so that they would mature at a date prior to that when by their terms they became due and to provide the bank with funds at the date of the earlier maturity by the assignment of moneys then to become due to the debtor under contracts, has been held to create a preference, the surrounding circumstances being such as to charge the bank with knowledge of the debtor's insolvency. *Fifth Nat. Bank v. Lyttle*, (C. C. A. 2d Cir. 1918) 250 Fed. 361.

**Bank discounting notes and crediting payee with proceeds.**—In *Bridgeton Nat. Bank v. May*, (C. C. A. 4th Cir. 1918) 253 Fed. 731, it appeared that a creditor when it took notes and a deed of trust from the bankrupt had reasonable cause to believe that the latter was insolvent and that the enforcement of the security would give it a preference over other creditors. When the notes were discounted for the payee, less than a month before the bankruptcy of the maker, the bank advanced no money to the payee, but simply placed the proceeds to its credit. On an appeal by the bank from a decision by the

referee setting aside the deed as a preference the court declared that the bank's claim to the fund in question was no better than the creditor's.

## II. CONSTITUENT ELEMENTS (p. 1014)

**Insolvency.**—To same effect as original annotation, see *Stephens v. Union Sav. Bank, etc., Co.*, (C. C. A. 6th Cir. 1918) 250 Fed. 192, 162 C. C. A. 328; *In re Keller*, (E. D. Mich. 1918) 252 Fed. 942.

"To constitute a voidable preference under the Bankruptcy Act, the person receiving the payment, or to be benefited by it, must have had reasonable cause to believe that the debtor was at the time insolvent and that the payment would effect a preference; and insolvency under the act means something more than that the debtor was financially embarrassed and hard pressed by his creditors. This condition may exist, and the debtor still be solvent, so that if the executor, who received payment, simply knew that the debtor said that he was having difficulty in financing his firm, it would not, taken alone, be reasonable cause to believe him insolvent, especially in view of the fact that he had made the same remark a year before, and had thereafter told him that he had 'financed' and was 'all right again.' The law is well established that, even if the creditor entertains doubts concerning the solvency of the debtor, it is not enough. He must have a knowledge of such facts as will carry him beyond this and furnish a reasonable ground to believe that the payment will give him preference over other creditors." *In re Salmon*, (C. C. A. 2d Cir. 1917) 249 Fed. 300.

**Preference must be given to creditor.—Transfer made to another for creditor's benefit.**—To constitute a transfer it is not necessary that the transfer be made directly to the creditor. It may be made to another for his benefit. *De Forrest v. Crane & Ordway Co.*, (1919) 55 Mont. 489, 178 Pac. 291.

**Validity confined to present consideration.**—The substitution of a mortgage for a lien under which the lienor had the right to assume immediate possession and which would have operated as a preference if it had been retained, is not open to the objection of creating a preference although the transaction occurred within four months prior to the debtor's bankruptcy, and is valid and enforceable against the trustee in bankruptcy to the extent of the rights given up under the original lien. *Hogan v. McNeill*, (C. C. A. 4th Cir. 1918) 253 Fed. 716, 165 C. C. A. 310.

**In calculating the four months.—Instrument valid under state law.**—Where the statutes of the state where land is situated do not require a deed to be recorded as to subsequent purchasers in good faith, the four months period fixed by the Bankruptcy Act is computed from the date of the deed and not from the date when it is recorded when the rights of innocent purchasers are not

involved. *Hoshaw v. Cosgriff*, (C. C. A. 8th Cir. 1917) 247 Fed. 22, 159 C. C. A. 240.

**Where recording required.**—Where the recording of chattel mortgages is required by the state law a chattel mortgage withheld from record until within four months of the bankruptcy of the mortgagor may be avoided by the trustee. *Bakersfield Bank v. Moore*, (C. C. A. 9th Cir. 1918) 247 Fed. 913.

## Vol. I, p. 1026, sec. 60b. [First ed., 1912 Supp., p. 739.]

I. Elements of voidability.

II. Recovery of voidable preferences.

### I. ELEMENTS OF VOIDABILITY (p. 1026)

**In general.**—In order to make a preference under section 60b, it is necessary for the plaintiff to show that the debtors were insolvent at the time they made the transfer: that it was within four months of filing the petition in bankruptcy; that its effect was to give a larger percentage to the defendants than to other creditors of the same class; that the persons receiving the preference were to be benefited by it either by direct payment of their debt or by relieving them from their indorsements or guaranties; that they were acting as agents of others who were so benefited; and that the persons or the agents had reasonable cause to believe that a transfer would operate as a preference. *Smith v. Coury*, (D. C. Me. 1918) 247 Fed. 168.

**Reasonable cause to believe transaction would effect preference.**—To same effect as third paragraph of original annotation, see *Bassett v. Evans*, (C. C. A. 8th Cir. 1918) 253 Fed. 532, 165 C. C. A. 202, also holding that "reasonable cause to believe," under this section, covers substantially the same field as "notice" in determining whether a person is a bona fide purchaser of property.

This section declares that the consequences of a transfer specified in section 60a shall be that it may be avoided by the trustee and the property, or its value, recovered by him for the benefit of the bankrupt's estate, provided the preference was given within the prescribed limit prior to the filing of the petition in bankruptcy, or the adjudication, and the creditor to whom the transfer was made had at the time reason to believe a preference was intended. *DeForrest v. Crane & Ordway Co.*, (1919) 55 Mont. 489, 178 Pac. 291.

Though a transfer is made which amounts to a preference, yet it is not unlawful within the meaning of section 60b, unless the creditor receiving it had reasonable cause to believe that the debtor intended thereby to give him a preference, that is, to pay him a larger percentage of his claim than others would receive. *DeForrest v. Crane & Ordway Co.*, (1919) 55 Mont. 489, 178 Pac. 291.

A creditor taking over a bankrupt's stock in good faith, after diligent inquiry as to

the total indebtedness of the insolvent, and agreeing to pay all debts in full, is not liable to the trustee for receiving a preference, under subd. b of § 60 of the Bankruptcy Act, which requires that such person have reasonable cause to believe that he was receiving a preference. *Williams v. Davidson*, (1918) 104 Wash. 315, 176 Pac. 334.

Courts must hold persons to have "reasonable cause to believe" what sensible business men standing in their place and possessing their knowledge would have believed. *Bassett v. Evans*, (C. C. A. 8th Cir. 1918) 253 Fed. 532, so declaring in the case of notes and a mortgage given to creditors.

*Conveyance to agent of creditor.*—A conveyance to the husband or brother of a creditor acting as agent for her is a preferential transfer within section 60b. *Smith v. Coury*, (D. C. Me. 1918) 247 Fed. 168.

*Indorser or guarantor as creditor.*—An indorser or a guarantor of the bankrupt is a creditor within the meaning of section 60b. *Smith v. Coury*, (D. C. Me. 1918) 247 Fed. 168.

*Preference of wife.*—The payment by a bankrupt of a debt whereby he releases securities of his wife which she had loaned him to pledge as security, is a preference of the wife and accordingly voidable, she being in effect a surety. *Smith v. Tostevin*, (C. C. A. 2d Cir. 1917) 247 Fed. 102, 169 C. C. A. 320.

A *circumity of arrangement* will not avail to deprive a payment of its character as a preference, as where a bankrupt, who is joint maker of a note, pays his co-maker who in turn pays the payee. In such a case reasonable cause to believe the transfer would effect a preference being shown, recovery may be had from the payee. *First Nat. Bank v. Blackburn*, (C. C. A. 3rd Cir. 1919) 256 Fed. 527.

*Payment conditioned on surrender of financial statement by debtor.*—A demand by the president of a debtor corporation of a financial statement made by him as a condition of the payment of the debt, coupled with a prior declaration to the creditor by a third party, apparently in a position to have knowledge, doubting the accuracy of the statement, is sufficient to give the creditor notice that the statement is apparently untrue and to create a belief that the payment was intended to prefer. *In re Cramer & Rogers Grocery Co.*, (C. C. A. 3rd Cir. 1918) 252 Fed. 112.

*Question of fact.*—The question whether a person to whom property was transferred by the bankrupt within four months prior to adjudication had reasonable cause to believe that the person transferring it was insolvent and that the transfer would effect a preference is a question of fact for the trial court. *Whitmore v. Swank*, (C. C. A. 4th Cir. 1918) 252 Fed. 135.

*Instruction to jury.*—In an action to recover a preference under this section, although the court in instructing the jury

should employ the language of the statute in respect to "reasonable cause to believe" yet an omission of the word "reasonable" will not be sufficient cause for reversal and the ordering of a new trial, where it appears that no specific exception was made to the omission to use the word as required by rule 10 of the Court of Appeals of the Circuit. *Campbell v. Krauss*, (C. C. A. 3d Cir. 1918) 249 Fed. 670.

*Reason to suspect insufficient.*—To same effect as original annotation, see *Bank of Commerce v. Brown*, (C. C. A. 4th Cir. 1918) 249 Fed. 37, 161 C. C. A. 97; *Smith v. Powers*, (N. D. N. Y. 1919) 255 Fed. 582; *Cohen v. Tremont Trust Co.*, (D. C. Mass. 1918) 256 Fed. 399.

It is not enough that the creditor receiving a transfer has some cause to suspect the insolvency of his debtor. He must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency in order to invalidate a security taken for his debt. Whether the facts known to the creditor meet this requirement is ordinarily a question of fact. *Donohue v. Dykstra*, (E. D. Mich. 1918) 247 Fed. 593.

Although there is a close relationship, by reason of common officers, between a bank and a bankrupt's creditor for whom it has discounted notes of the bankrupt, it has been held that whatever suspicion may be thus created it is not sufficient to charge the bank with knowledge of the debtor's insolvency in view of positive evidence showing a lack of knowledge. *Bridgeton Nat. Bank v. Way*, (C. C. A. 4th Cir. 1918) 253 Fed. 731.

*Positive knowledge unnecessary.*—To same effect as original annotation, see *In re Campion*, (N. D. N. Y. 1919) 256 Fed. 902.

Knowledge of one who was attorney both for the creditor and the bankrupt will be regarded as knowledge of the creditor. *Farmers' State Bank v. Freeman*, (C. C. A. 8th Cir. 1918) 249 Fed. 579.

Knowledge at the time of a transfer that the bankrupt was an absconding insolvent necessarily carried with it the further knowledge that he could not pay his creditors the amounts due them and that any one of them, including itself, receiving a payment would necessarily receive a preference over all the other creditors. *DeForrest v. Crane & Ordway Co.*, (1919) 55 Mont. 489, 178 Pac. 291.

*Notice of circumstances indicating preference.*—Where a chattel mortgage is withheld from record and before it is recorded the mortgagee becomes apprised of facts indicating that it operates to give a preference the chattel mortgage is voidable under section 60b. *Bakersfield Nat. Bank v. Moore*, (C. C. A. 9th Cir. 1918) 247 Fed. 913.

In *Farmers' State Bank v. Freeman*, (C. C. A. 8th Cir. 1918) 249 Fed. 579, 161 C. C. A. 505, "it was charged in the complaint: That on January 13, 1915, the bankrupt was indebted to the appellant bank in the sum of

\$3,196 and interest thereon, evidenced by its promissory note. The note had been overdue since October, 1914, and was unsecured. That on that day the defendant, E. M. Fowler, Mr. Clark, the cashier of the appellant bank, and the president of the Jones Company agreed upon and carried out the following scheme: The bankrupt executed to E. M. Fowler a bill of sale, whereby it conveyed to him 8,000 gallons of apple juice, belonging to it, for the expressed consideration of \$3,500. That the said Fowler, not being possessed of the money, borrowed it from the appellant, executing his note for said sum of money, and as security for the loan pledged the bill of sale executed to him by the bankrupt. That the bank gave Fowler credit on its books for that sum of money, and Fowler immediately thereafter gave his check on the bank to the bankrupt for the \$3,500. The check was thereupon deposited by the bankrupt with the appellant, and that evening, after banking hours, the bank charged the bankrupt with the amount of the note. That Mr. Fowler was the attorney for the bank, as well as of the bankrupt at the time. That for a long time prior to this transaction the bankrupt had kept its account with the appellant bank, which showed that for a considerable time the bankrupt was overdrawn at the bank, and when it had balances they were for very small sums. That at the time this transaction took place the bankrupt was insolvent, which was known to the appellant, as well as Mr. Fowler, its attorney. That the application of the money thus deposited to the credit of the bankrupt was not made in good faith in the usual course of business, but for the purpose of enabling the appellant to secure an unlawful preference, in violation of the provisions of the Bankruptcy Act. Defendants filed separate answers, denying that the bankrupt was insolvent at the time, and alleging, if it was insolvent, that neither of the defendants knew it or had reasonable cause to know it; that the transaction was made in good faith, and not for the purpose of obtaining thereby the apple juice as a security for the bankrupt's indebtedness to appellant, and that the payment was not an unlawful preference, but a set-off, as the bank had a right to make. The hearing was upon oral evidence, and the court found that the bankrupt, at the time this transaction took place, was insolvent, and that the transaction was in pursuance of an understanding between the officers and attorney of the bank and of the bankrupt, for the purpose of giving the bank a preference in the collection of its note, and rendered a decree against the bank for the amount claimed, but no decree was rendered against the defendant Fowler. From this decree the appellant prosecutes this appeal." The court said: "A careful reading of the evidence convinces that the entire transaction was merely a scheme for the purpose of enabling the appellant bank to secure payment of its debt in full, and enable it to bring

the transaction within the rule laid down in *N. Y. County Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. ed. 380. Mr. Fowler had no money of his own to lend; the bank advanced it to him; he loaned it to the bankrupt, taking as security therefor the bill of sale of the apple juice; the check he gave to the bankrupt was on the appellant bank, and was deposited immediately by it with the bank; and on the same day, after banking hours, the note was charged by the bank to Jones Bros. & Co."

*Duty of inquiry.*—To same effect as first and second paragraphs of original annotation, see *In re Campion*, (N. D. N. Y. 1919) 256 Fed. 902.

Cessation of activity in the account of a depositor, coupled with a request for larger loans, has been held sufficient in connection with other facts to excite inquiry by a trust company as to the solvency of such depositor. *Cohen v. Tremont Trust Co.*, (D. C. Mass. 1918) 256 Fed. 399.

*Knowledge presumed*—*Knowledge of officer of corporation.*—A corporation does not stand in any better position because knowledge of facts sufficient to lead a careful man to the conclusion that a debtor was insolvent was split up among several of its officers or agents, who did not exchange information. *Cohen v. Tremont Trust Co.*, (D. C. Mass. 1918) 256 Fed. 399.

*Facts shown by books.*—On the question of reasonable cause to believe it has been decided that a corporation must be held to knowledge of such facts as are evident from its own books. (*Cohen v. Tremont Trust Co.*, D. C. Mass. 1918) 256 Fed. 399.

*Intent to prefer.*—To same effect as original annotation, see *Cohen v. Goldman*, (C. C. A. 1st Cir. 1918) 250 Fed. 599, 162 C. C. A. 615.

In *In re Campion*, (N. D. N. Y. 1919) 256 Fed. 902, the court said as to the question of intent: "Intent to give a preference and intent to obtain a preference have nothing to do with the question of actually obtaining a preference. The questions under the act as amended are: (1) Was the debtor insolvent? (2) Within four months of filing the petition did he make a transfer of any of his property? (3) Would the effect of the enforcement of such transfer be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class would receive? (4) Did the person receiving it, or to be benefited thereby, or his agent acting in the matter of obtaining it, then have reasonable cause to believe that the enforcement of the transfer, here the taking or enforcement of the mortgage, would effect a preference; that is, give to the creditors receiving the transfer a greater percentage of his debt than any other of such creditors of the same class would or will receive? Answer these questions in the affirmative, and we have a preference voidable by the trustee. Reasonable cause to believe assumes that the

one receiving the transfer, or his agent, had knowledge of the insolvency, or such information on that subject as would put a man of reasonable intelligence on inquiry, and that means of obtaining knowledge was at hand and knowledge obtainable, and that knowledge would have been obtained if inquiry had been made."

**Instructions.**—In *First Nat. Bank v. Blackburn*, (C. C. A. 3rd Cir. 1919) 256 Fed. 527, a refusal to give the following instruction was held proper: "If the jury believe from the evidence that the \$600 note, which is a part of the \$3,100 paid to the bank on October 30, 1914, was not a primary indebtedness of J. F. Kenney, the bankrupt, the bank, the defendant in this case, cannot be charged with receiving said amount in preference to Kenney's other creditors."

## II. RECOVERY OF VOIDABLE PREFERENCES (p. 1038)

**Jurisdiction.**—*Dividends which have been unlawfully paid to a stockholder within four months of bankruptcy are recoverable by the trustee under this section.* See *Miller v. Day*, (C. C. A. 7th Cir. 1918) 249 Fed. 177.

**Evidence—The burden of proof.**—To same effect as first paragraph of original annotation, see *In re Campion*, (N. D. N. Y. 1919) 256 Fed. 902.

To same effect as second paragraph of original annotation, see *Bank of Commerce v. Brown*, (C. C. A. 4th Cir. 1918) 249 Fed. 37, 161 C. C. A. 97.

In an action by a trustee to recover alleged preferences the plaintiff has the burden proving his charges; judgment cannot be founded on suspicion. *Turner v. Schaeffer*, (C. C. A. 8th Cir. 1918) 249 Fed. 654.

It must be shown that the creditor had reasonable cause to believe that the transfer would effect a preference. *DeForrest v. Crane & Ordway Co.*, (1919) 55 Mont. 489, 178 Pac. 291.

In a suit by a trustee to recover a payment on the ground that it constituted a preference in order to entitle the plaintiff to recover, he must first show that at the time of the transfer the bankrupt was insolvent, as that word "insolvent" is understood to mean in the Bankruptcy Act; that is, that a fair valuation of the bankrupt's property was insufficient in amount to pay his debts, and further that the payment operated as a preference in favor of the bank, and that the bank had reasonable cause to believe that the enforcement of the payment would effect a preference. *McAleer v. Peoples' Bank*, (Ala. 1918) 80 So. 94.

For the purpose of showing notice on the part of the creditor of the bankrupt or insolvent condition of the debtor, evidence is admissible of the common report in the locality where the creditor and debtor were both doing business, that the latter contemplated bankruptcy at the time, or was about to go

into bankruptcy on account of his insolvent condition. *McAleer v. Peoples' Bank*, (Ala. 1918) 80 So. 94.

In an action by a trustee to recover a payment alleged to have been a preference it has been held that evidence is admissible that the person who loaned the money to the bankrupt insisted as a condition for the loan of the full sum requested, a considerable part of which was required to pay off a mortgage, that the debtor pay the unsecured indebtedness, which payment is complained of as the preference. *McAleer v. Peoples' Bank*, (Ala. 1918) 80 So. 94.

**Question for jury.**—In an action by a trustee to recover a payment alleged to have been a preference the question whether there was in fact a preference is for the jury. *McAleer v. Peoples' Bank*, (Ala. 1918) 80 So. 94.

The question whether a person had "reasonable cause" to believe is one for the jury. *McAleer v. Peoples' Bank*, (Ala. 1918) 80 So. 94.

## Vol. I, p. 1045, sec. 60d. [First ed., 1912 Supp., p. 747.]

**Order for restoration of excess.**—Where the evidence shows that a payment was made by the bankrupt out of his estate in contemplation of bankruptcy, for services rendered or to be rendered the bankrupt by an attorney in the matter of his bankruptcy proceedings, and that the amount thus received was in excess of the fair and reasonable value of the services rendered, the recipient may properly be required to return the excess. *In re Porter*, (C. C. A. 7th Cir. 1918) 253 Fed. 552.

## Vol. I, p. 1048, sec. 62a. [First ed., 1912 Supp., p. 749.]

**Necessary expenses allowed—Allowances to a special master and the expenses for stenographic minutes** must come preliminarily out of the general estate. If it should turn out that there are not sufficient funds in the general estate to permit a reasonable allowance to the master and the payment of stenographer's charges, then such balance as is necessary to be paid to the master or the stenographer, or to both, as the case may be, should be equitably apportioned among the successful claimants. The reason for this is that it would not be possible otherwise for the court to determine the rights of the claimants, and the court will protect its own officer in such circumstances. *In re Wilson*, (S. D. N. Y. 1917) 252 Fed. 631.

**Stationery used by referee.**—Where information is requested of the referee by creditors, requiring answers by mail, the cost of the stationery used in replying to such inquiries is an "actual and necessary expense" in the administration of such estate, for which the referee is entitled to reimbursement. *In re Capital Security Co.*, (M. D. Tenn. 1918) 251 Fed. 927.

**Stenographer hired by referee.**—"The duty of furnishing . . . information . . . rests upon the referee, under the specific provisions of the Act. His compensation, prescribed by sec. 40 of the Act, is in full for all services performed by him under the Act and General Orders. This compensation cannot be increased in any guise or form. . . . Clerical assistance aiding him in the discharge of the duties devolved upon him in a particular case does not, in general, constitute a necessary expense for which he may be reimbursed. . . . And if the referee, without any necessity therefor, and as matter merely of personal convenience, instead of answering the inquiries of creditors himself, employs stenographic assistance to aid him in the discharge of such duty, this is manifestly not a necessary expense for which he is entitled to reimbursement. The 35th General Order (89 Fed. xiii, 32 C. C. A. xiii), however, recognizes, impliedly at least, that it may sometimes be necessary for a referee to employ a 'clerk' to assist him in the performance of his duties in a particular case which has been referred to him. And I think it clear that if, in the administration of a particular case, the exigency is such, due either to the volume or urgency of the duties to be performed by the referee, as to render it necessary for him to employ stenographic or other clerical assistance in order that he may adequately and efficiently perform such duties, as where the volume of correspondence with creditors is such as to render it impossible for him to personally answer their letters, the expense so incurred should be allowed as an actual and necessary expense in the administration of such estate." *In re Capital Security Co.*, (M. D. Tenn. 1918) 251 Fed. 927.

**Expenses of accountants.**—Where, in the case of the bankruptcy of stockholders, it has been necessary for the trustee to engage accountants to unravel the details of the bankrupt's books in order to trace securities of creditors, disbursements for such services are chargeable to the claimants, except as to those who were able to trace their securities without the aid of the accountants. The court also further declared: "In order to avoid misunderstanding, I think it desirable to state that under this heading I am referring only to the case of a bankruptcy of stockbrokers. In the ordinary mercantile bankruptcy, the claimant can point to his specific merchandise, and in such case usually he is entitled to reclaim without contribution of any kind; but a bankruptcy of the character of that at bar must be treated differently because of the practical considerations above referred to. Possibly, when the figures are rearranged, this discussion as to contribution to expenses may prove academic." *In re Wilson*, (S. D. N. Y. 1917) 252 Fed. 631.

A mortgagee who elects to present his case as a part of the proceedings in the bankruptcy court is not required by this section to pay

a part of the fees, charges and costs of that court. *In re Russell Falls Co.*, (D. C. Mass. 1918) 249 Fed. 260.

**Form of referee's report of expenses.**—Where the referee filed a certificate stating that he had been to certain expense for stationery and hire of a stenographer in answering inquiries of creditors, the court held that the expenses would have to be reported under oath, in detail, before they could be allowed. *In re Capital Security Co.*, (M. D. Tenn. 1918) 251 Fed. 927.

**Attorney's fees—Allowance by referee.**—Where a referee makes a lump sum allowance for attorney's fees and it is impossible to determine what services were rendered "other than to say that the allowance to the attorneys appeared very large," it is proper for the district court to reverse the allowance and refer the matter to the referee for further consideration. *In re Wood*, (C. C. A. 6th Cir. 1918) 248 Fed. 246, 160 C. C. A. 324.

**Fees of trustee's attorney—Additional compensation to attorneys for the trustee and petitioning creditors** is allowed only in peculiar cases, where it is shown to the satisfaction of the court that the services rendered have been unusual and extraordinary, where the bankrupt estate has been materially increased through the diligent efforts of attorneys in discovering assets, or where the duties of the attorneys have been onerous and burdensome with litigation incident to the winding up of the bankrupt estate. Where, however, the bankrupt estate consisted entirely of a stock of goods which was disposed of in bulk and there had been no litigation which placed added labors on the attorneys, and no testimony was offered to take the case out of the ordinary run of bankruptcy cases in respect to fees, additional compensation was denied. *In re W. B. Terrell Co.*, (W. D. S. C. 1917) 250 Fed. 317.

**In the case of a bankrupt stockholder** no allowance to the attorney for the trustee can be made out of securities or their proceeds which claimants have successfully reclaimed. *In re Wilson & Co.*, (S. D. N. Y. 1917) 252 Fed. 631.

**Fees of bankrupt's attorney—Proof required.**—It is the duty of an attorney who presents a claim for compensation for services rendered to the bankrupt clearly to establish the value of his services. *In re U. S. Molybdenum Co.*, (D. C. Me. 1918) 255 Fed. 790.

**Fees of creditors' attorneys.**—To same effect as first paragraph of original annotation, see *In re Siegel*, (S. D. N. Y. 1918) 252 Fed. 197.

**Vol. I, p. 1055, sec. 63a (1).** [First ed., 1912 Supp., p. 753.]

**Judgments—Judgment for tort.**—A judgment against a bankrupt for injuries to a vehicle caused by the bankrupt's "negli-



gence" is a provable claim. *In re Cunningham*, (N. D. N. Y. 1918) 253 Fed. 663.

A judgment for damages recovered in an action against the defendant for negligently running his automobile on the highway so that it collided with and seriously injured a taxicab belonging to the plaintiff is a provable debt. *Jefferson Transfer Co. v. Hull*, (1918) 166 Wis. 438, 166 N. W. 1.

**Notes.**—Where, after creditors of a corporation had received their proportionate share from the estate of the debtor, certain stockholders of the bankrupt corporation gave their note for the balance of the debt, it was held that the note being without consideration, the transaction constituted a legal fraud on the creditors of such stockholders and that a claim founded thereon was invalid and not provable in bankruptcy. *In re Hawkins*, (D. C. N. D. Ga. 1918) 249 Fed. 355.

**Surety debts.**—One who has deposited collateral as security for a loan to another and subsequently pays the loan, with the knowledge and at the request of the debtor, may prove his claim for the amount so paid against the estate of the debtor on the latter's becoming a bankrupt. *In re Maiman*, (D. C. Me. 1919) 256 Fed. 127.

**Cosurety who loaned stock.**—Where it appears that a claimant's stock occupied the position of a cosurety with others for the payment of a note, the mere fact that the claimant has paid and acquired the note in order to save his stock, does not entitle him to recover against one of his cosureties more than his proportionate share of the debt which he paid. *In re Blanchard*, (D. C. N. J. 1918) 253 Fed. 758.

**Certificates of indebtedness of building and loan association.**—Where by the trustee's pleaded and proven objections to the allowance of claims founded on certificates of indebtedness of a building and loan association it appears that the issuance of the certificates to the claimants originated in fraud and that the bankrupt had received no consideration therefor, the burden is cast on the claimants to prove that they were good faith purchasers for value. Mere proof of possession of the certificates is not enough. *In re German Sav. & L. Assn.*, (C. C. A. 7th Cir. 1918) 253 Fed. 722, 165 C. C. A. 316.

**Rent.**—Where after the breach of the renting contract and surrender of the premises by the bankrupt, the lessor, after using reasonable diligence in securing a new tenant, finally relets them, the difference between the stipulated rent for the term specified in the lease with the bankrupt and the rent payable under the new rental contract is the amount which is allowable as damages for the breach and may be proved as a claim against the estate. *In re Mullings Clothing Co.*, (D. C. Conn. 1918) 252 Fed. 667.

**Adjudication as anticipatory breach of contract.**—Liability under a contract to pay out

of "actual and net earnings" is not, by an adjudication of bankruptcy against the promisor, rendered fixed so as to be provable. *In re 35% Automobile Supply Co.*, (S. D. N. Y. 1917) 247 Fed. 377.

**Effect of ultra vires and illegality—Corporate notes.**—Where a bank loaned money to a manufacturing corporation on notes secured by two indorsements and the corporation agreed to pay the bank 20 per cent. of its profits, but the bank never received any compensation as there were no profits, it was held that the trustee in bankruptcy of the corporation could not set up as a defense an estoppel by way of ultra vires or illegality. *In re Machine Metal Products Co.*, (C. C. A. 2d Cir. 1918) 251 Fed. 280, 163 C. C. A. 436.

**Vol. I, p. 1065, sec. 63a (4).** [First ed., 1912 Supp., p. 760.]

**Contracts and open accounts—In general.**—The validity of a claim for goods sold, where the purchaser resides in a state other than that of the seller, is, for the purpose of provability, to be determined by the place of sale, which under ordinary circumstances is the place where the seller is doing business. *Thompson Belden & Co. v. Leisy Brewing Co.*, (C. C. A. 8th Cir. 1918) 249 Fed. 462.

**Renting contracts.**—Where a lease contained a covenant against assignment and the lessee made an assignment for the benefit of creditors and thereafter the lessor received rent from the assignee for rent accruing after he took possession, the court, in disallowing a claim for breach of the covenant, said: "If an acceptance of the lease by the assignee was essential to constitute an assignment of it, and he never accepted it, it necessarily follows that there never was a breach of the covenant against assignment, and if it was accepted by the assignee, so that there was a breach of the covenant, we think the breach was waived by the unqualified demand and receipt of rent from the assignee that accrued thereafter." *Ratschesky v. Whiting*, (C. C. A. 1st Cir. 1918) 251 Fed. 268, 163 C. C. A. 424.

A landlord cannot be allowed rent for the use of premises while he himself is in possession. *In re H. M. Lasher Co.*, (C. C. A. 3d Cir. 1918) 251 Fed. 53, 163 C. C. A. 303.

Where a landlord refuses to accept a surrender of the lease and holds a bankrupt tenant for rent for the balance of the term, the trustee is entitled to whatever the demised property produced during that period, before meeting obligations of the estate to the landlord. The landlord in such a case may prove his claim as a general creditor but will be required to deliver to the trustee any rents received by him from tenants holding under the lessee during that period. *Rosenblum v. Uler*, (C. C. A. 3d Cir. 1919) 256 Fed. 584.

**Vol. I, p. 1073, sec. 63a (5).** [First ed., 1912 Supp., p. 764.]

**Right to attack deficiency judgment.**—A trustee who was a party to a suit in a state court to foreclose a mortgage given by the bankrupt is not entitled to have the deficiency judgment set aside merely because the property was sold for an inadequate price, where there was no fraud or collusion. *In re Falsone*, (S. D. Fla. 1917) 247 Fed. 607.

**Vol. I, p. 1074, sec. 63b.** [First ed., 1912 Supp., p. 765.]

**Contingent claims.**—A claim against a bank director to enforce his liability for violation of the banking law, on which a suit is pending wherein liability is denied, is not provable in bankruptcy against the estate of the director. *In re Hutchcraft*, (E. D. Ky. 1917) 247 Fed. 187. The court said: "Section 63b does not cover debts not covered by section 63a. It simply covers debts so covered which are not liquidated, and provides for their liquidation. If the claims in question are within section 63a, it is because they are covered by clause (4); i. e., are debts founded 'upon a contract express or implied.' It is not claimed that they are otherwise within it. Possibly as, if they are valid claims, it is because of the statute, it cannot be truly said that they are founded upon contract. I do not find it necessary to determine this question. It is sufficient to say that, conceding that they were so founded, they were not 'absolutely owing at the time of the filing of the petition in bankruptcy.' They were contingent debts. . . . That contingent debts are not provable under the present act is an inference from the fact that provision was made in the act of 1841 (Act Aug. 19, 1841, c. 9, 5 Stat. 440) for the proof of 'uncertain and contingent demands,' and in the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) for the proof of 'contingent debts and contingent liabilities,' 'if the contingency shall happen before the order for the final dividend,' and 'at any time' of the 'present value' thereof 'ascertained and liquidated' 'in such manner as the court shall order,' and that there is no such provision therein. Possibly, however, as under the act of 1841 the 'uncertain and contingent demands' provable thereunder were limited to demands whose present value should be determined as held in *Riggin v. Magwire*, 15 Wall. 549, 21 L. Ed. 232, and under the act of 1867 'the contingent debts and contingent liabilities' provable thereunder were limited to such debts and liabilities whose present value could be determined, to be inferred from the provision as to the proof of present value thereof, the provision in section 63b for the liquidation of unliquidated demands should be taken as evidence of an intent that contingent debts whose present value is capable of ascertainment are prov-

able under the present act. But clearly contingent debts whose present value is not so capable are not provable thereunder."

**Vol. I, p. 1076, sec. 64a.** [First ed., 1912 Supp., p. 766.]

**Construction.**—"Creditors" as used in this section means general creditors. *Richmond v. Bird*, (1919) 249 U. S. 174, 39 S. Ct. 186, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 4th Cir. 1917) 240 Fed. 545, 153 C. C. A. 349.

**Taxes entitled to priority.**—*Interest on tax claims.*—Holders of tax certificates are entitled out of the bankrupt's estate to interest on the amounts paid at ordinary legal rate. *Dayton v. Pueblo County*, (1916) 241 U. S. 588. See *In re Clark Realty Co.*, (C. C. A. 7th Cir. 1918) 253 Fed. 938.

**Order of priority.**—The expenses of administration are preferred over the claim of a state for taxes. *Polk County v. Burns*, (C. C. A. 8th Cir. 1917) 247 Fed. 399, 159 C. C. A. 453.

The unsecured claim of a municipality for unpaid personal taxes which was given no superior rights by the local law cannot be said to have been given priority over a valid lien for rent upon the personal property of the taxpayer, perfected before his bankruptcy, by reason of the provision of this section that the bankruptcy court shall order the trustee to pay "all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality, in advance of the payment of dividends to creditors," in view of the protection afforded such a lien by the provision of section 67d (see vol. I, p. 1115) of that Act, that liens given or accepted in good faith, and not in contemplation of or in fraud upon the Act, shall not be affected by it. *Richmond v. Bird*, (1919) 249 U. S. 174, 39 S. Ct. 186, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 4th Cir. 1917) 240 Fed. 545, 153 C. C. A. 349, wherein the court said: "Respondents therefor must prevail unless priority over their lien is given by § 64a to claim for taxes which, under state law, occupied no better position than one held by a general creditor. Section 67d, Bankruptcy Act, quoted *supra*, declares that liens given or accepted in good faith and not in contemplation of or in fraud upon this act, shall not be affected by it. Other provisions must, of course, be construed in view of this positive one. Section 64a directs that taxes be paid in advance of dividends to creditors; and 'dividend' as commonly used throughout the act means partial payment to general creditors. In § 65b, for example, the word occurs in contrast to payment of debts which have priority. And as the local laws gave no superior right to the city's unsecured claim for taxes we are unable to conclude that Congress intended by § 64a to place it ahead of valid lien holders. *New Jersey v. Anderson*, (1906)

203 U. S. 483 [27 S. Ct. 137, 51 U. S. (L. ed.) 284], is not decisive of any point here contested; it only adjudged that New Jersey's claim was for a tax within the meaning of § 64a and entitled to be treated accordingly. See *New Jersey v. Lowell*, (C. C. A. 3d Cir. 1910) 179 Fed. 321 [102 C. C. A. 505, 31 L. R. A. (N. S.) 988]."

**Priority over liens.**—Section 64a relates merely to administration and does not disturb the priorities fixed by the substantive law. *Polk County v. Burns*, (C. C. A. 8th Cir. 1917) 247 Fed. 399, 159 C. C. A. 453, holding that under the Iowa statute personal property taxes were a lien on a stock of goods superior to a landlord's lien.

**Duty of trustee to pay taxes—Tax certificates.**—Holders of tax certificates who have paid the taxes and assessments on property of the bankrupt sold for nonpayment of taxes are entitled to an order directing the payment of such taxes out of the bankrupt's estate. *Dayton v. Pueblo County*, (1916) 241 U. S. 588; *In re Clark Realty Co.*, (C. C. A. 7th Cir. 1918) 253 Fed. 938.

**Vol. I, p. 1083, sec. 64b (3).** [First ed., 1912 Supp., p. 772.]

**Services rendered to bankrupt—In involuntary cases.**—The amount allowed to an attorney for the bankrupt must be reasonable to be determined on the evidence of the service performed and its value. The limitation is also imposed that an allowance can be made only for such service as is rendered to the bankrupt "while performing the duties imposed upon him by the act." This excludes compensation for service rendered the bankrupt prior to filing the petition, resisting the adjudication, or in proposing or urging the acceptance or confirmation of a composition. *In re Mumford*, (E. D. N. C. 1919) 255 Fed. 108.

**Attorneys' fees for creditors—In involuntary cases.**—The petitioning creditors or their attorneys are entitled as a matter of right to an allowance for attorney's fees under this section. The amount must, of course, be reasonable and be determined on the evidence of the service performed and its value. *In re Mumford*, (D. C. E. D. N. C. 1919) 255 Fed. 108, wherein the court said: "It is uniformly held, and is in accordance with the plan provided by the act for dealing with such cases, that the allowance is to be confined to 'services actually rendered' in filing the petition and prosecuting it to the adjudication of the bankrupt. When this is accomplished, the estate passes under the jurisdiction and control of the court and its officers; the interest of the petitioning creditors, usually a small minority in number and amount of the general creditors, is merged into that of all of the creditors. The purpose of the act, the seizure and administration of the property of the bankrupt for the benefit of all the creditors, is accom-

plished. There is neither necessity nor opportunity for the attorney of the petitioning creditors to render 'actual service' to the estate."

**Vol. I, p. 1090, sec. 64b (4).** [First ed., 1912 Supp., p. 774.]

**Construction of clause.**—This clause must be read in connection with the preceding clause, which indicates an intention of Congress to provide a fixed and certain preference for wage claims as such, without regard to the varying degrees of priority accorded to such claims by the laws of the different states. This provision, therefore, supersedes the state laws on the same subject; the authority of Congress over this subject being, to the extent to which it is exercised, exclusive. *In re Caledonia Coal Co.*, (D. C. E. D. Mich. 1918) 254 Fed. 742.

**"Wages."**—Stockholders who permit the corporation to retain and use money due them as wages must be held to have loaned such money to the company, and claims therefor are not entitled to priority as labor claims. *In re Caledonia Coal Co.*, (D. C. E. D. Mich. 1918) 254 Fed. 742.

**Who may claim wages—Salesmen.**—A claim has been held not entitled to priority as being one for wages due traveling salesmen where the following facts appeared. The claimants were partners, and represented other houses besides that of the bankrupt. They were not under any obligation to devote all their time to selling goods for the bankrupt, and apparently could control their time as they pleased. They were compensated on a commission basis; that is to say, if their orders were accepted, they were entitled to their commissions. They had an office of their own, with their own business cards, and were, for all practical purposes in their relations with the bankrupt, a commission house. *In re Kerniners*, (D. C. S. D. N. Y. 1916) 252 Fed. 183.

**Vol. I, p. 1100, sec. 64b (5).** [First ed., 1912 Supp., p. 777.]

**Landlord's right to priority.**—By virtue of the Pennsylvania statute, a landlord, who had, at the time the petition in bankruptcy was filed, a right, or the lawful power, to distrain upon goods and chattels upon premises demised to the alleged bankrupt, is entitled to priority of payment of the rent in arrear (up to the limit of one year's rent) out of the proceeds of the sale of such goods and chattels. *In re Delaney*, (E. D. Pa. 1918) 251 Fed. 425; *Rosenblum v. Uler*, (C. C. A. 3d Cir. 1919) 256 Fed. 584.

**Rent of earlier tenant.**—The right of a landlord to assert priority of payment over other creditors of a bankrupt tenant being based on his right of distraint, he cannot be accorded such priority for rent due by a

tenant who immediately preceded the bankrupt although the bankrupt on taking possession of the premises took over the personal property of the former tenant then on the premises. In such a case the relation of landlord and tenant as existing between the landlord and the prior tenant was dissolved on the making of the lease to the bankrupt, and as the landlord has no right to distrain as against the bankrupt tenant for rent due by his predecessor, he cannot claim priority therefor. *In re West* (E. D. Pa. 1918) 253 Fed. 963.

**Priority under composition agreement.**—One who lends money to a bankrupt for the purpose of enabling it to carry through a composition agreement, which fact is communicated to the creditors, cannot claim priority over the creditors in any liquidation of the assets of the bankrupt, but as between them and the lender the loan is a subordinated indebtedness. *In re George C. Burns Co.*, (C. C. A. 7th Cir. 1919) 256 Fed. 840.

**Equitable rights—Assignment.**—An order given by a bankrupt to a contractor for the payment of construction work, drawn on a bank as trustee of a mortgage fund raised for the purpose, cannot be considered as an equitable assignment of the fund giving the contractor preference over the other creditors, where it appears that the contractor acquiesced in and consented to another plan of disbursement, whereby the bankrupt issued checks on the mortgage funds which had been credited to it instead of to the trustee under the mortgage. *In re Hawley Dawn Draft Furnace Co.* (E. D. Pa. 1919) 256 Fed. 555.

**Priority of mortgage bondholders.**—"In the administration and distribution of the property of insolvent corporations in equity the claims of subsequent creditors without notice are superior and entitled to preference in payment over the holders with notice of mortgage bonds of the corporation whose only consideration was the purchase by the mortgagor corporation of its own stock, either for itself or for another." *Edgar v. Ames*, (C. C. A. 8th Cir. 1919) 255 Fed. 835.

The principle that valid parts of a severable contract which contains both valid and void or voidable parts may be enforced, if the consideration and the agreement are tainted with no fraud or immorality, although the void or voidable parts cannot be, has been applied in the case of corporate bonds. *Edgar v. Ames*, (C. C. A. 8th Cir. 1919) 255 Fed. 835.

**Secured claims.**—This section does not relate to claims secured by specific liens on the property protected by section 67 of the Bankruptcy Act. *In re North Star Ice Co., etc., Co.*, (E. D. Tenn. 1918) 252 Fed. 301.

**State may claim priority.**—The right of a state to priority is limited to those cases expressly provided for or judicially recognized by the laws and courts of that state. *State*

*v. Martin*, (C. C. A. 5th Cir. 1919) 256 Fed. 313.

## Vol. I, p. 1106, sec. 65a. [First ed., 1912 Supp., p. 781.]

**Secured and priority creditors.**—A creditor holding collateral security which by consent of the trustee he applies to his claim and which together with a part of the dividends thereon are sufficient to pay a claim for which the bankrupt is primarily liable may apply additional dividends to a claim for which the bankrupt is secondarily liable, but after such claim is paid the trustee may be subrogated to the creditor's rights in future dividends on a claim filed by the creditor against another bankrupt for which the first bankrupt is secondarily liable. *In re American Paper Co.*, (D. C. N. J. 1919) 255 Fed. 121.

**Payment of dividend not new promise.**—The payment of dividends by the trustee in bankruptcy on a claim is not an acknowledgment of the debt by the bankrupt and a promise to pay it which takes the debt out of the state statute of limitations. *American Woolen Co. v. Samuelson*, (1919) 226 N. Y. 61, 123 N. E. 154.

## Vol. I, p. 1109, sec. 67a. [First ed., 1912 Supp., p. 783.]

**Purpose of section.**—This provision does no more than give to the trustee a right to dispute an alleged lien to the same extent which other creditors could have asserted had there not been an adjudication of bankruptcy. *American Laundry Machinery Co. v. Everybody's Laundry*, (1a. 1919) 171 N. W. 161.

Section 67a does no more than to provide that creditors having no valid liens as against other creditors at the date when a debtor goes into bankruptcy shall have no lien upon the bankrupt's estate. In other words, the relative positions and relative rights of the individual creditors of the bankrupt as they exist when the jurisdiction of the federal court attaches are to remain unchanged, and claimants or creditors in whose favor there is then no valid lien as against other creditors cannot thereafter assert such alleged lien as against the trustee of the bankrupt estate. Section 67d recognizes the validity of liens created in good faith for a consideration and have been duly recorded if record was necessary to impart notice. *American Laundry Machinery Co. v. Everybody's Laundry*, (1a. 1919) 171 N. W. 161.

**Validity determined by state law.**—Validity of chattel mortgage determined by law of state as to filing. *In re Steiner*, (D. C. E. D. N. Y. 1918) 249 Fed. 880.

The question of the validity of a chattel mortgage is one of local law. *Garrison v. Kurt*, (C. C. A. 8th Cir. 1918) 249 Fed. 672.

**Mortgaged personal property removed from state where mortgage executed.**—"The general consensus of judicial opinion seems to

be that when personal property, which at the time is situated in a given state, is there mortgaged by the owner, and the mortgage is duly executed and recorded in the mode required by the local law so as to create a valid lien, the lien remains good and effectual, although the property is removed to another state, either with or without the consent of the mortgagee, and although the mortgage is not recorded in the state to which the removal is made. The mortgage lien is given effect, however, in the state to which the property is removed, solely by virtue of the doctrine of comity. Hence a state may by appropriate legislation decline to observe the rule of comity and may require all mortgages affecting personal property which is situated therein or brought therein to be recorded, as a condition precedent to the recognition of their validity in that state." *Shapard v. Hynes*, 104 Fed. 449, 45 C. C. A. 271, 52 L. R. A. 675; *In re Davis*, (D. C. W. D. Tenn. 1919) 256 Fed. 52.

**Invalid chattel mortgage or pledge.**—The claim of a city to title to tools and equipment of a contractor, taken by the city on the contractor's abandonment of his contract, cannot be enforced against a trustee in bankruptcy on the theory of the city's right to the property as mortgagee where the instrument alleged to constitute the mortgage is not recorded in accordance with the provisions of a state statute; nor can such a claim be based on the rights of the city as pledgee where there was no delivery of possession, which is essential to a pledge of chattels. *In re P. J. Sullivan Co.*, (C. C. A. 2d Cir. 1918) 254 Fed. 680, 168 C. C. A. 158, *affirming* (N. D. N. Y. 1918) 247 Fed. 139.

**Retention of possession by the mortgagors** of a stock of goods and their authority to make sales and to retain receipts, which elements tend to invalidate a mortgage, may be insufficient for that purpose, when qualified by other conditions, as where other creditors extended credit with actual or constructive notice of the mortgage and the entire transaction showed the utmost good faith on the part of the mortgagee. *Garrison v. Kurt*, (C. C. A. 8th Cir. 1918) 249 Fed. 672.

**Secret equity of wife.**—Where a wife, with knowledge that her husband has taken title in his own name to property purchased with funds belonging to her, permits him to retain title and possession, and credit is extended to him upon the faith of his apparent ownership, she will be estopped from asserting her secret equity as against a trustee in bankruptcy seeking to recover the property to be applied upon debts arising from credits extended on the faith of the husband's apparent ownership. *Krueger v. MacDougall*, (1918) 148 Ga. 429, 96 S. E. 867.

**Vol. I, p. 1115, sec. 67d.** [First ed., 1912 Supp., p. 786.]

**Valid liens remain undisturbed.**—The only consequence of a discharge in bankruptcy is

to suspend the right of action for a debt against the bankrupt person. If the creditors have a lien or equitable claim, by mortgage or otherwise, upon the property of the bankrupt, such right or rights remain uneffective. The independent collateral agreement given by way of security outlives the remedy on the debt which it was given to secure. *Bisby v. Walker*, (Ia. 1918) 169 N. W. 467.

**Rights of lienor.**—Under section 70 of the Bankruptcy Act the trustee is vested only with the bankrupt's title to property. Hence where the bankrupt's property is subject to a mortgage or other incumbrances, the trustee takes only the bankrupt's equity therein, subject to such incumbrances; and since under section 67 of the Act the validity of the pre-existing liens is not affected, the lienholder, unless restrained by the order of the bankruptcy court, may enforce the same dehors the court. Nevertheless the bankruptcy court may in the interest of general creditors regulate the method of enforcing such lien in order to realize as much as possible from the bankrupt's equity. If the property comes into the possession of the bankruptcy court it may sell the property free from the lien and award the lienholder a preferential payment representing the proceeds of his lien. This practice is, however, of doubtful propriety where the right to a lien is disputed and its determination would involve a controversy productive of delay in the bankruptcy proceedings. Or the bankruptcy court may, in its discretion, sell merely the bankruptcy's equity in the property; that is, sell the property subject to the incumbrance and leave the lienor to enforce his lien upon the property by appropriate proceedings. In thus selling the property subject to lien "the trustee acts only in the interest of general creditors." *In re North Star Ice, etc., Co.*, (E. D. Tenn. 1918) 252 Fed. 301.

**The state law governs.**—To same effect as original annotation, see *New York Fifth Nat. Bank v. Lytle*, (C. C. A. 2d Cir. 1918) 250 Fed. 361, 162 C. C. A. 431.

The state law as interpreted by the state courts governs as to the validity of an unrecorded chattel mortgage given by the bankrupt. *Jones v. Excelsior Springs Bank*, (Mo. App. 1919) 213 S. W. 892.

The effect to be given to an unrecorded chattel mortgage where the possession of the mortgaged article is not given to the mortgagee is to be determined by the law of the state in which the case arises. *Stewart v. Asbury*, (1918) 199 Mo. App. 123, 201 S. W. 949.

Where under a provision of the state constitution creating liens, the existence of a lien is not dependent on any action taken under the terms of a statute, the seller of property which comes within the provision of the constitution acquires an enforceable lien against the trustee having notice thereof, regardless of any statute as to the filing of the

contract when in writing, such enactment being considered as merely providing for notice and no rights having arisen on the part of any one because of the failure to record the instrument. *Reeves v. New York Engineering etc. Co.*, (C. C. A. 5th Cir. 1918) 249 Fed. 513.

**Chattel mortgages.**—A chattel mortgage covering goods sold for use in a retail store, and providing that its lien should extend to goods bought to replace those sold from the store, is good as between the parties, and creates an equitable lien on the subsequently acquired property which may be perfected by the mortgagee taking possession of such property. Consequently a purchaser of the store and goods who assumes the mortgage is bound by its terms, and if he subsequently becomes a bankrupt, that part of the replacement goods which the mortgagee has reduced to possession prior to the bankruptcy is not subject to the control of the bankrupt court and may be held by the mortgagee who has thus perfected his equitable lien. *In re Roseboom* (N. D. N. Y. 1918) 253 Fed. 136.

**Unrecorded chattel mortgage.**—A chattel mortgage which is not required by the law of the state to be recorded cannot be avoided by the trustee. *Bonner v. Athens First Nat. Bank*, (C. C. A. 5th Cir. 1918) 248 Fed. 692, 160 C. C. A. 592.

"The bank is not in a position to claim an equitable lien, which can precede the title of the trustee, for notwithstanding the knowledge which its officers had of the situation it deliberately kept the existence of the mortgages secret, and refrained from putting them upon record." *Bakersfield Nat. Bank v. Moore*, (C. C. A. 9th Cir. 1918) 247 Fed. 913.

An assignee of chattel mortgages taken by the bankrupt to secure payment to him for goods sold, which assignments were made to secure loans by the assignee to the mortgagee, has been held entitled to moneys collected by the mortgagee within the four months period. *In re Michigan Furniture Co.*, (D. C. S. D. N. Y. 1918) 249 Fed. 978.

**Redemption by trustee.**—The trustee may, and if it is to the interest of creditors to do so, should redeem property from a pledge by the bankrupt. *In re East Stroudsburg Supply, etc., Co.*, (M. D. Pa. 1918) 248 Fed. 356.

**Right of mortgagee to rents.**—A mortgagee is entitled to receive on his claim for a deficiency, rents collected by the trustee from the mortgaged premises, as against the general creditors. *Bindseil v. Liberty Trust Co.*, (C. C. A. 3d Cir. 1917) 248 Fed. 112, 160 C. C. A. 252.

**Mechanics' and kindred liens.**—A person holding a mechanic's lien against the land of a bankrupt, who also files his claim based on such lien in the bankruptcy proceedings, is entitled to share in the distribution of the proceeds from the land sold free from liens, although he has not complied with the provisions of a state statute requiring a writ of scire facias to be issued within two years, as

there was no legal necessity that the writ be issued after the lien had been divested by the sale under the bankruptcy proceedings. *In re Dubasky*, (E. D. Pa. 1918) 253 Fed. 794.

Proceedings in bankruptcy under which the property of a building contractor was sold by the trustee, and the subcontractors and other lienholders were called upon to show cause why they should not have their inscriptions erased and their claims referred to the proceeds of the sale of the property to which the liens had attached, do not operate as a "concursus" under a state statute which provides that the failure of the holder of a lien against a contractor to assert any objection to the sufficiency or solvency of the surety on the contractor's bond has the effect of remitting him to his remedy against the surety company and therefore of releasing any claim he might otherwise have against the proceeds of the sale of the property to which the lien attached. *C. C. Hartwell Co. v. Miller*, (C. C. A. 5th Cir. 1919) 256 Fed. 273.

**Compliance with state statute.**—An order of a referee disallowing a mechanic's lien on the ground that the contractor had failed to file the statement required by a state statute, will be reversed on petition for review and the lien allowed on a showing that such a statement had been filed which was acquiesced in by counsel for the other parties in interest. *In re Williams*, (N. D. Ohio 1918) 252 Fed. 924.

**Trust deeds.**—Where a trust deed, which has been given to certain creditors to secure the payment of their claims, is by its terms subordinate to a prior trust deed given for an amount deemed sufficient to liquidate all claims against the debtor, and is also delivered on the condition that nothing is to be paid thereon until all the claims of creditors are satisfied, the lien of the creditors under the second deed is subordinate to the claims of the bankrupt's other creditors irrespective of the validity of the earlier deed. *In re Cloverdale Creamery Co.*, (C. C. A. 7th Cir. 1918) 249 Fed. 194.

**Equitable liens.**—The surety of a bankrupt contractor who is liable for labor and material claims will be given an equitable lien on a sum of money paid to the contractor by the owner where the specific fund may be traced into the hands of the trustee. *Cox v. New England Equitable Ins. Co.*, (C. C. A. 8th Cir. 1917) 247 Fed. 955, 160 C. C. A. 655.

Where a bankrupt mingled funds alleged to have been obtained by fraud with his general funds, all of which was deposited in bank from day to day in order to meet overdrafts which were also secured by the pledge of certain collateral security, the defrauded claimant cannot claim a preference in the proceeds of the sale of the collateral on the ground that the mingling of the funds had created a trust in his favor on such collateral, nor can he be subrogated to the rights of the

bank against the collateral. *Knouth v. Knight*, (C. C. A. 5th Cir. 1919) 255 Fed. 677.

A surety advancing money to his bankrupt principal to take up the secured claims, the money being used for that purpose in connection with money of the bankrupt and being mingled with the general funds of the bankrupt, is not entitled to an equitable lien. *Chapman v. Hunt*, (N. D. N. Y. 1918) 248 Fed. 160.

**Pledges.**—To the same effect as the original annotation, see *Griffin v. Smith*, (1918) 177 Cal. 481, 171 Pac. 92.

A pledge by a bankrupt of lumber held by a storage company in carload lots, a "carload" representing either the load of a particular car which was kept separate by the storage company, or lumber of the value of two hundred dollars, is not invalid because of indefiniteness, and the storage company may be required to set aside the amount of lumber pledged in so-called "carload lots" as against the claims of the trustee in bankruptcy, even though some of the lumber delivered to it was shipped by water and not in cars. *Atherton v. Beaman*, (D. C. Mass. 1919) 256 Fed. 871.

**Administration by court of incumbered property.**—A bankruptcy court is not required to administer property burdened with liens, and should only do so when it is for the interest of the general estate. *In re North Star Ice, etc., Co.*, (E. D. Tenn. 1918) 252 Fed. 301.

## Vol. I, p. 1122, sec. 67e. [First ed., 1912 Supp., p. 792.]

**Distinction between fraud and preference.**—The distinction between fraudulent transfers avoidable under section 67e and preferential transfers avoidable under section 60b was pointed out in *Smith v. Coury*, (D. C. Me. 1918) 247 Fed. 168, as follows: "Under section 67(e) the basis of invalidity is much broader than under section 60(b); it covers every transfer made by the bankrupts within four months before the filing of the petition with the intent and purpose to hinder, delay, or defraud their creditors or any of them; for a transaction may be invalid both as a preference and as a fraudulent transfer. It is clear that, whatever the conveyance be, wherever the transferee receives property and advances, or pays money therefor, with knowledge or reason to believe that the money so advanced is to be used to make a payment to creditors, which would be preferential because of the insolvency of the maker of the transfer, it is a fraudulent transfer and void, under section 67(e). In *Dean v. Davis*, 242 U. S. 438, 37 Sup. Ct. 130, 61 L. Ed. 419, speaking for the Supreme Court, Mr. Justice Brandeis has made a clear exposition of the law on this subject, and has added a table of valuable citations. In *Van Iderstine v. Nat. Discount Co.*, 227 U. S. 575,

582, 33 Sup. Ct. 343, 57 L. Ed. 652, the distinction is pointed out between the intent to prefer and the intent to defraud. It is shown that one is inherently always vicious; the other innocent and valid except when made in violation of the express provisions of a statute. A fraudulent conveyance is void regardless of its date, while a preference is valid unless made within the prohibited period."

**Intent to hinder, delay or defraud essential.**—Neither the fact that a mortgage given by a bankrupt was to a relative of his nor that it was not recorded was notice of a fraudulent intent. *Kimbrough v. Alred*, (Ala. 1918) 80 So. 617.

The fact that a person selling property on which he had given a mortgage to a relative was heavily indebted does not as against the purchaser make the transfer fraudulent if based on a good consideration as a bona fide sale, though the purchaser had knowledge of the mortgage and required that a part of the consideration paid be used to discharge such mortgage. *Kimrough v. Alred*, (Ala. 1918) 80 So. 617.

A conveyance by a bankrupt made without intent to defraud cannot be avoided under the first paragraph of section 67e, which requires that actual fraud must be shown. *Baldwin v. Kingston*, (D. C. N. J. 1918) 247 Fed. 163.

**Transfer of individual property to partnership.**—Where a person who is not shown to be insolvent at the time, organizes a partnership and transfers his individual property to the partnership, this act is not in itself a hindering and delaying of creditors within the meaning of the Bankrupt Act. *In re Stringer*, (C. C. A. 2d Cir. 1918) 253 Fed. 352, 165 C. C. A. 134.

**Transfer of corporate property by corporate officers.**—Where a corporation, knowing itself to be insolvent, sells its property and in so doing disables itself from carrying on its business or performing its contracts, and with the proceeds pays the claims of certain creditors who are largely its friends, it is guilty of transferring its property with the intent to hinder, delay and defraud its creditors. *Smith v. Powers*, (N. D. N. Y. 1919) 255 Fed. 582.

**Transfers void under state law.**—Where the transfer of the property by an insolvent corporation is made invalid by a state law the trustee in bankruptcy of the corporation may recover such payments under this section when made within four months prior to the filing of the petition in bankruptcy, and it is immaterial what the intent and purpose of the recipient was or whether or not he had knowledge of the insolvency of the corporation. *Smith v. Powers*, (N. D. N. Y. 1919) 255 Fed. 582.

**Transfer by husband to wife.**—In the case of a conveyance by a husband to his wife more than four months before he filed a voluntary petition, which conveyance was alleged in a suit by the trustee to have been in

fraud of creditors, it has been said: "The mere relationship of husband and wife between the parties to a transfer is not sufficient ground for setting aside a conveyance, although the question of the circumstance of such relationship may be considered on the question of fraud. . . . Transactions between husband and wife to the prejudice of the husband's creditors will be closely scrutinized to see that they are fair and honest, and not merely contrivances resorted to for the purpose of placing the husband's property beyond the reach of creditors. Where the conveyance is made, even though by an insolvent, for the purpose of discharging an indebtedness incurred in good faith, and the bona fides of the consideration is not attacked, other than by possible inference or a belief that possibly the transaction was colorable, courts will not undertake to defeat the will of such grantor, even though it have the effect of preventing other creditors from subjecting the property in satisfaction of their indebtedness." *Swan v. Bailey*, (Okla. 1918) 174 Pac. 1065.

**Transfer to corporation organized for that purpose.**—Where a bankrupt, while insolvent and before his adjudication, forms a corporation in combination with near relatives as nominal stockholders, and transfers his property to such corporation with the purpose of hindering, delaying and defrauding his creditors, such a corporation will not be subrogated to execution liens paid off by it before the adjudication. To allow this would be to allow the bankrupt to be reimbursed through this means for debts he was legally bound to pay and of which the law at the time was compelling payment. *In re Tiller*, (N. D. W. Va. 1918) 253 Fed. 845.

**Transfer to new or another corporation.**—In New York it is lawful for a business corporation to transfer its entire property to a new or another corporation, and leave its creditors to collect from such other or successor company, unless the creditors object; but, if they do object, they cannot be compelled to recognize as their debtor any one with whom they did not contract; and the conveyance, good inter partes, becomes fraudulent as to the nonconsenting creditors, who by appropriate suit (as for sequestration) may pursue the property that was their debtor's unless prevented by some equity other than that of the transferee and recover from the estate in bankruptcy of the transferee. *In re American Candy Mfg. Co.*, (C. C. A. 2d Cir. 1919) 256 Fed. 87, — C. C. A. —, *reversing* (E. D. N. Y. 1918) 248 Fed. 145.

**Money is leviable property and may be reached by a creditor's suit when fraudulently disposed of.** *Kimbrough v. Alred*, (Ala. 1918) 80 So. 617.

**Bank deposits.**—The deposit by a receiver in bankruptcy of funds under his control in a bank to which the bankrupt was indebted and which later became insolvent, does not amount to a conveyance or transfer, etc.,

void or voidable under this section. *In re United Grocery Co.*, (S. D. Fla. 1918) 253 Fed. 267.

**Gift.**—In *Murray v. Ray*, (C. C. A. 9th Cir. 1918) 251 Fed. 866, 164 C. C. A. 82, it was held that a conveyance by the bankrupt without consideration, was a gift, and voidable at the suit of the trustee in bankruptcy.

**Payments for services rendered.**—A trustee may recover funds which have been transferred in the form of exorbitant payments for services rendered, supplies furnished and the like. *Kimbrough v. Alred*, (Ala. 1918) 80 So. 617.

**Chattel mortgages.**—To the same effect as the original annotation, see *In re Schilling*, (N. D. Ohio 1918) 251 Fed. 966; *In re Schilling*, (N. D. Ohio 1918) 251 Fed. 972.

Where chattel mortgagees have unlawfully foreclosed the mortgage and disposed of the property so that it cannot be turned over to the trustee, they cannot be heard to complain that they are required to pay to the trustee the value of the property, instead of an amount sufficient to pay the claims filed, where the trial court's judgment fully protects them by providing that any surplus left after the trustee has discharged the obligations of the bankrupt's estate, shall be paid over to the mortgagees. *Simpson v. Combes*, (Wash. 1919) 182 Pac. 566.

In a suit by a trustee to set aside a foreclosure and sale of property under a chattel mortgage and to recover the property involved or the value thereof, fraud or conspiracy is not established by evidence merely that the mortgagee did not attempt to foreclose the mortgage when it became due by reason of default in payments by the mortgagor. *Simpson v. Combes*, (Wash. 1919) 182 Pac. 566.

No part of section 67 makes invalid a chattel mortgage merely because it was given at a time when the bankrupt is insolvent and within four months prior to the filing of the petition in bankruptcy and for a past consideration. A chattel mortgage given under these conditions is valid or invalid as provided in section 60. *In re Schilling*, (N. D. Ohio 1918) 251 Fed. 972.

**Mortgage given but not recorded.**—The fact that a mortgagor may, where the mortgage is not recorded, be permitted to remain in possession of the mortgaged property, is not necessarily controlling on the question of fraud. *Kimbrough v. Alred*, (Ala. 1918) 80 So. 617, wherein the court, after citing cases referred to in support of the view that such retention of possession showed a fraudulent intent, said: "These cases, however, dealt with transactions wherein the mortgagor was permitted to remain in possession of the mortgaged property, such as stock of goods or lumber, with the right to dispose of the same, as had been the previous custom, on his own behalf, and thereby reserving a benefit to the mortgagor, which rendered the mortgage fraudulent. These cases are, in our opinion,



not in point in the instant case. The mortgagor here was not left in possession of the property with the authority to dispose of the plant in the ordinary course of trade, as in the case of a stock of goods, and the very nature of the property distinguishes it in every way from a stock of merchandise. The mere retention therefore by the mortgagor, in such a case, was not such a reservation of a benefit to him as invalidates the instrument against creditors."

**Other conveyances held fraudulent.**—In *Smith v. Coury*, (D. C. Me. 1918) 247 Fed. 168, a conveyance was held to be fraudulent in fact, the court saying: "The proofs show that close family relations existed between the defendants and the bankrupts; that the Courys knew the Hobarts were doing a losing business; that they were not attending to their trade; that they were increasing their indebtedness all the time; that on December 2, 1915, they were conveying away all their real estate. Simon Hobart admitted that he knew of his insolvency, and that the effect of the transfer would be that creditors, other than the Courys, would not get their pay. He must then have known that the effect of the transfer would be to hinder, delay, and defraud creditors. His brother must have known it. The proofs convince me, too, that Amos and Selim Coury had such facts brought home to them as would put reasonably prudent men on inquiry, and that inquiry would inevitably have revealed insolvency. They must be held then to have known that this transfer would effect a preference, and would hinder, delay, and defraud other creditors. I am satisfied that the transaction in question was voidable in its entirety as a transfer made with intent to hinder, delay, and defraud creditors under section 67 (e)."

**Recovery by trustee.**—A suit to set aside, as in fraud of creditors, certain conveyances, to declare certain transactions void and to recover property and funds thus transferred is properly brought in the name of the trustee. *Kimbrough v. Alred*, (Ala. 1918) 80 So. 617.

In a suit to set aside as in fraud of creditors, certain conveyances, to declare certain transactions void and to recover property and funds thus transferred, the bankrupt is properly made a party defendant. *Kimbrough v. Alred*, (Ala. 1918) 80 So. 617.

**Action for recovery.—Pleading must set out facts.**—Since a trustee in bankruptcy has no greater rights than the creditors, in an action to obtain possession of property of the bankrupt fraudulently conveyed or subject to creditors' liens he must allege and prove that he has not sufficient assets in his hands to satisfy claims of creditors of the bankrupt. *Hibschman v. Bevis*, (1918) 103 Wash. 317, 174 Pac. 5, wherein the court said: "A trustee in bankruptcy has no greater right, nor is he accorded higher standing in the civil courts, than a creditor would have if the

suit were brought by him in his own behalf. He is subject to the same rules of pleading and is bound to meet the same measure of proof as if no bankruptcy proceeding were pending. In consequence, the rule is quite universal that a trustee in bankruptcy cannot maintain an action unless it is alleged and sustained by proof that he has not sufficient assets in his hands to satisfy the claims of the creditors of the debtor. . . . The theory of the law is that a suit by a trustee in bankruptcy is essentially a creditor's bill, and that the insufficiency of the property left in the debtor's hands is an essential to the right to question a fraudulent conveyance, whether the suit be maintained by a creditor or by a trustee in his own behalf."

Upon the issue as to whether a bankrupt had, at the time of making a gift, retained property fully sufficient and available for the satisfaction of his then creditors, as required by a state law in order to render the gift a valid one, allegations in his answer and his evidence, in attempting to show that he had done so, to the effect that "he owed little or nothing more than he had property to pay," is insufficient for the judge to reverse a negative finding of the jury and answer the issue in the affirmative, it being for the jury to find thereon as to the debtor's solvency or insolvency at the time of making the gift. In such a case it is the determination by the jury of the fact whether the donor had retained property amply sufficient to pay his creditors at the time of his making the gift, within the intent and meaning of the statute, which determines the validity of the transaction, and the question of his intent to defraud has no significance. *Garland v. Arrowood*, (1919) 177 N. C. 371, 99 S. E. 100.

Where a bill sufficiently shows a scheme on the part of the bankrupt to defraud his creditors, and that resort was had to the various transactions, as set up in the bill, for the consummation of this one purpose, it has been held that the bill is not multifarious for having made respondents those parties charged with participation or knowledge of the fraud, although in separate transactions which had no connection one with the other. *Kimbrough v. Alred*, (Ala. 1918) 80 So. 617.

**Evidence and proof.**—Where it is claimed in a suit by a trustee in bankruptcy to recover property conveyed by the debtor to his wife more than four months before the filing of a petition in bankruptcy, on the ground that such conveyance was in fraud of the creditors of the bankrupt, it is incumbent upon the trustee to prove that the conveyance was either made without a fair and valuable consideration, or in bad faith, or for the purpose of hindering, delaying, or defrauding the creditors of the grantor. True, it is not necessary that fraud should be established by direct proof; for such purpose it is competent to resort to circumstantial or presumptive evidence. *Swan v. Bailey*, (Okla. 1918) 174 Pac. 1065.

Where it was claimed, in an action by a trustee to recover commercial paper transferred by the bankrupt to his son's wife, that the transfer was in fraud of creditors, it was held that the claim was not sustained where the transferee testified that she purchased such paper with her own funds at no more than a reasonable discount, and other testimony tended to show the possession of abundant means by her with which to have made the purchase and that she had engaged in various businesses in which she had been usually successful, and furthermore tended to refute any idea of knowledge of a fraudulent purpose on the part of the bankrupt. *Mohamara v. Farnsworth*, (Wash. 1919) 180 Pac. 466.

**Vol. I, p. 1129, sec. 67e.** [*Jurisdiction.*] [First ed., 1912 Supp., p. 797.]

**Concurrent jurisdiction.**—An objection to a complaint in a state court by a creditor, to set aside an alleged fraudulent conveyance, on the ground that the plaintiff has not a legal capacity to sue and that the trustee is the only proper party to bring such an action, cannot, it is held, be sustained for the reason that proceedings in bankruptcy do not prevent an action in the state courts to set aside fraudulent transactions on the part of the bankrupt, it being also declared that even if the proceedings in bankruptcy could be regarded as in the nature of an action in the federal court, the state court has jurisdiction to determine the issues. *Board of Directors v. Lawrence*, (S. C. 1919) 97 S. E. 830.

**Vol. I, p. 1130, sec. 67f.** [First ed., 1912 Supp., p. 797.]

- I. Annulment of liens generally.
- III. Judgment liens.
- IV. Attachment and garnishment liens.
- V. Liens on exempt property.

**I. ANNULMENT OF LIENS GENERALLY**  
(p. 1130)

**Voluntary and involuntary proceedings included.**—This section is applicable to voluntary as well as involuntary bankruptcies. *Ford v. Henderson*, (Ore. 1919) 179 Pac. 558.

**Landlord's lien.**—A judgment obtained against a bankrupt one day before he filed a voluntary petition in bankruptcy is void under this section, and consequently cannot be superior to a chattel mortgage on the bankrupt's property given nearly two years prior to his bankruptcy, nor does the fact that the lien acquired by the judgment is provided for by a state statute affect the operation of the rule under this section. *In re Chambers* (N. D. Ia. 1919) 254 Fed. 506.

**Annulment of liens obtained through legal proceedings.**—To same effect as original an-

notation, see *In re Chambers*, (N. D. Ia. 1919) 254 Fed. 506.

**III. JUDGMENT LIENS (p. 1134)**

**Judgment against husband and wife.**—This section applies to a judgment against husband and wife rendered within four months of the bankruptcy of the husband as to leasehold property owned by the two as tenants by the entirety. *Ades v. Caplan*, (1918) 132 Md. 66, 103 Atl. 94, L. R. A. 1918 D. 276.

**Lien on salaries of state employees.**—A state statute provided for the filing within 30 days after entry of judgments against officers or employees of the state or of any municipal corporation, and for the payment after the expiration of 30 days to the owner of the judgment by the disbursing officer of the state or of the municipal corporation of such sum as was then due or might thereafter become due to such officer or employee as salary or wages, not exceeding the amount of the judgment, and not including such sums as were exempt from garnishment. It was held that the lien given by such statute was affected by this section. *Jefferson Transfer Co. v. Hall*, (1918) 166 Wis. 438, 166 N. W. 1.

**Judgment acquired prior to four months period.**—While it is true that the Bankruptcy Act avoids only those liens of executors issued within the four months period, when the owner of a lien based on an execution issued before that time has lost it by reason of his unreasonable delay in enforcing it by sale, he cannot claim the benefit of that provision. In such a case the lienor loses the benefit of his lien as against other execution creditors, not because the levy was intended to defraud other creditors, but because of the policy of the law not to permit the use of executions for other than legitimate purposes, and levies made to secure and hold a lien could easily be made to hinder and delay other creditors. *In re Rayford Truck, etc., Co.*, (E. D. Pa. 1918) 250 Fed. 634.

**Right of judgment creditor to file answer.**—A judgment creditor whose judgment is invalid under this section because obtained within the four months period, may nevertheless answer the petition as an unsecured creditor by virtue of sections 1(9), 18(b) and 59f *supra*. *In re Carey*, (C. C. A. 2d Cir. 1918) 254 Fed. 688, 166 C. C. A. 186.

**Debtor solvent when judgment entered.**—If the debtor was solvent at the time the judgment was entered his subsequent bankruptcy will not invalidate the lien unless there was actual intent to defraud. *Farmer's Nat. Bank v. Slaton*, (1918) 180 Ky. 700, 203 S. W. 565.

**Effect of execution sale after filing of petition.**—On the filing of a petition the property of the bankrupt is *in custodia legis*, and a sale thereafter made under a judgment entered less than four months before bankruptcy is a nullity. *Archenhold Co. v. Schaefer*, (Tex. 1918) 205 S. W. 139.

#### IV. ATTACHMENT AND GARNISHMENT LIENS (p. 1136)

**Effect of section.**—The effect of this provision as working a dissolution of an attachment is not affected by a state act providing: "From the date of the attachment, until it be discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property, real or personal, attached." *Ford v. Henderson*, (Ore. 1919) 179 Pac. 558.

**Attachment and garnishment liens.**—An attachment lien on a crop acquired within four months is void. *Ford v. Henderson*, (Ore. 1919) 178 Pac. 381.

**Attachment for rent.**—An attachment for rent is not the equivalent of a distress for rent, where the levy perfects an existing inchoate lien which does not require a judicial proceeding to make it effective, but merely serves to sequester and control in the custody of the court the means of satisfying any judgment later secured on the merits. Consequently the lien secured by such an attachment if levied within four months prior to the petition in bankruptcy is void under this section. *Jones v. Ford*, (C. C. A. 8th Cir. 1918) 254 Fed. 645, 166 C. C. A. 143.

#### V. LIENS ON EXEMPT PROPERTY (p. 1138)

**Rights acquired in exempt property by contract or waiver of exemptions.**—Where a judgment creditor issues execution out of a state court and levies on personal property of the defendant, who, pending the sale under the execution, has a petition in bankruptcy filed against him, and who subsequently fails or refuses to file any claim for exempt property, the creditor is not deprived of his lien by this section and his right to receive payment in full out of the assets of the estate thus previously liened on up to the amount of the debtor's exemption which had been waived in favor of the judgment creditor, as this section does not defeat rights in exempt property acquired by contract or by waiver of the exemption. *In re Goldberg*, (E. D. Pa. 1918) 254 Fed. 440.

#### Vol. I, p. 1141, sec. 68a. [First ed., 1912 Supp., p. 805.]

**Object and scope of section.**—Set-offs are authorized only in cases of "mutual debts or mutual credits." This does not enlarge or change—it only recognizes—what under general law may constitute set-offs. *Lehigh Valley Coal Sales Co. v. Maguire*, (C. C. A. 7th Cir. 1918) 251 Fed. 581, 163 C. C. A. 575.

**Federal decisions are controlling in an action in a state court as to the right of set-off as against a trustee in bankruptcy.** *Whaley v. King*, (Tenn. 1918) 206 S. W. 31.

**Set-off against claim.**—The holder of a mortgage on the property of a bankrupt is entitled to file and have allowed his claim

against the estate for the difference between the debt due and the value of the security covered by the mortgage, and in determining the difference the amount of outstanding taxes against the property covered by the mortgage should be deducted. When the holder of the mortgage has purchased these tax certificates he is entitled to receive from the estate the sum represented by them, but in such case his claim representing the difference between the amount of the bankrupt's indebtedness to him and the value of the security should be reduced in accordance with sections 57k and 57l *supra* to the extent of these certificates. *In re Clark Realty Co.*, (C. C. A. 7th Cir. 1918) 253 Fed. 938, 66 C. C. A. 38.

**Time as of which account is stated and liquidated.**—Incorporated in all bankrupt systems, English and American, is the idea that everything stops at a certain date, as of which reckonings are made, and to which status and rights relate. For the purpose of testing rights upon liquidation, the date of the filing of an involuntary petition by the bankrupt is this date. The estate of the bankrupt as it then stands goes into administration, and a creditor's right to a set-off or counterclaim is determined as of that date. The proceeding in bankruptcy impounds the bankrupt's existing estate, but it does not reach forward and affect the wages, earnings, profits, or transactions that subsequently arise. While they belong to the bankrupt, they are parts of his new estate. A "new estate" of a bankrupt may be defined to be that estate which is built up by or accrues to him after the test date which is the line of demarcation between such and the "old estate"—the date of filing of the petition. In order to a set-off mutuality is necessary, and in order to mutuality the debts or credits must exist at the time thus indicated. *Bramham v. Lanier*, (1917) 138 Tenn. 702, 200 S. W. 830.

**Money due by creditor under court orders.**—Where, at the time of the adjudication, the bankrupt had in its possession certain raw material of another corporation upon which it was under contract to perform certain machine work, part of which work it had already performed, and such material was turned over to the owner by the receiver upon the order of the bankruptcy court which provided that the owner was to pay to the receiver the value of the work already performed by the bankrupt, it was held that the owner could not set off the amount due against its claim for breach of the contract. *In re Barnes Gear Co.*, (N. D., N. Y. 1918) 251 Fed. 764.

**Money given for specific purpose.**—Where a creditor receives money from his debtor, with instructions not to apply it on the debt, but to hold or use it for a specific purpose, the right of set-off does not exist, because the creditor has become, not the debtor of his debtor, but the trustee of a specific trust.

Lehigh Valley Coal Sales Co., *v.* Maguire, (C. C. A. 7th Cir. 1918) 251 Fed. 581, 163 C. C. A. 575.

**Set-off between bank and depositor.**—Where a bank, on the insolvency of another bank, appropriated a deposit credit of the insolvent bank and credited it on notes of which it was indorsee from the latter bank, it was held that on the bankruptcy of the makers of the notes the indorsee bank being the legal owner of such paper was entitled to dividends from the estate of the maker, although an allowance of interest in the sum thus appropriated was properly refused. *Coats Shingle Co. v. Chester, etc., Co.*, (Wash. 1919) 179 Pac. 862.

**Set-off after adjudication.**—A deposit made by a receiver in bankruptcy after the adjudication in a bank to which the bankrupt was indebted cannot be used in payment of this indebtedness. *In re United Grocery Co.*, (S. D. Fla. 1918) 253 Fed. 267.

## Vol. I, p. 1150, sec. 70a. [First ed., 1912 Supp., p. 811.]

- II. Nature of trustee's title.
- III. Time when title passes.
- VI. Exempt property.
- VII. Reclamation proceedings.

### II. NATURE OF TRUSTEE'S TITLE (p. 1151)

**Trustee takes bankrupt's title.**—To the same effect as the original annotation, see *In re Moose River Lumber Co.*, (N. D. N. Y. 1918) 251 Fed. 409; *In re Roseboom*, (N. D. N. Y. 1918) 253 Fed. 136.

The trustee of a bankrupt mortgagor stands in no better position than the bankrupt in a controversy between him and the mortgagee. *In re Russell Falls Co.*, (D. C. Mass. 1918) 249 Fed. 260.

The payment by a corporate officer of his personal debts from the funds of the corporation, which fact was known to his fellow officers who owned nearly all of the stock, is ratified by their silence and failure to object, and as the trustee in bankruptcy of the corporation has, under the circumstances, no greater rights than the corporation, he cannot set up the fact that such payments were improperly made. *Atherton v. Beaman* (D. C. Mass. 1919) 256 Fed. 871.

**Title as if by purchase.**—The trustee in bankruptcy takes title as if by purchase. He takes an absolute title, which of course carries with it the right of possession. *Harlin v. American Trust Co.*, (Ind. App. 1918) 119 N. E. 20.

**Valid liens and incumbrances.**—*Property obtained by bankrupt's fraud.*—A trustee in bankruptcy takes the property of the bankrupt acquired by fraudulent representations made to a seller subject to the same rights and liabilities as those of the bankrupt would have been if bankruptcy proceedings had not been instituted, except in cases where there

has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the Bankruptcy Act. *In re F. Grave Construction Co.* (N. D. N. Y. 1919) 256 Fed. 907.

### III. TIME WHEN TITLE PASSES (p. 1154)

**Effect of commencement of proceedings.—Property in custodia legis.**—To the same effect as the original annotation, see *In re Capital City Cap Co.*, (D. C. N. J. 1918) 251 Fed. 664, holding that property held under a conditional sale contract passed to the trustee where the contract was recorded after the petition was filed but before the adjudication.

**Effect of adjudication.**—Trustee takes title as of date of adjudication. *In re Soltmann*, (C. C. A. 2d Cir. 1918) 249 Fed. 455.

Since the trustee is vested with the bankrupt mortgagor's title as of date of adjudication, if the mortgagee brings suit to foreclose after that date, though before the trustee is selected, and the trustee is not made a party, his equity of redemption is not barred by the judgment in the foreclosure proceeding. *In re Soltmann*, (C. C. A. 2d Cir. 1918) 249 Fed. 455.

### VI. EXEMPT PROPERTY (p. 1162)

**Title remains in bankrupt.**—This section excepts property which is lawfully claimed by the bankrupt as exempt and does not confer on the bankruptcy court jurisdiction to administer it. *McBride v. Gibbs*, (1918) 148 Ga. 380, 96 S. E. 1004.

### VII. RECLAMATION PROCEEDINGS (p. 1165)

**Right to reclaim.—Claim allowed from proceeds of sale.**—A creditor may reclaim merchandise which was obtained by means of false representations which were relied on by him, so long as it remains in the hands of the bankrupt. And even when such merchandise has been disposed of he may claim the proceeds, provided he can identify the fund. *In re Askin Dress Co.*, (C. C. A. 2d Cir. 1918) 253 Fed. 926, 166 C. C. A. 26.

Where hogs were sold to which persons asserted claims it was said: "It has further been contended that certain stockholders of the National Hog Company had rights or claims to some of the hogs in the herd, and that their rights had been denied them by the seizure and sale of the herd. It is proper for us to add that it is quite apparent that there was a pressing necessity to very promptly sell this herd, as there were no funds with which to feed the hogs. But the substitution of the purchase money for the herd in no way changes the rights of litigants, and if any stockholders of the company had any rights, claims, or property in any of the hogs, it is certainly in the power, and we doubt not will be the wish, of the court below, if it be shown such rights exist, by proper proceedings and order, to afford such persons an opportunity to litigate and establish their several rights."

*Gealey v. South Side Trust Co.*, (C. C. A. 3d Cir. 1918) 249 Fed. 189.

Where a bankrupt obtains possession of goods by fraud, misrepresentation, and deceit, and then fraudulently and wrongfully sells them, and afterwards collects a part of the proceeds of the sale, which are traced into the hands of the trustee in bankruptcy, the person from whom the goods were obtained may rescind the sale to the bankrupt and may recover such proceeds from the trustee. *In re Liebig*, (C. C. A. 2d Cir. 1918) 255 Fed. 458, 166 C. C. A. 534.

**Demand upon receiver for property held by him.**—Whatever rights the holder of an unperfected and unrecorded trust receipt, under which he delivered property to a bankrupt, may have in view, a paper demand made by him on a receiver appointed by a state court for the possession of the property and subsequent appropriate demands on the receiver in bankruptcy are not prejudiced by the treatment of the property requisite to its marketing or by its subsequent sale when possessed, or by its intermingling with other property, though consented to by the holder of the receipt. His rights must be regarded as fixed as of the date of the appointment of the receiver by the state court, and to be the same as if the property was susceptible of delivery in the original packages in which they were first received. *In re Bettman Johnson Co.*, (C. C. A. 6th Cir. 1918) 250 Fed. 657, 163 C. C. A. 3.

**Reclamation precluded by act of claimant.**—*Failure to file.*—The vendor of goods to a bankrupt taking a chattel mortgage to secure the purchase price cannot reclaim the property from the receiver in bankruptcy where he has failed to have the mortgage recorded as required by a statute of the state in which the sale was made, providing that such a contract shall be void as against the creditors of the mortgagor unless filed in accordance with the provisions of the statute. *In re American Steel Supply Syndicate*, (E. D. Mich. 1919) 256 Fed. 876.

**Vol. I, p. 1169, sec. 70a (3).** [First ed., 1912 Supp., p. 821.]

**The surrender value of a life insurance policy on the life of a bankrupt, payable to a third person as beneficiary, cannot be cancelled except with the consent of such person and consequently does not fall within the powers which a bankrupt might have exercised for his own benefit, which pass to his trustee under this section.** *In re Simmons*, (C. C. A. 1st Cir. 1919) 255 Fed. 521, 166 C. C. A. 589.

**Vol. I, p. 1169, sec. 70a (4).** [First ed., 1912 Supp., p. 821.]

**Property sold by a bankrupt but retained in his possession passes to the transferee, if sold in good faith, where, under the decisions of**

the state where the transaction takes place, such a sale is good if such a change of possession is not practical or possible. *In re Komara*, (C. C. A. 3d Cir. 1918) 251 Fed. 57, 163 C. C. A. 297, wherein the court upheld a sale by a son-in-law to his mother-in-law, a woman of seventy years, whose only home was with the son-in-law.

**Vol. I, p. 1171, sec. 70a (5).** [First ed., 1912 Supp., p. 823.]

- I. In general.
- II. Interests in real property, etc.
- III. Pledges.
- IV. Conditional sales.
- VII. Subscriptions for stock.
- VIII. Membership in stock exchange.
- IX. Contractual interests and obligations.
- X. Licenses.
- XI. Effect of commingling property.

#### I. IN GENERAL (p. 1171)

**Transferable and leviable property passes to trustee.**—To same effect as original annotation, see *Brown v. Crawford*, (D. C. Ore. 1918) 252 Fed. 248.

**Local laws govern.**—It is well settled that whether any particular property of a bankrupt might have been transferred by him or levied upon and sold under judicial process against him prior to the filing of the petition in bankruptcy is a question to be determined by the laws of the state in which such property was located. *In re Berry*, (E. D. Mich. 1917) 247 Fed. 700.

**Stock of goods acquired by administratrix.**—Where an administratrix, instead of proceeding forthwith to liquidate the business of the decedent, continues it, incurs new debts, and creates new accounts due without the authority of the Surrogate's Court, if she is thereafter adjudicated a bankrupt, such merchandise as remains on hand, acquired after she was appointed administratrix, and all outstanding accounts arising after such appointment, are the property of the receiver in bankruptcy. *In re Tietje*, (D. C. E. D. N. Y. 1918) 253 Fed. 283.

**Retroactive increase of wages.**—A demand for increased wages taken under consideration, under an agreement that if granted the allowance would be retroactive from a date specified, constitutes a claim which passes on the adjudication of an employee as a bankrupt, to his trustee in so far as any allowance may be made for wages earned prior to the date of adjudication. *In re Evans*, (W. D. Tenn. 1918) 253 Fed. 276.

**Assignment of money to become due.**—In *Montgomery v. Philadelphia*, (E. D. Pa. 1918) 253 Fed. 473, it appeared that as part of the inducement to the surety to become such, a contractor made a valid assignment of all moneys which became payable under the contract by the city, including a reserve payable on completion of the contract. The

assignment became operative in the event of a default by the contractor upon its contract. This assignment was duly executed and delivered, but no notice thereof was given to the city, nor was there other delivery than of the assignment. The contractor defaulted, and the city thereupon regularly declared, and notified the surety of, the default, and called upon the latter to complete the work. This the surety did at a cost in excess of all payments under the contract, including the sum which had been held back from the contractor by the city by virtue of the right given to it by the contract, and it was held that the title to the reserve fund was in the surety as against the trustee.

## II. INTERESTS IN REAL PROPERTY, ETC. (p. 1174)

**Generally.**—To same effect as original annotation, see *Tripplehorn v. Cambron*, (C. C. A. 6th Cir. 1918) 250 Fed. 605, 162 C. C. A. 621.

**Life interest.**—Where a life estate is created, although a power of disposition is given in favor of the widow the remainder to be equally divided among the children, the latter are vested with a clearly existent right or interest which passes to their trustees in bankruptcy by operation of law. *Markham v. Waterman*, (S. C. Kan. 1919) 181 Pac. 621.

**Estate by the entirety.**—Under the law of Michigan the interest of a bankrupt in land which he and his wife have contracted to buy is that of a tenant by the entirety and does not pass to the trustee because incapable of being levied on for his debts. *In re Berry*, (E. D. Mich. 1917) 247 Fed. 700, holding also that a Michigan corporation was not so restricted in its power to convey as to reduce to personalty the interest passing by its contract to convey and thereby to avoid the rule as to estates by the entirety.

**Title in name of bankrupt and wife.**—Without proof of actual fraud a trustee may recover in ejectment land paid for by the bankrupt where title is originally taken in the names of the bankrupt and wife although it appears that subsequent creditors will benefit by the recovery. *Shaver v. Mowry*, (1918) 262 Pa. St. 381, 105 Atl. 505.

**Encumbered property.**—The purchaser at a foreclosure sale, under a decree in a foreclosure proceeding commenced after adjudication and to which the trustee was not made a party, becomes a mortgagee in possession, and if on a sale thereafter of the premises under a prior mortgage a surplus be paid into court, the purchaser at the foreclosure sale becomes entitled to it and if there remain a surplus after that it will go to the trustee as the owner of the equity of redemption. *In re Soltmann*, (C. C. A. 2d Cir. 1918) 249 Fed. 455.

**Landlord's interests.**—Where a decedent leaves real estate which is transferred to the bankrupt by the next of kin, as was the

case here, and the bankrupt has title to the real estate when the petition is filed, no proceedings to sell the same to pay decedent's debts having been instituted, the creditors of the decedent have no such interest in the real estate as will justify this court in preventing the receiver in bankruptcy from collecting the rents. *In re Tietje*, (E. D. N. Y. 1918) 253 Fed. 283.

**Tenant's interest in leasehold.**—A trustee may, at his option, assume a lease of the bankrupt or decline to assume it as an asset of a bankrupt estate; and he has a reasonable time within which to exercise this option. If he considers the lease of value to the estate and assumes it, bankruptcy operates like any other assignment, and the bankrupt is released from all liability for rent thereafter. But if he deems the lease of no value to the estate and refuses it, this does not avoid the lease but leaves the bankrupt lessee liable as before. *Rosenblum v. Uber*, (C. C. A. 3d Cir. 1919) 256 Fed. 584.

**Rights and obligations of trustee.**—A trustee or receiver has the right to use the premises occupied by the bankrupt for a reasonable period, sufficient to enable him to dispose of the bankrupt's property without unnecessary loss, and to do so by selling it there, if that be the best way. Such use of the premises is not an adoption of a lease to the bankrupt. In determining the rent allowable to the lessor in such cases it has generally been thought that the rent reserved in a lease to the bankrupt was, under ordinary conditions, the fair measure of what the use and occupancy was fairly worth. In the absence of an express agreement for a lower rental, there is a presumption in favor of that sum; and it will ordinarily be allowed, unless unusual circumstances appear making it plainly unreasonable. *In re Crawford Plummer Co.*, (D. C. Mass. 1918) 253 Fed. 76.

**Surrender of lease by trustee.**—The trustee may, if the landlord consents, surrender the lease; whereupon the landlord regains possession of the premises, and all unmatured obligations between the parties depending upon the continuance of the leasehold estate are terminated. But in surrendering the lease, the trustee has no greater right than the tenant, had he attempted to make a surrender before bankruptcy. To be a valid surrender in either case there must be, not only an offer by the lessee (or the trustee) to yield up the leasehold, but an acceptance of that offer by the lessor. This principle was applied where the trustee, acting on the instruction of the creditors, offered to surrender the demised premises to the land and symbolized his offer by the delivery of the key to the landlord's attorney. But nothing appeared in the stipulated record which showed or even suggested that the landlord or his attorney accepted the tender as made; but on the contrary the record showed that the attorney, speaking for the landlord on accepting the key, specifically stated: "That

he accepted same upon the express condition that he would care for the building and rent it if possible, *for the benefit of the estate.*" The court declared that instead of being an acceptance of surrender, the act of the landlord was, in fact, a rejection of surrender, and left the lease where it was before the attempt to surrender was made. *Rosenblum v. Ueber*, (C. C. A. 3d Cir. 1919) 256 Fed. 584.

**Fixtures.**—Where a tenant refuses to install fixtures at his own expense under an agreement that they shall become the property of the landlord, and subsequently installs them without any warning from the landlord that he would claim such fixtures, an order for their return should not be made after they have been sold as a part of the tenant's estate in bankruptcy. *In re West*, (E. D. Pa. 1918) 253 Fed. 963.

### III. PLEDGES (p. 1178)

**Property pledged by bankrupt—Invalid pledge.**—To same effect as original transaction, see *In re P. J. Sullivan Co.*, (C. C. A. 2d Cir. 1918) 254 Fed. 660, 166 C. C. A. 158.

In the case of *In re Germantown Almegum Mfg. Co.*, (E. D. Pa. 1918) 251 Fed. 755, the following facts appeared. In the regular course of its business the bankrupt had bought crude rubber. This, for the purpose of being used as collateral, was put on storage in the Rex Warehouse, an independent depository, and was pledged to the Philadelphia Warehouse Company for advances made. The bankrupt then applied to a trust company for a loan or advances, offering as security whatever value there was in rubber over and above the debt due the warehouse company. The trust company agreed to make the advances, and received a paper, which recited the fact of the rubber being on storage with the Rex Company, described its character, quantity, and value, and further set forth, "All of our right, title, and interest to and in this rubber is assigned to Pelham Trust Company as further protection and security," etc., and added authority in the pledgee to have the goods insured for the pledgee's benefit. The assignment was delivered, and knowledge of it conveyed to the storage company and first pledgee. It was held that the second pledge was valid.

**Property pledged by pledgee.**—Where the owner of corporate stock pledges it to a corporation to secure advancements made by it to another corporation in which he is interested, and the pledgee deposits the stock with a bank as collateral security for its indebtedness to the bank, which, on its debtor being adjudicated bankrupt, sells the stock to satisfy its debt, at which sale one of the active managing officers of the bankrupt corporation becomes the purchaser, and the officer so purchasing it had full knowledge at the time of its deposit with his company by the owner that it was only deposited for the purpose aforesaid, and became an indorser on the notes for which the stock was deposited

with the bank as collateral, knowing that it was being used by his company in violation of the contract under which it holds the same, such managing officer so becoming the purchaser of the stock cannot hold it against the true owner thereof after all advancements for which the stock was deposited as security have been paid. *Kay v. Piney Coal & Coke Co.*, (W. Va. 1919) 99 S. E. 501.

**Stock brokerage transactions—Effect of conversion by broker.**—As to rights and equities under particular circumstances of customers where stocks pledged by a stock broker have been sold by the pledgee, see *In re Wilson*, (S. D. N. Y. 1917) 252 Fed. 631.

**Pledged stock.**—Under the Massachusetts law, stock pledged with a stock broker remains the property of the pledgor, subject to the rights created by the pledge, and the trustee in bankruptcy takes no greater rights than the bankrupt had, as the Massachusetts law gives no special rights to a creditor holding a lien unless there has been actual or constructive seizure by legal or equitable process. *In re Gay*, (D. C. Mass. 1918) 251 Fed. 420.

### IV. CONDITIONAL SALES (p. 1181)

**If the sale is valid and binding.**—To same effect as original annotation, see *In re American Steel Supply Syndicate*, (E. D. Mich. 1919) 256 Fed. 876.

### VII. SUBSCRIPTIONS FOR STOCK (p. 1188)

**Trustee may recover stock subscriptions.**—To same effect as original annotation, see *In re Phoenix Hardware Co.*, (C. C. A. 9th Cir. 1918) 249 Fed. 410.

It is the duty of the trustee to reduce unpaid stock subscriptions for the benefit of the creditors. *De Muth v. Faw*, (1918) 103 Wash. 279, 174 Pac. 18.

Unpaid subscriptions to the stock of a corporation constitute a trust fund and in case of bankruptcy may be recovered for the benefit of the creditors. *In re Phoenix Hardware Co.*, (C. C. A. 9th Cir. 1918) 249 Fed. 410.

**Stock of bankrupt corporation disposed of at inadequate price.**—Where a corporation has disposed of its shares of stock at a grossly inadequate price, or without consideration, an action may be brought by the trustee in bankruptcy for the benefit of those creditors who have extended credit in reliance upon the capital stock of the corporation. The theory upon which the action may be maintained by a trustee in bankruptcy against a stockholder who has paid an agreed price for stock in a corporation, is that the capital stock of a corporation is a trust fund for the benefit of its creditors, and its officers may not fraudulently convey it away, and that, if so fraudulently conveyed away, the contract may be vacated and the stock may be recovered for, and must be based upon the following premises: (1) That the capital stock is the property of the corporation, a

trust fund for the benefit of the corporation and its creditors; (2) that creditors have a right to rely and do rely on such capital stock in extending credit to the corporation; and (3) that in disregard of the rights of such creditors the corporation has disposed of its capital stock either in actual fraud, or for such inadequate consideration as to work a constructive fraud. In pursuing such trust fund the trustee's right must come from the amendment to the Bankruptcy Act, rather than from the original act, and he has not only the rights of a creditor "armed with process," but also the remedies of such a creditor. Since some of the creditors may not be entitled to recover, and under the broad power of a court of equity what creditors, if any, are entitled to participate may be determined, what persons, if any, are liable to account may be decreed, and sufficient to liquidate the claims of those entitled to participate, and no more, may be awarded against such persons as may be liable, the case will be remanded to the equity court to be there disposed of. *Courtney v. Youngs*, (1918) 202 Mich. 384, 168 N. W. 441.

**Liability of stockholder.**—Whether a stockholder of a bankrupt corporation is liable to the estate for the difference between the par value of the stock held by him and the amount originally paid therefor is determined by the law of the state where the company was incorporated. *In re Manufacturers' Box, etc., Co.*, (D. C. N. J. 1918) 251 Fed. 957.

Parties to whom stock has been issued, thus becoming holders thereof, are as equally liable for the payment of calls as if they were original subscribers thereto. And the fact that such holders turned over a stock of merchandise taking corporate stock in payment thereof, does not relieve them from this liability where it appears that the concern was greatly over-capitalized, though it is proper to credit them with the value of the merchandise thus turned over to the corporation. *In re Phoenix Hardware Co.*, (C. C. A. 9th Cir. 1918) 249 Fed. 410.

**Nature of stockholder's liability.**—The liability of subscribers to the capital stock of a corporation is several and not joint. *In re Phoenix Hardware Co.*, (C. C. A. 9th Cir. 1918) 249 Fed. 410.

**Liability contingent on call.**—Where the liability of a stockholder for the unpaid balance due on his stock is contingent on a call, the statute of limitations does not commence to run until a call has been made. Therefore, where the call is first made by the referee in bankruptcy, the statute does not attach until that time. *In re Phoenix Hardware Co.*, (C. C. A. 9th Cir. 1918) 249 Fed. 410.

**Order of court for assessment as res adjudicata.**—In a case in which this question arose it is said: "In making the assessment, the federal court 'took the place and exercised the office of the directors' (*Great Western v. Purdy*, 162 U. S. 336, 16 Sup. Ct.

813, 40 L. Ed. 986), and the order of the court settles the question of the necessity for the assessment and of the authority of the trustee in bankruptcy to sue to recover it, not, it would seem, on the principle of res adjudicata, because the order is not a judgment, but on the principle that such necessity and authority are things which the stockholder may not gainsay, since the directors of the company might make the assessment or give the authority without his knowledge or consent or against his protest. Not so, however, as to the question whether the stock is full paid; on that he has a right to be heard on an issue properly made by pleadings, and he may have a jury as in any case in assumption or debt. It follows that the appearance of the defendants before the federal court to resist the motion for an assessment does not give to the order the effect of res adjudicata. We think therefore that by reason of the modification of the order, or even without that modification, the defendants had the right, notwithstanding the order, to show, if they could, that their stock was full paid." *Sweet v. Barnard*, (Colo. 1919) 182 Pac. 22.

**Jurisdiction.**—After appointment of a trustee in bankruptcy for an insolvent corporation, creditors making claim against stockholders on their unpaid stock subscriptions must wage their causes in the bankruptcy proceeding, the federal courts being vested with exclusive jurisdiction, and the trustee being charged with the duty of reducing unpaid stock subscriptions, if necessary, for the benefit of creditors. *De Muth v. Faw*, (1918) 103 Wash. 279, 174 Pac. 18.

As soon as it appears in an action by creditors in a state court to recover stock subscriptions that the corporation has been adjudged a bankrupt, and that its affairs are being handled by a trustee under the direction of the federal court, the state court should dismiss the cause without attempting to determine the merits of a controversy, solely within the jurisdiction of the bankruptcy court. *De Muth v. Faw*, (1918) 103 Wash. 279, 174 Pac. 18.

**Enforcement of liability.**—The liability of a stockholder of a corporation for the difference between the par value of the stock and the consideration paid cannot be enforced in a summary proceeding on the objection of a creditor to a claim of such stockholder against the corporation. *In re Manufacturers' Box, etc., Co.*, (D. C. N. J. 1918) 251 Fed. 957.

**Pleading.**—In an action by a trustee to recover the balance due on the purchase price of corporate stock it is not necessary to allege that he is without sufficient funds to pay all the creditors and the expenses of the bankruptcy proceedings. *Benner v. Billings*, (Wash. 1919) 181 Pac. 18.

The fact that the petition alleges a subscription for the stock and that the proofs show that the stock was issued without the formality of a subscription is a variance which is immaterial. *In re Phoenix Hard-*



ware Co., (C. C. A. 9th Cir. 1918) 249 Fed. 410.

#### VIII. MEMBERSHIP IN STOCK EXCHANGE (p. 1189)

Property rights in seat on stock exchange pass to trustee.—To same effect as original annotation, see *In re Stringer*, (C. C. A. 2d Cir. 1918) 253 Fed. 352, 165 C. C. A. 134.

#### IX. CONTRACTUAL INTERESTS AND OBLIGATIONS (p. 1191)

Bankruptcy does not terminate contractual relations.—Voluntary bankruptcy not being an anticipatory breach, except for the purpose of making a provable claim under section 63, the trustee may enforce a contract of the bankrupt. *Planter's Oil Co. v. Gresham*, (Tex Civ. App.) 202 S. W. 145.

The trustee of an estate in bankruptcy succeeds to the bankrupt's rights in the premises, but subject to his liabilities. He takes his contracts and can compel their performance, provided he performs them upon the bankrupt's part. *First Trust, etc., Bank v. Bitter Root Valley Irrigation Co.*, (D. C. Mont. 1918) 251 Fed. 320.

Interest as vendee.—The fact that the interest of the bankrupt was that of a vendee in a contract does not prevent it from passing to the trustee. *In re Berry*, (E. D. Mich. 1917) 247 Fed. 700. The court said: "An adjudication in bankruptcy does not dissolve or terminate the contractual relations of the bankrupt. . . . Its effect is to transfer to the trustee all the property of the bankrupt, except his executory contracts, and to vest in the trustee the option to assume or to renounce these."

Goods consigned to bankrupt for sale as agent.—Where an agreement between the parties providing that merchandise shipped to the bankrupt was to remain the property of the consignor and to be sold by the consignee as their agent only, was ignored by the parties and it appeared that the business was not carried on in accordance with the agreement, and that the consignor had so acted upon the breach as to show, with respect to future consignments, that title passed in the transactions and that they were sales and not bailments, it was held that the consignors were not in a position to invoke the written agreement as against the trustee so as to shield them in the retention of property which had been surrendered into their possession by the bankrupt. *Taylor v. Fram*, (C. C. A. 2d Cir. 1918) 252 Fed. 465. In this case it appeared that an agreement was entered into providing in substance as follows: (1) That all merchandise delivered to the bankrupt shall, at all times, be the property of the defendant; (2) that he shall sell the merchandise at retail as their agent, and in that capacity only; (3) that the price for the merchandise shall be designated on certain signed statements and memorandum bills; (4) that the bankrupt shall not sell

for less than the amount therein stipulated; (5) that any excess retained shall not be retained by the bankrupt for his services; (6) that the bankrupt shall account for all the moneys received by him weekly and pay over same to the defendants; (7) that the defendants shall be at liberty at all times to demand the return of the merchandise on hand; (8) that nothing in said agreement shall be construed as vesting any title in the bankrupt; (9) that nothing in said agreement shall be changed or altered unless it be in writing; (10) that all business relations between the bankrupt and the defendants shall be governed absolutely and entirely by the provisions in said agreement contained. In determining the character of this agreement, which was ignored by the parties in their subsequent transactions, the court said: "There are numerous cases which may be cited to show that such an agreement creates a bailment, and not a sale, and that the bailor is at liberty at any time to retake his merchandise, irrespective of whether bankruptcy proceedings intervene or whether the debtor is solvent or not. All this we concede, and no citation of authorities is necessary. But the above doctrine only applies where the agreement is entered into in good faith, and without intent to hinder, delay, or defraud creditors. . . . In the case at bar the district judge was convinced that there was a lack of good faith in the making of the original contract. . . . If the bankrupt had given the defendants a mortgage upon the stock in his store, and had been permitted to sell the stock covered by it and to deposit the moneys received in his general account, and use them to meet his liabilities as if no mortgage existed, instead of paying them over to the mortgagee, we should be obliged to hold that the mortgage was fraudulent as against the trustee in bankruptcy. . . . If that be so as to a mortgage of record, and of which creditors have constructive notice, it should follow a fortiori that an agreement of which creditors have no constructive notice, which reserves title to the consignor, who nevertheless and contrary to its terms permits the consignee to make sales, and deposit the proceeds of sales in his general bank account, and use them for his own purposes, is equally fraudulent as against the trustee."

Goods held on consignment by trustee.—Under a state statute providing that if any person transact business under his own name without any addition disclosing the name of his principal or partner, all property used in such business shall, as to creditors of such person, be liable for his debts, the trustee in bankruptcy of the trader so doing business takes title to all the stock used in the business, including goods held by the bankrupt on consignment, to which he did not have title as between himself and the consignor. The fact that the consignor repossessed himself of the goods shortly before the bankruptcy proceedings were instituted does not

alter the rule and the trustee may recover them or their equivalent in money by proper petition. *Virginia Book Co. v. Stiles*, (C. C. A. 4th Cir. 1918) 254 Fed. 46, 165 C. C. A. 456.

**Life insurance policy.**—A life insurance policy which by the laws of the state is exempt from the claims of creditors does not pass to the trustee. *Elledge v. Sumpter*, (1918) 140 Tenn. 11, 203 S. W. 346.

**Accounts due agent holding as trustee for principal.**—Where a company acting as agent for another under a contract authorizing it to make sales of products of the principal and providing that all notes, mortgages, liens or cash taken in payment by the agent shall be held in trust for the principal, fails in many cases to take notes, liens or mortgages for the purchase money, its trustee in bankruptcy may be required in a summary proceeding to turn over to the principal accounts for such sales. *International Agricultural Corp. v. Sparks*, (D. C. W. D. S. C. 1917) 250 Fed. 318.

Where the lessee of a building agrees to install certain equipment therein which by the terms of the contract is immediately to become the property of the lessor as part of the consideration for the lease, the lessor becomes the owner when it is installed and is entitled thereto on a surrender of the lease as against the trustee in bankruptcy. *Hills v. Stimson Co.*, (1918) 102 Wash. 1, 172 Pac. 1181.

#### X. LICENSES (p. 1193)

**The right to renew a liquor license does not pass to the personal representatives of the licensee but inures to the benefit of those to whom the personal representative stands in the relation of trustee, that is the creditors and beneficiaries of the estate.** In case, however, the representative obtains a transfer of the license to himself and conducts the business as his own the creditors to whom he becomes personally indebted have a primary right to have the proceeds of a sale of the license by his trustee in bankruptcy applied to the payment of their debts incurred in carrying on the business. *In re Mitchell*, (D. C. E. D. Ga. 1918) 250 Fed. 1003.

#### XI. EFFECT OF COMMINGLING PROPERTY (p. 1195)

**Money given to purchase drafts.**—Persons who gave money to a banker for the purchase of drafts and who obtained the same cannot, on the bankruptcy of such banker, claim against a fund of the bankrupt on deposit in another banking institution because such paper remains unpaid, and, in the absence of any active fraud or deception, their status is that of general creditors. *In re Boglognesi*, (C. C. A. 2d Cir. 1918) 254 Fed. 770.

**When property traceable.**—In so far as any claimant may have given money to a bankrupt for investment in a specified manner, the bankrupt undoubtedly, by accepting

the deposit, undertook to act in the interest of the depositor-claimant, and thereby assumed toward him a fiduciary relation, and in so far as such claimants may trace their funds into a fund deposited by the person in a banking institution they are *prima facie* entitled to share therein. *In re Boglognesi*, (C. C. A. 2d Cir. 1918) 254 Fed. 770.

**A replenishing of a depleted trust account cannot (per se) be considered as restoring the trust; and it follows that when it appears that the moneys impressed with a trust have been "mingled with the [trustee's] general account, and a certain amount remains in the account at the end of the period, and the account has not been, in the interval, depleted below the trust amount or final amount, that final amount will be presumed to include the trust money."** But where such commingled fund comes into the hands of a receiver, trustee in bankruptcy, or the like, what is responsible for the claims of the *cestuis que trust* is the remainder so coming into the hands of the officer of the court, "not exceeding the smallest amount the fund contained subsequent to the commingling." *In re Boglognesi*, (C. C. A. 2d Cir. 1918) 254 Fed. 770.

**Burden of proof.**—It is necessary in order to identify money to trace it to some specific fund or property. *In re Boglognesi*, (C. C. A. 2d Cir. 1918) 254 Fed. 770, 166 C. C. A. 216.

**Vol. I, p. 1196, sec. 70a (5).** [*Policy of insurance.*] [First ed., 1912 Supp., p. 835.]

**Reason underlying enactment of provision.**—"It was known that in bankruptcy proceedings the court would often be confronted with a fact situation under which the policies of insurance were outstanding upon the life of the bankrupt, who because of advanced years or condition of health was no longer an acceptable insurance risk. It was recognized, also, that because of the peculiar character of the insurance contract it was not property which could be sold, because of the principle of law that no one could recover under such a contract who had not an insurable interest in the life of the insured. Under such circumstances, there might be outstanding policies which were of real value to the insured, but this value would be one available to creditors only at the cost of the payment of premiums for an indefinite period. The situation would frequently make it impracticable for the bankrupt estate to continue such policies in force, and if the bankrupt, or some members of his family, were not permitted to keep them in force, they would lapse, thereby resulting in a wasteful loss, or, if they were put up for sale, the possible purchasers would be so limited that the bankrupt estate would realize nothing. If the policies had a cash surrender value, the trustee had no recourse other than to give up the policies on receipt of such value. The doing of this would re-

sult in a loss to the insured and his family, and often result in benefit to no one except the insurance company. The difficulties of such a situation were happily met by the provision, to which we have referred, which enabled the bankrupt to reclaim the policy upon payment of the surrender value. This gave to the bankrupt estate all of the value which the policy had to the creditors, and at the same time saved to the bankrupt and his family any redundant value it might have. In choosing a phrase to incorporate this thought into the bankruptcy laws, the framer of the statute gave to the bankrupt the right referred to whenever the policy had "a cash surrender value," etc. In all other cases the policy was to pass to the trustee, unaffected by this provision." *In re Williams*, (D. C. E. D. Pa. 1918) 250 Fed. 288.

**Policies having surrender or other value.**—To same effect as original annotation, see *In re Simmons*, (D. C. Mass. 1918) 253 Fed. 466.

**What constitutes surrender value.**—The phrase "surrender value" we think must now be held to cover any and every policy which the insured by his own efforts, unassisted by any beneficiary or assignee, can obtain from the insurer in cash and in cancellation of the policy at the date of the petition filed; the amount being determined in accordance with a fixed and definite method of compensation, uniform in all cases. The amount which can be thus obtained is the cash surrender value of the policy. It makes no difference whether the amount he can obtain is secured to him by a statute, or rests upon the mere willingness of the company to buy out the policy at the particular time. The material and important fact is that at the time of the adjudication the policy had a value which the company was willing to pay and which the bankrupt by his own act could obtain. The theory of the law is that the creditors of a bankrupt are entitled to everything that a bankrupt could get out of the policy by his own act at the time he was put into bankruptcy. *In re Gannon*, (C. C. A. 2d Cir. 1917) 247 Fed. 932, 160 C. C. A. 122.

**Amount to which trustee is entitled.**—Whatever may have been the view in some of the earlier decisions, it is now settled law that the right of the trustee in bankruptcy is limited to the amount which the bankrupt might have received on the policy at the time of the bankruptcy as a cash asset. *In re Simmons & Griffin*, (C. C. A. 1st Cir. 1919) 255 Fed. 521.

**Date of cash surrender value.**—If a policy is not one which on the day of the filing of the petition has a cash surrender value payable to the bankrupt, his estate, or his personal representatives, the trustee has no claim on it. *In re Jones*, (D. C. Md. 1917) 249 Fed. 487.

The trustee in bankruptcy is entitled to whatever cash value the policies in question had on the date of adjudication. *In re*

*Samuels*, (C. C. A. 2d Cir. 1918) 254 Fed. 775.

**Policy not payable to bankrupt or his estate or personal representatives.**—Where a policy is payable to the wife of the insured and cannot be surrendered without her consent, the surrender value is not "property which, prior to the filing of the petition, he could by any means have transferred or which might have been levied upon" and therefore does not pass to the trustee. *In re Simmons & Griffin*, (C. C. A. 1st Cir. 1919) 255 Fed. 521.

**Effect of right to change beneficiary.**—See to same effect as original annotation, *In re Jones*, (D. C. Md. 1917) 249 Fed. 487; *Rawls v. Penn. Mut. L. Ins. Co.*, (C. C. A. 5th Cir. 1918) 253 Fed. 725, 165 C. C. A. 319; *Cohn v. Malone*, (1919) 248 U. S. 450, 39 S. Ct. 141, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 5th Cir. 1916) 236 Fed. 882, 150 C. C. A. 144. In the case last cited the court said: "In 1902 and 1905 the bankrupt took out two policies on his life in the Penn Mutual Life Insurance Company, loss under one payable to his 'executors, administrators or assigns,' under the other to his sister and brother with full power in the assured 'while this policy is in force and not previously assigned, to change the present beneficiary or beneficiaries.' By formal written instruments dated July 15, 1910, he assigned both policies to his wife 'if she outlives me, otherwise to my estate, with full power to the insured to change the beneficiary or surrender this policy to said company at any time, this to be done by instrument in writing under his hand and seal to be recorded at the home office of the company.' While both policies were in the bankrupt's possession, the trustee demanded them in order that their cash surrender value might be secured and distributed under the Bankruptcy Act. The bankrupt defended upon two grounds: First, that the cash surrender value was not property which could have been transferred by him prior to bankruptcy; and second, that the assignment to his wife could not be defeated by the trustee because protected by section 2498, Georgia Code 1910, which provides—'The assured may direct the money to be paid to his personal representative, or to his widow, or to his children, or to his assignee; and upon such direction given, and assented to by the insurer, no other person can defeat the same. But the assignment is good without such assent.' The Court of Appeals held both grounds of defense bad, 236 Fed. Rep. 882. As to the first, its ruling accords with the doctrine recently announced in *Cohen v. Samuels*, 245 U. S. 50. In respect of the second that court declared:

"Nothing in the terms of the statute, especially when they are considered in the light of the circumstances of its enactment, indicates that it had any other purpose or effect than to deny to anyone other than the assured himself the power to defeat a direc-

tion by him to pay to his personal representative, or to his widow, or to his children, or to his assignee, the money payable in a life policy issued to him. The provision does not purport to make every such direction by the assured irrevocable by him, or to invalidate a stipulation in a life policy giving the assured the right to change the beneficiary at any time during the continuance of the policy. The statute puts a direction by the assured to pay to his widow on the same footing as one to pay to his assignee. If a policy is assigned as security for a debt which the assured pays during his life, certainly the statute is not to be given the effect of putting it out of the power of the assured to change the beneficiary upon the reassignment of the policy to him by the satisfied creditor. Nothing in its terms justifies giving a different operation or effect in the case of a direction to pay to the widow. We are not of opinion that the provision quoted had the effect of conferring on the bankrupt's wife, as the result of her having been named as the beneficiary, a vested and indefeasible interest in policies by the terms of which the beneficiary could be changed by the bankrupt at any time.' And we approve its conclusion."

Where by the terms of a policy payable to the wife of the insured he has the absolute right to change the beneficiary, the trustee is entitled to whatever cash value the policy may have. *In re Samuels*, (C. C. A. 2d Cir. 1918) 254 Fed. 775, 166 C. C. A. 221.

**Surrender value subject to valid liens—Pledge.**—Where full paid policies on the life of a bankrupt have been borrowed on to their full loan value, and the interest on the loans exceeds the dividends and none of them have a cash surrender value in excess of the loans, they do not pass to the trustee. *In re Williams*, (D. C. E. D. Pa. 1918) 250 Fed. 288.

**Policies having no cash value.**—Where a policy allows a change of beneficiary and provides "a loan value" but does not refer to "a cash surrender value" which the company issuing the policy declines to pay or recognize, it is proper to require the bankrupt to pay or secure to the trustee the cash surrender value of the policy and to direct that if this value which is fixed in the order is so paid the policy shall be delivered to him and that otherwise the policy shall pass to the trustee as assets of the estate. The court, on appeal, in confirming such an order said:

"Whether or not a company, by its policy or otherwise, recognizes a cash surrender value, the value exists. If there is a difference between the loan value and the cash surrender value, the difference would, ordinarily, be in favor of the latter. By payment of the cash surrender value, the company escapes all future liability. The value to the company is there, and what it amounts to in dollars is a matter of ascertainment by computation, if it is not indicated by the policy. It is a value that has been created by and

from the business or estate of the bankrupt, and his creditors are entitled in law and good morals to the benefit of it. On the other hand, the creditors having received this value, there can be no reason why the bankrupt should not get the benefit of life insurance which he might not at that time be able to secure, and at a premium rate less than would be demanded upon a new policy. It is within the rights and the ability of the bankrupt to secure from the life insurance company the amount required by the order to continue his policy, and if he does not pay the cash surrender value, as legally and properly ascertained, the referee should take such steps as may be necessary and proper to secure for the creditors the benefit of the asset evidenced by the policy." *Richter v. Rochhold*, (C. C. A. 5th Cir. 1918) 253 Fed. 941, 165 C. C. A. 383.

**Insurer not bound to accept surrender.**—A policy of which the insurer is not bound to accept a surrender has no cash surrender value though the insurer is authorized to purchase its policies and has sometimes done so, where it is not bound by law or custom to do so in any particular instance. *In re Gannon*, (C. C. A. 2d Cir. 1917) 247 Fed. 932, 160 C. C. A. 122.

**Exempt policies do not pass.**—*In re Jones*, (D. C. Md. 1917) 249 Fed. 487.

The matter is one of state law. *In re Samuels*, (C. C. A. 2d Cir. 1918) 254 Fed. 775.

**A statutory provision as to exemptions of life insurance policies** is to be read in the light of a constitutional provision limiting the power of the legislature in respect to the amount for which exemptions may be granted. *In re Jones*, (D. C. Md. 1917) 249 Fed. 487.

**Vol. I, p. 1202, sec. 70a (6).** [First ed., 1912 Supp., p. 838.]

**The right to sue for a personal tort—Action for damages under Sherman law.**—An action to recover triple damages under the Sherman law is personal and nonassignable and does not pass to the trustee of the bankrupt. *Bonvillain v. American Sugar Rep. Co.*, (D. C. E. D. La. 1918) 250 Fed. 641.

**Action for purchase price.**—An action lies by the trustee for the purchase price of property leased to the defendant with an option to purchase at a fixed price, which option was exercised before the bankruptcy proceedings were instituted. *Buell v. Williamsport Staple Co.*, (1918) 261 Pa. St. 180, 104 Atl. 572.

**Vol. I, p. 1204, sec. 70b.** [First ed., 1912 Supp., p. 839.]

## II. SALES

**Sale of assets free of incumbrances—In general.**—To same effect as original annotation, see *In re Franklin Brewing Co.*, (C. C. A. 2d Cir. 1918) 249 Fed. 333.

A court of bankruptcy has jurisdiction to order a sale free of incumbrances without first determining either the validity or the amount of the lien. *In re Franklin Brewing Co.*, (C. C. A. 2d Cir. 1918) 249 Fed. 333.

Where an order, which is made for the sale of property free of incumbrances, is not unlawful and there is no abuse of discretion there is no error available on a petition to revise. *In re Franklin Brewing Co.*, (C. C. A. 2d Cir. 1918) 249 Fed. 333.

Although in making an order for a sale free of incumbrances there may be a drastic exercise of authority yet circumstances may justify it as a matter of discretion. *In re Franklin Brewing Co.*, (C. C. A. 2d Cir. 1918) 249 Fed. 333.

When sale free from incumbrance will be ordered—*Generally*.—In one circuit it is said that it is good practice, and the usual procedure in that circuit, not to order sales free of incumbrances unless there is a fair prospect that the proceeds will at least discharge the lien. The court further said: "The reason, or one very good reason, for this forbearance, is that, unless more is produced by sale than the lien debt, there is nothing coming to the estate in bankruptcy; therefore the bankruptcy court does not meddle with what it can never administer. But this is not a rule of law, and where (for instance) the very existence of any lien is in litigation, and property is wasting while waiting decision, it must be matter of discretion whether or not to sell promptly and save expense. Nor does a mortgage clause giving the right to bid on bonds in any way limit the power of the court, however much it may influence its discretionary application." *In re Franklin Brewing Co.*, (C. C. A. 2d Cir. 1918) 249 Fed. 333.

Manner of selling assets—*In general*.—Where property incumbered is made up of property both real and personal, thus constituting a business entity which in its entirety has been hypothesized by an agreement good until set aside by competent authority, an order directing the sale of the personalty alone would be unlawful. And the same result would follow where, after ordering a sale of the entire property, the court should confirm a sale only of the personalty. *In re Franklin Brewing Co.*, (C. C. A. 2d Cir. 1918) 249 Fed. 333.

Releasing purchaser from bid.—The successful bidder at a sale of the bankrupt's property on condition that the purchaser pay the war tax on the property sold is not entitled to be relieved from his bid on the ground that the property was appraised too high where it appeared that another bidder had offered an amount nearly equal to that accepted, nor on the ground that the bidder was disappointed in his expectation of being able to give bond for the tax instead of paying the same in cash, no such condition being a part of the terms of the sale. *In re McCann*, (N. D. N. Y. 1918) 250 Fed. 1006.

Sale pursuant to reorganization plan.—Since a bankrupt court can under no circumstances compel creditors to accept an aliquot interest in the assets of the estate of a bankrupt under the guise of a sale, it cannot compel them to accept stock in a reorganized corporation to which the bankrupt's assets have been transferred. On the other hand a dissenting creditor cannot compel the reorganized corporation to pay him his pro rata share of the assets. *In re Prudential Outfitting Co.*, (S. D. N. Y. 1918) 250 Fed. 504.

Setting sale aside—*Failure to appraise property*.—The sale of a deceased bankrupt's real estate lying in another state before causing the same to be appraised as provided by this section, and an advertisement describing the property as the bankrupt's one-third interest in two tracts of land located in a certain county and state, containing a certain number of acres each, without stating its nature and accessibility to transportation, will be set aside by a court of bankruptcy. *In re Irvine*, (W. D. S. C. 1919) 255 Fed. 168.

Opposition by receiver after discharge.—After a receiver is discharged he has no further interest in the proceedings, consequently he cannot oppose a petition to set aside a sale made by himself of the assets of the bankrupt to a reorganized corporation. Where, however, both the Liddar and the reorganized corporation were served with the order and are parties to the proceeding, the attorney for the receiver will be accepted by the court as representing them for the purposes of the contest, though strictly speaking they appear to have allowed the matter to go by default. *In re Prudential Outfitting Co.*, (S. D. N. Y. 1918) 250 Fed. 504.

Vol. I, p. 1212, sec. 70e. [First ed., 1912 Supp., p. 844.]

Contrasted with section 67f.—Section 70e of the Bankruptcy Act differs from section 60f of that Act, in that the former does not contain any provision to the effect that property, or its value, recovered by the trustee in a suit which that section authorizes him to bring when he elects to avoid a transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, shall "pass to the trustee as part of the estate of the bankrupt." It may be that property or its value so recovered by his trustee might have been made a part of the bankrupt's estate, not subject to any priority in favor of the creditor or creditors who alone had had the right to avoid the transfer brought into question. But it is significant that the statute does not so provide, while it does provide for the passing to the trustee, as a part of the estate of the bankrupt, of property, or its value, acquired by him as a result of the preservation and enforcement of a lien obtained through legal proceedings against an insolvent within four months prior to the filing of a petition in bankruptcy.

against him, without making any exception based upon the circumstance that the lien so preserved and enforced was obtained by a creditor or creditors who alone had the right to obtain it; the right being one not possessed by other creditors. The statute gives notice to any one obtaining a lien by legal proceedings against an insolvent person that, if the insolvent's bankruptcy occurs within four months after the lien is obtained, it may be preserved and enforced for the benefit of the bankrupt's estate, the proceeds of such enforcement to pass to the trustee as part of the estate of the bankrupt. The provision having this effect deals with "levies, judgments, attachments, or other liens" obtained through legal proceedings against an insolvent within four months prior to his bankruptcy, and with property affected by a lien so obtained. It does not deal with the rights of creditors who have not so obtained a lien. *American Trust, etc., Co. v. Duncan*, (C. C. A. 5th Cir. 1918) 254 Fed. 780, 166 C. C. A. 226.

**Construction—In general.**—This section has been construed as limiting actions to cases where the defendant is alleged to claim title, and its consequent advantages, under the bankrupt by virtue of a transfer from him. *Flanders v. Coleman*, (D. C. S. D. Ga. 1918) 249 Fed. 757.

**Not limited to transfers within four months.**—Transfers made more than four months before bankruptcy may be set aside under section 70e. *Riggs v. Price*, (Mo. 1919) 210 S. W. 420.

**Effect of state law.**—Under section 70e the trustee may avoid any transfer by the bankrupt which any creditor of the bankrupt might have avoided, under the laws of the state, had not bankruptcy intervened, irrespective of the time when the transfer was made and of the financial condition of the bankrupt at that time, provided only that conveyances to bona fide holders for value are protected. It is a necessary conclusion, of course, that, if the four months limitation does not apply in a case brought under section 70e, neither is the question of the insolvency of the bankrupt at the time of the conveyance of any materiality, except it be made so by the state law, because one is as essential an element of section 67e as the other. It is also the right of a trustee to avoid a transfer, under section 70e, although there are no creditors who, because they had no liens or judgments, would have been in a position, at the time of the filing of the petition in bankruptcy to attack the transfer. . . . Not only is the language of section 70e sufficiently comprehensive to alone justify this latter rule as the above-cited cases point out, but, since all of them were decided, the amendment of 1910 to section 47a specifically vests a trustee with such a lien as is sufficient to enable a creditor to attack a fraudulent conveyance in a court of equity in most, if not all, states. Hence, it fol-

lows that the plaintiff may attack the conveyance in question, irrespective of the solvency or insolvency of the bankrupt at the time the conveyance was made, provided that it could have been attacked by any creditor in the courts of New Jersey, had not bankruptcy intervened. *Baldwin v. Kingston*, (D. C. N. J. 1918) 247 Fed. 163.

**State law governs as to validity.**—Whether a transfer is one which any creditor might have avoided within the meaning of section 70e is to be determined by the law of the state where the property is situated. *Hall v. Glenn*, (S. D. Cal. 1917) 247 Fed. 997.

**Limitation of actions.**—The time to sue to set aside a fraudulent conveyance is to be determined by the state statute applicable to actions of that character. *Riggs v. Price*, (Mo. 1919) 210 S. W. 420.

**Necessity of diverse citizenship.**—Where the action is solely to set aside a conveyance made more than four months before the adjudication, diversity of citizenship is essential to confer jurisdiction on a federal court, but where the bill seeks, as under section 70e it may, to recover and collect the value of property so transferred, a court of bankruptcy has jurisdiction under section 23-b, without regard to the citizenship of the parties. *Hall v. Glenn*, (S. D. Cal. 1917) 247 Fed. 997.

**Power conferred on trustee—Property transferred in violation of state statute.**—A trustee in bankruptcy may maintain an action against the vendee when a sale by a bankrupt is made in violation of a state "Bulk Sales Law" and against the person who received the purchase money with knowledge of the fact, by virtue of the provisions of this section and sections 47a (2) and 70a (4) *supra*. *Brown v. Kossore*, (C. C. A. 8th Cir. 1919) 255 Fed. 806.

Under this section a trustee in bankruptcy has the right to recover property transferred in violation of state law. *Irwin v. Maple*, (C. C. A. 6th Cir. 1918) 252 Fed. 10, 164 C. C. A. 122.

**Conveyance not invalid under state law.**—A conveyance by a man separated from his wife of property to her for her support is not voluntary under the law of New Jersey and hence cannot, on the bankruptcy of the grantor, be avoided under section 70e. *Baldwin v. Kingston*, (D. C. N. J. 1918) 247 Fed. 163.

**Where there are no judgment creditors.**—Since by the amendment of 1910 to section 47a (2) giving the trustee the rights of a judgment creditor, the fact that there are no judgment creditors does not prevent the trustee from avoiding a voluntary transfer by the bankrupt under section 70e. *Baldwin v. Kingston*, (D. C. N. J. 1918) 247 Fed. 163.

**Agreement to withhold mortgage from record.**—A mortgage given under an agreement that it will not be recorded because of the possible effect on the mortgagor's credit is fraudulent as to creditors and may be set

aside at the suit of the mortgagor's trustee in bankruptcy without regard to the four months limitation. *Cooper Grocery Co. v. Penland*, (C. C. A. 5th Cir. 1918) 247 Fed. 480, 159 C. C. A. 534.

**Property of wife.**—In a suit to set aside a conveyance made by a bankrupt, evidence was held to sustain a finding that the property was the separate property of the wife of the bankrupt and that when conveyed it was occupied as a homestead by the bankrupt and his wife. *Young v. Evans*, (C. C. A. 5th Cir. 1918) 251 Fed. 282, 163 C. C. A. 438.

**Chattel mortgages.**—In *Calkins v. Lichtig*, (C. C. A. 6th Cir. 1918) 251 Fed. 844, 164 C. C. A. 60, it was held that a sale of the interest of one partner to the other partner and the giving of a chattel mortgage on the stock of goods to the withdrawing partner were merely a scheme to defraud subsequent creditors.

A suit by a trustee to set aside a foreclosure and sale of property under a chattel mortgage and to recover the property involved or the value thereof, the suit being in substance one to recover property wrongfully or fraudulently disposed of, is not subject to the defense that the trustee had no authority to institute and maintain the suit because at the time of the filing the petition in bankruptcy and the appointment of the trustee, the property had been foreclosed without contest, the sale made and the mortgagor had lost all interest in the property. *Simpson v. Combes*, (Wash. 1919) 182 Pac. 566.

**Dividends unlawfully paid to a stockholder** prior to four months before bankruptcy are recoverable under this section. *Seegmiller v. Day*, (C. C. A. 7th Cir. 1918) 249 Fed. 177.

**Trustee vested with rights of creditor—Setting aside liens.**—There is no question that the federal Bankruptcy Act empowers a trustee to enforce the rights of creditors of the bankrupt to set aside liens which are void under the state law for want of recording or for other reasons. *Stewart v. Asbury*, (1918) 199 Mo. App. 123, 201 S. W. 949.

**Persons entitled to share in recovery.**—Where by virtue of this section, a trustee in bankruptcy recovers from the bankrupt's wife property given to her by the bankrupt at a time when he was indebted, though many years before his adjudication, the proceeds cannot be placed in the general assets of the bankrupt but must be paid to the creditors whose debts were existent at the time the gift was made. *American Trust, etc., Bank*

*v. Duncan*, (C. C. A. 5th Cir. 1918) 254 Fed. 780, 166 C. C. A. 226.

**Pleading.**—A petition by a trustee to set aside a fraudulent conveyance by the bankrupt need not allege the names of the creditors or show the amount and nature of any claim to which the property sought to be recovered can be applied. *Riggs v. Price*, (Mo. 1919) 210 S. W. 420.

**Right to injunction pendente lite.**—Though the action is for the value of property rather than for the recovery of the property itself an injunction against its further transfer pendente lite may issue. *Hall v. Glenn*, (S. D. Cal. 1917) 247 Fed. 997.

**Scope of decree by state tribunal.**—Where pending proceedings in a state court by creditors the debtor was adjudicated a bankrupt and the trustee permitted to intervene in the state proceedings, it is held to be proper for the state tribunal to decree title in the bankrupt's property to be in the trustee without ascertaining the amount due the respective creditors. "The bankrupt court has jurisdiction to determine the amount due each creditor by the bankrupt, and what amount and what properties of his assets shall go to each particular creditor, and in case the property brought more than enough to pay the creditors, the bankrupt court would make the proper disposition of the funds, or, if the bankrupt or his wife should satisfy the creditors by paying into the bankruptcy court sufficient funds to pay all debts, the court could make proper order conveying the property back to the appellant or to the bankrupt, according to right and justice of the case. It was not the duty of the chancery court to ascertain and enter into a controversy or hearing to ascertain the rights between the respective creditors and the bankrupt, but the chancery court made proper order." *McCrory v. Donald*, (1918) 119 Miss. 256, 80 So. 643.

**Right of bankrupt, after discharge, to stay of execution levied on property transferred to wife.**—Where a judgment is recovered against a person who subsequently becomes a bankrupt, and after his discharge in bankruptcy execution is issued on the judgment and a levy is made on property which he had conveyed to his wife before bankruptcy, on the ground of fraud in the conveyance, he has no standing to move to stay the execution on such property as he is not an aggrieved party. *Deposit Nat. Bank v. Hay*, (1918) 262 Pa. St. 388, 105 Atl. 463.

## BILLS OF LADING

### 1918 Supp., p. 73, sec. 1.

**Constitutionality.**—Bills of lading for the movement of interstate commerce are instrumentalities of that commerce which Congress, under its power to regulate commerce, has authority to deal with and provide for. *U. S.*

*v. Fenger*, (1919) 250 U. S. 199, 39 S. Ct. 445, 63 U. S. (L. ed.) — [reversing (S. D. Ohio 1918) 256 Fed. 388], wherein the court said: "That bills of lading for the movement of interstate commerce are instrumentalities of that commerce which Congress

under its power to regulate commerce has the authority to deal with and provide for is too clear for anything but statement, as manifested not only by that which is concluded by prior decisions, but also by the exertion of the power by Congress. . . . That as instrumentalities of interstate commerce, bills of lading are the efficient means of credit resorted to for the purpose of securing and fructifying the flow of a vast volume of interstate commerce upon which the commercial intercourse of the country, both domestic and foreign, largely depends, is a matter of common knowledge as to the course of business of which we may take judicial notice. Indeed, that such bills of lading and the faith and credit given to their genuineness and the value they represent are the producing and sustaining causes of the enormous number of transactions in domestic and foreign exchange, is also so certain and well known that we may notice it without proof."

### 1918 Supp., p. 77, sec. 23.

The purpose of the section undoubtedly was to protect goods in transit and in possession of a carrier against seizure until the carrier should be first liberated from liability and attack by the surrender of the order bill. The bill is made the res rather than the goods. *Brimberg v. Hartenfeld Bag Co.*, (1918) 89 N. J. Eq. 425, 105 Atl. 68.

### 1918 Supp., p. 81, sec. 41.

**Validity.**—The fraudulent fabrication and use of fictitious interstate bills of lading could be prohibited and punished, as was done by this section, as a means of protecting and sustaining the vast volume of interstate commerce operating and moving in reliance upon genuine bills of lading. *U. S. v. Ferger*, (1919) 250 U. S. 199, 39 S. Ct. 445, 63 U. S. (L. ed.) — [*reversing* (S. D. Ohio 1918) 256 Fed. 388], wherein the court said: "With this situation in mind the question therefore is, Was the court below right in holding that Congress had no power to prohibit and punish the fraudulent making of spurious interstate bills of lading as a means of protecting and sustaining the vast volume of interstate commerce operating and moving in reliance upon genuine bills? To state the question is to manifest the error which the court committed, unless that view is overcome by the reasoning by which the conclusion below was sought to be sustained. What was that reasoning? That the bills were but 'pieces of paper fraudulently inscribed' and 'did not affect interstate commerce, directly or indirectly . . . and had nothing whatsoever to do with it, or with any existing instrumentality of it.' But this rests upon the unsustainable assumption that the undoubted power which

existed to regulate the instrumentality, the genuine bill, did not give any power to prevent the fraudulent and spurious imitation. It proceeds further, as we have already shown, upon the erroneous theory that the credit and confidence which sustains interstate commerce would not be impaired or weakened by the unrestrained right to fabricate and circulate spurious bills of lading apparently concerning such commerce. Nor is the situation helped by saying that as the manufacture and use of the spurious interstate commerce bills of lading were local, therefore the power to deal with them was exclusively local, since the proposition disregards the fact that the spurious bills were in the form of interstate commerce bills which in and of themselves involved the potentiality of fraud as far-reaching and all-embracing as the flow of the channels of interstate commerce in which it was contemplated the fraudulent bills would circulate. As the power to regulate the instrumentality was coextensive with interstate commerce, so it must be, if the authority to regulate is not to be denied, that the right to exercise such authority for the purpose of guarding against the injury which would result from the making and use of spurious imitations of the instrumentality must be equally extensive." See to the same effect *U. S. v. Ferger*, (1919) 250 U. S. 207, 39 S. Ct. 447, 63 U. S. (L. ed.) —, (*reversing* (S. D. Ohio 1918) 256 Fed. 388) decided on the authority of the above case, the court saying: "This case is disposed of by the ruling just announced in No. 776, *ante*, 199. The indictment here was for conspiring to do the various acts charged in the previous case, that is, the fraudulent fabrication and uttering of the same fictitious bills of lading and the obtaining of money thereon by delivering the same to the Second National Bank of Cincinnati as collateral. The demurrer which was sustained by the court below in the previous case was also sustained as to this. While there is a separate writ of error and a separate record in this case, it is conceded by all parties that the cases are in legal principle the same and that the decision of one concludes the other. It follows, therefore, that for the reasons stated in the previous case, No. 776, the judgment in this must be and it is reversed and the case remanded for further proceedings in conformity with this opinion."

### 1918 Supp., p. 81, sec. 42.

**"Holder."**—The definition of a "holder" here given does not fit one who has no right of property or interest in the bill of lading, or control of it, or right of possession beyond its safe keeping. *French v. Pere Marquette R. Co.*, (Mich. 1919) 171 N. W. 491.



## CARRIERS

Vol. II, p. 10, sec. 5. [First ed., vol. I, p. 724.]

**Employment of surgeon.**—To same effect as original annotations, see *The Korea Maru*, (C. C. A. 9th Cir. 1918) 254 Fed. 397, 165 C. C. A. 617.

In *The Great Northern*, (C. C. A. 9th Cir. 1918) 251 Fed. 826, 163 C. C. A. 660, the court said: "In the present case the regulations of the statute were complied with, a surgeon or medical practitioner was employed, who was carried on the ship's articles, and hospital accommodations and medicines were provided. The services of the physician were engaged by the marine superintendent of the steamship, after having made diligent inquiry and relying, also, upon the written recommendations of the assistant general manager of the Oriental Steamship Company, the recommendation of the master of the steamship *Honolulu*, and upon the certificate of the Medical Society of the State of California, stating that the physician was a regular graduate physician, licensed to practice in that state, and for some time has been known favorably to this office.' We think it clear that the appellees had discharged their full duty when they employed the physician, after taking pains, as they did, to inquire of his antecedents and his fitness. But it is said that the physician was incompetent, and that the vessel is liable for the failure of the owners and master thereof to comply with the provisions of the statute, which required them to employ a competent physician. We do not think that the statute requires more than that in the selection of a physician reasonable care shall be exercised. We add that in our opinion the evidence fails to show that the physician was in fact incompetent."

Vol. II, p. 17, sec. 4278. [First ed., vol. I, p. 719.]

**Municipal regulations as to storing.**—Notwithstanding this section and sections 4279 and 4280, *infra*, a municipality may enact ordinances designating the place or places within its harbor where explosives, being transported in interstate or foreign commerce, shall be handled, kept, or stored. *Seattle v. Lloyds' Plate Glass Ins. Co.*, (C. C. A. 9th Cir. 1918) 253 Fed. 321, 165 C. C. A. 103, wherein the court said: "It is beyond question that where Congress has legislated in respect to either foreign or interstate commerce, no state or other subordinate legislation upon the same subject is of any validity. But we find no legislation of Con-

gress with respect to the place or places within any harbor of the United States where any kind of explosives shall be handled, kept, or stored. Section 4278 above cited makes it unlawful to transport, carry, or convey, ship, deliver on board, or cause to be delivered on board, certain specified kinds of explosives, including nitroglycerin, upon or in any vessel or vehicle used or employed in transporting passengers by land or water, between a place in any foreign country and a place within the limits of any state, territory, or district of the United States, or between a place in one state, territory or district of the United States and a place in any other state, territory or district thereof; and section 4279 of the same statutes makes it unlawful to ship, send, or forward any quantity of such explosives by a vessel or vehicle of any description, by land or water, between a place in a foreign country and a place within the United States, or between a place in one state, territory, or district of the United States, and a place in any other state, territory, or district thereof, unless the same shall be securely inclosed, deposited, or packed in a certain prescribed way; and the next section (4280) declares that the two preceding sections shall not be so construed as to prevent any state, territory, district, city, or town within the United States from regulating or from prohibiting the traffic in or transportation of those substances between persons or places lying or being within their respective territorial limits, or from prohibiting the introduction thereof into such limits for sale, or consumption therein. In all this we see nothing in any way relating to the place or places in any harbor of the United States where any kind of an explosive in course of foreign or intrastate commerce shall be placed, kept, or stored; and while, as has been said, it is beyond question that where Congress has legislated in respect to either foreign or interstate commerce no state or other subordinate legislation upon the same subject is of any validity, yet we understand the law to be that, where Congress is silent, the state may legislate in aid of, but without burdening, both foreign and interstate commerce. Such we understand to be the effect of the last of the decisions above cited of the Supreme Court, where, at page 436 of 222 U. S., at page 142 of 32 Sup. Ct. (56 L. Ed. 257), the court cited, with apparent approval, its previous decisions in the cases of *Atlantic Coast Line R. R. Co. v. Mazursky*, 216 U. S. 122, 30 Sup. Ct. 378, 54 L. Ed. 411, and *Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, saying, among other things, that —

"In those cases, and in the later case of *Western Union Tel. Co. v. Milling Co.*, 218 U. S. 406 [31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815], the principle is expressed that "there are many occasions where the police power of the state can be properly exercised to insure a faithful

and prompt performance of duty within the limits of the state upon the part of those engaged in interstate commerce." Such exercise of power, it was further said, was in aid of interstate commerce, and, although incidentally affecting it did not burden it."

## CHINESE EXCLUSION

**Vol. II, p. 67, sec. 1.** [First ed., vol. I, p. 774.]

**Merchant afterward becoming laborer.**—To the same effect as the first paragraph of the original annotation, see *Ex p. Hor Yuk Sang*, (D. C. Mass. 1918) 251 Fed. 403; *U. S. v. Lew Loy*, (N. D. Ohio 1918) 253 Fed. 784.

In *Ex p. Hor Yuk Sang*, (D. C. Mass. 1918) 251 Fed. 403, the court, after a consideration of the evidence in the case of a Chinaman who entered as a merchant, but five months afterwards was found working in a laundry, said: "Under all the circumstances, it does not seem to me that the fact that the petitioner, five months after his admission, engaged in manual labor, affords any reasonable proof that he was not a merchant when he entered the country, nor any sufficient ground for canceling and setting aside, as fraudulently obtained, the certificate made after such investigation as was deemed necessary at the time of entry, and in pursuance of our treaty obligations."

Where the status of a Chinese person as a merchant is established before he visits China, the mere fact that he works as a laborer during a part of the time after his return to this country does not of itself forfeit his right to remain in the United States as one of the exempted class. *U. S. v. Moy Nom*, (N. D. Ia. 1918) 249 Fed. 772.

**Vol. II, p. 71, sec. 6.** [First ed., vol. I, p. 778.]

**Certificate prima facie evidence only.**—The certificate does not have the force and effect of a judgment, but, being issued under a statute of the United States made in pursuance of a treaty entered into by this country with a foreign power, it is not to be set aside and disregarded without substantial evidence. Whether there is such evidence is for the courts to determine. *Ex p. Hor Yuk Sang*, (D. C. Mass. 1918) 251 Fed. 403.

**Wives and minor children of Chinese merchants.**—To the same effect as the original annotation, see *U. S. v. Gin Ong*, (S. D. Cal. 1918) 253 Fed. 210.

The minor son of a Chinese merchant is entitled to enter this country and remain with his father as one of the exempted class, dur-

ing his minority at least. And if during that time he succeeds to the business interests of his father, either by purchase or gift from him, and engages in the same business, he acquires the status of his father as one of the exempted class, although the latter returns to China. *U. S. v. Moy Nom*, (N. D. Ia. 1918) 249 Fed. 772.

**Vol. II, p. 82, sec. 7.** [First ed., vol. I, p. 770.]

**Estoppel of government to question status.**—The defendant, a Chinese person, prior to leaving the United States for a visit to China, presented himself to the Bureau of Immigration for preinvestigation as to the status claimed by him as a merchant. The bureau examined him and other witnesses, found him to have been there engaged for the required time as a merchant, and gave him a certificate accordingly, with a copy of the evidence taken by it, which was delivered to the Bureau of Immigration at the port from which he sailed. Upon his return from China, the latter bureau again examined him and gave him a certificate of identity, which permitted him to re-enter the United States as a returning merchant. It was held on these facts that the government was estopped from questioning his status as a merchant, unless it alleged and established by competent proof some fraud on his part in obtaining re-entry to the United States. *U. S. v. Moy Nom*, (N. D. Ia. 1918) 249 Fed. 772.

**Vol. II, p. 94, sec. 3.** [First ed., vol. I, p. 763.]

**Evidence—Of citizenship.**—To the same effect as the second paragraph of the original annotation, see *U. S. v. Charlie Dart*, (N. D. Ga. 1918) 251 Fed. 394.

**Undisclosed evidence in possession of commissioner as ground for setting aside findings.**—Finding of an immigration commissioner rejecting admission to a Chinese applicant, will not be set aside because of the fact that at the time of the hearing the commissioner had in his possession a report of an inspector containing information material to the case given him by an undisclosed witness,

which report was not shown to the applicant or his attorney, where it appears that the commissioner did not consider the report in reaching his decision. *Kwook Jan Fat v. White*, (C. C. A. 9th Cir. 1919) 255 Fed. 323, 166 C. C. A. 493.

**Unfair hearing.**—A Chinese woman's hearing on her application for admission to this country as the wife of a Chinese merchant, is unfair where her attorneys are not allowed to interview her pending the determination of the application by the immigration authorities, and where such authorities base their determination on confidential communications, the source, motive, or contents of which are not disclosed to the applicant or her counsel and no opportunity afforded them to offer testimony in rebuttal thereof. *Chew Hoy Quong v. White*, (C. C. A. 9th Cir. 1918) 249 Fed. 869, 162 C. C. A. 103.

**Burden and measure of proof.**—A person of Chinese descent claiming to be a native-born citizen of the United States, who is required by this section to establish, by affirmative proof, his lawful right to remain in the United States, is not required to make the same degree of proof as an alien who has come into the country and is attempting to avoid deportation, but is entitled to the lawful presumption of the right to remain while the other is subject to the lawful presumption in favor of deportation. The affirmative proof required is hereby proof to establish a *prima facie* case sufficient to call for rebuttal. *Moy Jik v. U. S.*, (1918) 47 App. Cas. (D. C.) 498, wherein it was further held that there was sufficient proof that a person of Chinese descent was born in the United States, in the absence of any proof to the contrary, to overcome the statutory presumption against him and to create a *prima facie* case in his favor, where there was proof of his residence in this country since he was four years old; and he testified that his parents told him he was born in San Francisco, which was the place associated with his earliest recollections and where his parents resided and conducted a business until they returned to China, which was after he was fifteen years old, and it further appeared that he had gone with his uncle to Washington, where he had since maintained a permanent residence, with a steady business or occupation, and had conducted himself in such an honorable and upright manner as to have the confidence and respect of the community.

**Vol. II, p. 104, sec. 2.** [First ed., vol. I, p. 760.]

**Conspiracy to secure approval of application under rule 15 of Department of Labor.**—In *U. S. v. Fung Sam Wing*, (N. D. Cal. 1918) 254 Fed. 500, the defendants were charged with a conspiracy to defraud the United States by securing from the Commissioner of

Immigration at Angel Island for Fung Sam Wing, a Chinese person, claiming to be a merchant domiciled in this country, the approval of the application of said Fung Sam Wing, pursuant to the provisions of rule 15 of the Department of Labor, governing the admission of Chinese, for the preinvestigation of his claim that he was such domiciled merchant, with the intent that said application should, when approved, enable the said Fung Sam Wing to go abroad and return to the United States without difficulty, because of his approved status as such domiciled merchant. The indictment further averred that a lawfully domiciled Chinese merchant within the meaning of this section was a Chinese person who, for at least one year immediately preceding the date of the application for a preinvestigation of his status, had been engaged in the occupation of a merchant and had not performed any manual labor, except such as was necessary in the conduct of his business as such merchant. It was then averred that the said Fung Sam Wing was not, as defendants well knew, a lawfully domiciled merchant, within the meaning of the Chinese Exclusion Laws, at the time of his said application; that is to say, a Chinese person who had been engaged for at least one year immediately preceding the date of the said application, in the occupation of a merchant, and had not performed any manual labor, except such as was necessary in the conduct of his said occupation. The indictment then charged the commission of certain overt acts in furtherance of the conspiracy. A demurrer to the indictment was sustained and the court gave the following reasons for its decision: "The act requires of a returning merchant proof that he was such for at least one year immediately preceding his departure. The rule, based thereon [rule 15] requires the naming of at least two witnesses by the applicant for preinvestigation, who will testify that he was a merchant for at least one year immediately preceding the date of proposed departure. This application must be filed at least 30 days prior to the date of the proposed departure. The indictment, however, charges that the conspiracy was to secure the approval of an application fraudulently, because the applicant had not been a merchant for one year preceding the date of his application, and that the witnesses well knew that he had not been a merchant as defined by the statute for a period of one year immediately prior to the date of his application. But this fact might well be true, and still no fraud committed or attempted, as neither the law nor the rule requires proof of the existence of the mercantile status for a year prior to the date of the application, but for a year prior to the date of the proposed departure, which by the very terms of the rules must be at least 30 days subsequent to the date of the application."

## CITIZENSHIP

**Vol. II, p. 116, sec. 1993.** [First ed., vol. I, p. 786.]

**Child of native born Chinaman.**—This section "applies to all persons alike, without any discrimination as to race or place of birth," and consequently includes a child born in China whose father although belonging to the Chinese race was a native born American citizen. *Quang Hing Sun v. White*, (C. C. A. 9th Cir. 1918) 254 Fed. 402, 165 C. C. A. 622, wherein it was said: "The appellant was first examined as to his right to admission under the provisions of the immigration laws, and was found qualified to be admitted. He was then examined by the immigration inspector under the Chinese Exclusion Act, and his application for admission denied, on the ground that the applicant had failed to establish the fact that he was the son of Quan Hay; but it was stated by the inspector that the applicant was excluded under rule 9 (f) of the then rules governing the admission of Chinese. This finding was approved by the Commissioner of Immigration, and upon appeal to the Secretary of Labor the decision of the Immigration Commissioner was affirmed. It is claimed on behalf of appellant that the action of the officers of the Immigration Bureau and of the Department of Labor in holding the appellant for deportation was an abuse of discretion committed to them by statute, and resulted in denying him a fair hearing, to which he was entitled under the law. The objection to the hearing is that under the regulations prescribed by the Commissioner General of Immigration a different procedure was pursued by the immigration officers in determining appellant's right to admission into the United States from that pursued under other

statutory regulations for determining the right of persons other than those of the Chinese race to enter the United States. . . . To apply to a person of Chinese birth the procedure provided by the rules of the Department of Labor governing the admission of Chinese, for the purpose of determining whether the applicant's father was a citizen of the United States, and to all others making this claim, the procedure provided by the immigration statute is plainly a discrimination against the person of Chinese birth, and the hearing measured by the immigration statute distinctly unfair."

**Vol. II, p. 122, sec. 2.** [First ed., 1909 Supp., p. 68.]

**Foreign oath of allegiance of husband as forfeiting wife's citizenship.**—Where the enlistment of a citizen of the United States in the Canadian expeditionary force for the European war, although it requires his taking a qualified oath of allegiance to Canada, does not forfeit his wife's American citizenship, she cannot be barred from returning to this country on the ground that she is an alien. (1915) 30 Op. Att.-Gen. 412.

**Vol. II, p. 125, sec. 6.** [First ed., 1909 Supp., p. 69.]

**Foreign-born children of American-born Chinese fathers** are entitled to enter the United States as citizens thereof notwithstanding the fact that they continued to reside for some time in China after reaching their majorities, without any affirmative action on their part indicating an intention to remain citizens of the United States. (1916) 30 Op. Otty.-Gen. 529.

## CIVIL SERVICE

**Vol. II, p. 156, sec. 2.** [First ed., vol. I, p. 809.]

**Correction of mistakes in certification.**—The Civil Service Commission may, at any time prior to appointment, correct a mistake in its certification, but after an appointment has been made and accepted by the appointee, without any fraud on his part or concealment of material facts, and the matter involved is not jurisdictional, it is then too late for the commission to attempt to correct its certification. (1913) 30 Op. Atty.-Gen. 169.

**Investigation of violation of civil service rules.**—The Civil Service Commission has authority under clause 4 of this section to

investigate alleged violations of civil service rules prohibiting political discrimination in the classified service. (1916) 30 Op. Atty.-Gen. 512.

**Vol. II, p. 168, sec. 7.** [First ed., 1909 Supp., p. 716.]

**Non-assembled examinations.**—The provision of this section requiring that all examinations for positions in the government service shall be had in the state or territory in which the applicant resides, does not apply to the so-called non-assembled examinations. (1913) 30 Op. Atty.-Gen. 194.

**Vol. II, p. 169, sec. 4.** [First ed., 1914 Supp., p. 44.]

**Effect of proviso.**—The proviso of this section does not prohibit the head of a depart-

ment from conforming the salary of such employees to the grade or character of work they may be called upon to perform. (1913) 30 Op. Atty.-Gen. 167.

## CLAIMS

**Vol. II, p. 179, sec. 3477.** [First ed., vol. II, p. 7.]

**Effect of assignment as between parties.**—In *Lay v. Lay*, (1918) 248 U. S. 24, 39 S. Ct. 13, 63 U. S. (L. ed.) —, *affirming* (1918) 118 Miss. 549, 79 So. 291) the court stated the proposition involved and its conclusion as follows: "The right to a fund resulting from the payment of an appropriation by Congress to satisfy a judgment for the value of property taken during the Civil War is the issue here involved. The contestants are the heirs at law of the original claimant and persons holding under an assignment by her of all her right to the claim or fund. The court enforced the assignment. Under the assumption that the claimant was prohibited by the law of the United States (§ 3477, Rev. Stat.) from making an assignment, the heirs at law prosecute error to correct the federal error thus assumed to have been committed. But the assumption indulged in as to the effect of the law of the United States is without merit. *McGowan v. Parish*, 237 U. S. 285, 294, and cases cited. This renders it unnecessary to consider whether, if the heirs at law were entitled to the fund, they would be liable to pay the full sum of the attorney's fee contracted for by the transferee and the duty to pay which the transferee and those in privity do not dispute."

**Claim arising out of use of patent.**—There can, under this section, be no valid assignment to the assignee of a patent of any unliquidated claim against the federal government under Act of June 25, 1910 (see vol. 7, p. 375) arising out of the use of such patent by the government before he became the owner of the patent. *Brothers v. U. S.*, (1919) 250 U. S. 88, 39 S. Ct. 426, 63 U. S. (L. ed.) —, *affirming* (1917) 52 Ct. Cl. 462.

**As between rival claimants** the statute has no application where the United States has no interest, and so where the claim has been paid the statute cannot be set up in an action by a rival claimant against the person receiving the payment. *Lay v. Lay*, (1918) 118 Miss. 549, 79 So. 291.

**Consolidation of corporations as assignment.**—Where two corporations enter into an agreement to merge or consolidate into a new corporation, the transaction in legal contemplation is similar to a purchase by the

new corporation of the railroads and properties of the two former companies, so far as the right to collect the debts or claims of the former companies is concerned, and the new company cannot sue for such claims in view of the statute forbidding assignment of claims against the United States. *Seaboard Air Line Ry. v. U. S.*, (1918) 53 Ct. Cl. 107.

**Vol. II, p. 203, sec. 1.** [First ed., vol. II, p. 28.]

**Expiration of time for presenting claims.**—The right to present claims under this Act for reimbursement for horses lost in the military service in consequence of the failure of the United States to supply sufficient forage, or in any case where the loss resulted from any exigency or necessity of the military service without fault or negligence of the owner, finally expired under the Act of January 9, 1883 (see vol. 2, p. 204) and the Act of August 13, 1888 (see vol. 2, p. 206). *U. S. v. Babcock*, (1919) 250 U. S. 328, 39 S. Ct. 464, 63 U. S. (L. ed.) —, *reversing* (1918) 53 Ct. Cl. 629, 54 Ct. Cl. 1.

**Vol. II, p. 205.** [*Property of officers, etc.*] [First ed., vol. II, p. 26.]

**Jurisdiction of court of claims.**—Jurisdiction of the court of claims to determine whether recovery may be had under this act for property of officers and enlisted men in the military service which has been lost or destroyed in that service, is excluded by the provision of that act that "any claim which shall be presented and acted on under authority of this act shall be held as finally determined, and shall never thereafter be reopened or considered," since these words express clearly the intention to confer upon the Treasury Department exclusive jurisdiction and to make its decision final. *U. S. v. Babcock*, (1919) 250 U. S. 328, *reversing* 39 S. Ct. 464, 63 U. S. (L. ed.) —, (1918) 53 Ct. Cl. 629, 54 Ct. Cl. 1.

**Vol. II, p. 229, sec. 1.** [First ed., vol. II, p. 91.]

**Extension of rights to inhabitants.**—Applying the cardinal principle of statutory construction, of ascertaining the legislative

intent by reference to all circumstances surrounding the passage of the law and the history of the subject matter thereof, to the Act of January 11, 1915, 38 Stat. 791, it is clear that the Congress intended to grant to inhabitants of the United States the same rights, and nothing more, that were given to citizens of the United States by the Act of March 3, 1891, 26 Stat. 851. *Rex v. U. S.*, (1918) 53 Ct. Cl. 320.

**Vol. II, p. 235, sec. 4.** [First ed., vol. II, p. 96.]

**Ex parte affidavits.**—A judgment against Indian funds will not be awarded on uncorroborated statements in *ex parte* affidavits. *Jones v. United States*, 35 Ct. Cl. 36, *followed Albright v. U. S.*, (1918) 53 Ct. Cl. 247.

## COLLISIONS

**Vol. II, p. 379, art. 5.** [First ed., vol. II, p. 155.]

**Failure to have light burning.**—In *The Lexington*, (S. D. N. Y. 1917) 256 Fed. 63, *affirmed* (C. C. A. 2d Cir. 1919) 256 Fed. 65, it was held that the failure of a sailing vessel to have her port light burning was such negligence as would bar recovery of damages in an action against a steamer for collision, where the latter vessel was not at fault.

**Vol. II, p. 385, art. 11.** [First ed., vol. II, p. 158.]

**Section as only applicable to anchored boats.**—This section is applicable only to a boat lying at anchor and not expecting to move from her position. It does not apply to a boat drifting with a small anchor dragging for the purpose of retarding her progress and keeping her from going ashore while repairs are being made to the engine. *The O'Brien Bros.*, (E. D. N. Y. 1918) 252 Fed. 185.

**Failure to display anchor light.**—Failure of a pile driver at anchor to display an anchor light precludes recovery in an action at law. *Houchen v. Oregon-Washington R., etc., Co.*, (1918) 103 Wash. 598, 175 Pac. 316.

**Vol. II, p. 386, art. 15.** [First ed., vol. II, p. 158.]

**Sailing ship must use fog horn.**—In *The Middlesex*, (D. C. Mass. 1916) 253 Fed. 142, it was contended that a schooner was at fault for a collision at sea in a fog because she did not show flares or blow danger signals on her steam whistle, in addition to sounding proper warnings on her fog horn. Answering this contention, the court said: "As to blowing the whistle, I think that would have tended rather to confuse and mislead than to assist the approaching vessel. The schooner was certainly not at fault for failing to do it. As to the flare, while I think that an unusually careful master would perhaps have displayed one, I cannot say that the course

and distance of the on-coming steamer were so apparent to the men on the schooner that they were required to do so in the exercise of prudent seamanship. Additional warnings of this character are intended to be used either to attract the attention of an approaching vessel which apparently has overlooked the vessel resorting to them, or to warn an approaching vessel when she cannot otherwise be expected to locate accurately the place of the vessel showing the flare. In this case the schooner had a fog horn which, upon the great weight of the testimony, was a suitable one, and was being sounded at frequent intervals after the steamer's whistle was heard. The steamer was approaching from ahead and the schooner's horn was pointed in that direction. It was not evident on the schooner that the horn would not afford to the steamer adequate information of her presence and location. To hold her at fault for not showing a flare would practically amount to establishing a rule that sailing vessels were bound to do so whenever they became aware of danger from a steamer approaching in a fog at night. I do not think that the failure of the schooner to display a flare was a fault on her part." To the same effect, see *The Chepstow Castle*, (D. C. Mass. 1916) 253 Fed. 147.

**Fog signals held adequate.**—In *The Sagamore*, (C. C. A. 1st Cir. 1917) 247 Fed. 743, 159 C. C. A. 601, a sailing vessel run down by a steamer in a fog was held to have complied adequately with the requirement as to fog signals.

**Vol. II, p. 388, art. 15(c).** [First ed., vol. II, p. 159.]

**Evidence regarding signals.**—In an action to recover damages because of a collision between a steamer and a sailing vessel, testimony of witnesses from the latter ship as to what signals were actually sounded is not overcome by testimony of persons aboard the former ship as to signals heard by them when the ships were some distance apart. *The Melbourne P. Smith*, (E. D. Va. 1919) 256 Fed. 45.

**Vol. II, p. 389, art. 16.** [First ed., vol. II, p. 160.]

**What constitutes moderate speed.**—To same effect as second paragraph of original annotation, see *The Beaver*, (C. C. A. 9th Cir. 1918) 253 Fed. 312, 165 C. C. A. 94, also holding that the words "moderate speed" as used in this section do not necessarily mean less than full speed, if that speed is slow enough to be regarded as moderate in view of the circumstances of the case.

In *The Middlesex*, (D. C. Mass. 1916) 253 Fed. 142, it was held that a speed of four knots an hour at night in a fog was not excessive for a long, heavily loaded schooner where it was necessary to give her steerage-way.

A speed of 5½ miles per hour by a large steamer navigating in a dense fog at a place where fishing boats are apt to be encountered is excessive. *The Sagamore*, (C. C. A. 1st Cir. 1917) 247 Fed. 743, 159 C. C. A. 601, wherein the court discussed the "rule of sight" and the right to maintain steerage-way, and said that while the rules approach inconsistency they are both to be applied so far as possible.

**Excessive speed.**—In *Puget Sound Nav. Co. v. Canyon Lumber Co.*, (C. C. A. 9th Cir. 1918) 254 Fed. 574, 166 C. C. A. 132, a collision between a tug with tows and a steamer was held to be due to the fault of the latter in running fifteen miles an hour through a fog and for attempting to cross the tug's tow line after having safely passed her.

The speed in a fog was held to be excessive under the particular facts in *The New London*, (E. D. N. Y. 1918) 253 Fed. 842.

**Suspensions of pilot's license.**—Where a notice to a pilot of charges against him for causing a collision stated that he was "charged with inattention to your duties and violation of section 4442, R. S. U. S.," in that he disregarded this article, setting out the article, it was held that the general reference to section 4442 of the Revised Statutes (see vol. 6, p. 1256) was surplusage, and that the inspectors had no jurisdiction to suspend or revoke his license for violation of said section. *Benson v. Bulger*, (W. D. Wash. 1918) 251 Fed. 757.

**Vol. II, p. 393, art. 18.** [First ed., vol. II, p. 161.]

**Different crossing proposed.**—Where two vessels are on a meeting course and one of them proposes a starboard to starboard crossing she undertakes the risk of the venture. *The Hokendaqua*, (C. C. A. 2d Cir. 1918) 251 Fed. 562, 163 C. C. A. 556.

**Case within rule.**—Evidence held to present a case of vessels meeting end on within article 18 and not a case of vessels crossing. *The City of Norfolk*, (E. D. Va. 1917) 248 Fed. 780.

**Vol. II, p. 393, art. 19.** [First ed., vol. II, p. 162.]

**Meeting, not crossing case, shown.**—Where there was a collision between a boat which was going up the west channel of the East river and one coming out of the Harlem river around Horn's Hook, it was held that there was a meeting and not a crossing. *The Hokendaqua*, (C. C. A. 2d Cir. 1918) 251 Fed. 562, 163 C. C. A. 556.

**Failure to maintain course and speed.**—In *The Cherokee*, (S. D. N. Y. 1918) 253 Fed. 851, it was held that in a collision between a steamer and a tug both vessels were at fault, the steamer, being the privileged vessel, for failure to maintain its course and speed, and the tug for failing to keep out of the steamer's way.

**Vol. II, p. 393, art. 20.** [First ed., vol. II, p. 162.]

**Sailing vessel in tow.**—A sailing vessel in tow has no claim whatever to superior rights as a sailing vessel. *The M. Moran*, (C. C. A. 2d Cir. 1918) 251 Fed. 277, 163 C. C. A. 433.

**Negligence of sailing vessel.**—In *The M. Moran*, (C. C. A. 2d Cir. 1918) 251 Fed. 277, 163 C. C. A. 433, the facts were as follows: On a fair summer afternoon, with the tide ebb and a light south southwest wind (barely enough to give a sailing vessel steerage-way), the small schooner *Oakwoods* went down Buttermilk Channel in tow of a tug. At the same time the tug *Moran*, with two scows on a steel towing hawser, also passed through the channel. Not far from the lower end of Governor's Island the *Moran* stopped to lengthen hawsers, as she was bound to sea. The *Oakwoods* and her tug were nearer the Brooklyn shore than the *Moran* and when off the bell buoy below Governor's Island she cast off from the tug and began to sail, admittedly on the port tack. Thereafter she came about on the starboard tack, and her port bow then came in collision with the forward starboard corner of the starboard scow in the *Moran's* tow. Unless hindered by the *Moran* and her scows, there was nothing in the *Oakwoods'* path requiring her to go about when she did. The schooner was injured by collision, and brought suit. The court said:

"Confessedly there was a time when the *Oakwoods* on her port tack was heading for the *Moran's* hawser; she declares that she came about to avoid fouling that hawser, yet after so doing she admittedly struck the starboard scow with her port bow. This difficult, if not impossible, performance is sought to be accounted for by saying that the scows sheered toward Brooklyn, so as to present the one to starboard to the swinging schooner. If this happened, it could only have occurred by the *Oakwoods* tacking directly in front of the scows. But the lower

court found that the Moran let her steel hawser run out and sink, and the Oakwoods passed entirely over it. We see no reason to doubt this finding, and it follows therefrom that whatever danger the schooner apprehended from the hawser was avoided by the skillful action of the Moran's master, and the Oakwoods had no excuse for going about where she did and failing to beat out her tack. . . . Under such circumstances the schooner must show some justification for crossing or approaching the Moran's hawser. We find none; there was plenty of room for her on the Brooklyn side of the Moran, nor was she bound to go off on a port tack. So far from the Moran creating the situation of danger, we find that she was executing a lawful maneuver when the Oakwoods cast off, and the latter created her own danger by unnecessarily interfering with said maneuver. A sailing vessel's privilege does not extend to being towed close to a tug lengthening hawser, then resuming the privileged role, and complaining because the maneuver she could plainly see interfered with, not what she had to do, but what she preferred doing."

**Negligence of steam vessel.**—In *The Dorothy*, (E. D. Va. 1918) 254 Fed. 477, it was held that a steamship was solely at fault for a collision at night with a schooner, for not observing the latter's lights until within a mile of her, at which time she showed her own lights, but continued at full speed on her course after noting that the schooner had changed her course.

**Vol. II, p. 396, art. 24.** [First ed., vol. II, p. 162.]

**Steamer overtaking tow.**—A steamer overtaking a tug with barges in tow, and colliding with one of the barges which has its lights set, is solely at fault for such collision where it is caused by the navigation officer of the steamer having his attention fixed on another vessel, by his changing the course of the steamer shortly before the collision and not discovering the barge until too late to avoid it. *The Howard*, (D. C. Md. 1916) 253 Fed. 599.

**Duty of overtaken vessel.**—It is the duty of an overtaken vessel, when the danger of collision is apparent, to sound a warning signal to the overtaking vessel. It is also the duty of the overtaken vessel to maintain its course and speed, and it is at fault for slackening its speed for the purpose of allowing hawsers to barges in tow to sink so as to permit the overtaking vessel to pass between the barges. *The Howard*, (D. C. Md. 1916) 253 Fed. 599.

**Vol. II, p. 398, art. 28.** [First ed., vol. II, p. 163.]

**Rule violated.**—In *The Hokendaqua*, (C. C. A. 2d Cir. 1918) 251 Fed. 562, 163 C. C. A. 556, it was held that a vessel was in fault

for failing to give the backing signal required by this article.

**Vol. II, p. 398, art. 29.** [First ed., vol. II, p. 163.]

**Failure to maintain lookout.**—To the same effect as the original annotation, see *The Gaston*, (C. C. A. 4th Cir. 1918) 251 Fed. 887, 164 C. C. A. 103.

**Vol. II, p. 413, rule 26.** [First ed., vol. II, p. 172.]

**Rule applied.**—A vessel proceeding at full speed down a river and disregarding a refusal of passage by a vessel attempting to turn in the river, is solely at fault for a collision with the latter vessel. *The Norman B. Ream*, (C. C. A. 7th Cir. 1918) 252 Fed. 409, 164 C. C. A. 333.

A side-wheel steamer which collided with a steam freighter just inside the main harbor entrance of Cleveland was held culpably negligent for continuing on her course without stopping or reversing her engines in accordance with this rule after receiving no response to her signals, and in failing to properly note and observe the movements and position of the freighter after giving the signals. The freighter was also held to be culpably negligent in not answering the steamer's signals and in maneuvering across the harbor entrance in her path. *The City of Erie*, (N. D. Ohio 1918) 250 Fed. 259.

**Vol. II, p. 415, sec. 1.** [Definitions.] [First ed., vol. II, p. 174.]

**Vessel when "under way."**—A vessel lying dead in the water while taking in tow barges which have been dropped by another vessel, must under this Act be deemed to be "under way" as it is "not at anchor, or made fast to the shore, or aground." *The George W. Elder*, (C. C. A. 9th Cir. 1918) 249 Fed. 956, 162 C. C. A. 154.

**Vol. II, p. 417, art. 3.** [First ed., vol. II, p. 175.]

**Failure to light tow.**—A tug with tow navigating in a river at night will be held responsible for a collision between the tow and a launch, where it appears that the tow was not lighted, and that the launch was navigated properly but it was too dark to see the tow. *The Barge No. 12*, (S. D. Fla. 1918) 250 Fed. 923.

**Vol. II, p. 419, art. 11.** [First ed., vol. II, p. 176.]

**Anchored vessel at fault.**—In *The Josephine*, (C. C. A. 2d Cir. 1917) 247 Fed. 296, 159 C. C. A. 390, a collision between a scow anchored in a harbor and a schooner seeking



anchorage therein, was held to be due to the failure of the scow to carry an anchor light.

**Vol. II, p. 420, art. 15.** [First ed., vol. II, p. 177.]

**A vessel approaching a pier when another vessel collides with it, is not at fault because it fails to give the fog signals required by this section.** The *El Monte*, (C. C. A. 5th Cir. 1918) 252 Fed. 59, 164 C. C. A. 171.

**Collision of vessel about to anchor with one at anchor.**—A vessel which when entering an anchorage ground in a fog fails to give more frequent signals is at fault for a collision with an anchored vessel which is sounding signals at proper intervals. The *Quevilly*, (E. D. N. Y. 1918) 253 Fed. 415.

**Signals by vessels in tow.**—Where the whistle signal, required by this section and made exclusive of all other signals, is given by a tug with a barge in tow, the barge, which cannot whistle, is not negligent in failing to give other signals. The *Washington*, (C. C. A. 2d Cir. 1918) 250 Fed. 436, 162 C. C. A. 506.

**Vol. II, p. 421, art. 16.** [First ed., vol. II, p. 178.]

**Navigation in fog.**—Where a vessel in a fog hears the fog signal of another vessel "apparently forward of her beam" she is not required under the provisions of this section to ascertain the position of the vessel by sight, and if she recognizes and locates the vessel by her signal, knows the locality and the usual course of such vessel, she may continue her navigation accordingly. The *Pernaquid*, (D. C. Me. 1918) 255 Fed. 709.

In the following case a vessel was found guilty of fault in navigating at an excessive speed in a fog. The *El Monte*, (C. C. A. 5th Cir. 1918) 252 Fed. 59, 164 C. C. A. 171.

**Vol. II, p. 423, art. 18, rule I.** [First ed., vol. II, p. 178.]

**Failure to carry out passing agreement.**—In the following case a vessel was held to be in fault for failure to carry out a passing agreement: The *Florida*, (C. C. A. 2d Cir. 1919) 256 Fed. 22.

**Steamer at rest—tug passing.**—In The New York Central No. 17, (C. C. A. 2d Cir. 1919) 256 Fed. 220, it appeared that a ferryboat was lying at rest in the East river awaiting the departure of a sister boat of the same line, from the slip to which the ferryboat was bound. While so lying a tug came up the river close to the shore in violation of the duty imposed on her by section 757 of Ash's Greater New York Charter, to keep to the middle of the river. Each vessel was in plain view of the other, and as the tug approached the ferryboat signalled her to pass across her bow. The tug proceeded straight ahead on her course without answering the

signal but suddenly changed her course as she approached the ferryboat and collided with her. It was held that the tug was solely at fault for violation of her statutory duty and the ordinary rules of navigation.

**Vol. II, p. 426, rule V.** [First ed., vol. II, p. 179.]

**Applicability to vessel not in motion.**—The rule as to bend signals does not apply to a vessel lying at a bend but not in motion. The *Transfer No. 21*, (C. C. A. 2d Cir. 1917) 248 Fed. 459, 160 C. C. A. 469.

**Collision with ship being backed from slip.**—In The *Tambor*, (D. C. Md. 1919) 256 Fed. 717, it was held that a tug with scows in tow which collided with a steamship while the latter was being backed out of her slip in a harbor, after having given the proper signal, was solely in fault for not having kept out of the steamship's way, the starboard hand rule not applying.

**Vol. II, p. 428, art. 19.** [First ed., vol. II, p. 180.]

**Collision through mistaking signals.**—In The *Musconetcong*, (C. C. A. 2d Cir. 1918) 255 Fed. 675, it was held that a tug which was passing down Hudson river was solely responsible for a collision with a crossing ferryboat, where it appeared that it was a clear day, that the ferryboat was the privileged vessel under the starboard hand rule, and that although the tug mistook the ferryboat's signal, she had time after realizing her mistake to change her course.

**Vol. II, p. 434, art. 24.** [First ed., vol. II, p. 180.]

**Refusal of consent to pass.**—A steamer which overtakes on a river a vessel engaged in taking barges in tow, and collides with it while attempting to pass, is solely at fault where it continued on its course after the overtaken vessel had refused to consent to its passing, for this article makes the overtaken vessel the judge of the time when the overtaking vessel may pass safely. The *George W. Elder*, (C. C. A. 9th Cir. 1918) 249 Fed. 956, 162 C. C. A. 154.

**Overtaking vessel going astern after passing.**—Where a tug with tow, while proceeding down a river, overtakes two other tugs with tows and passes between them without exchanging signals, but, on encountering a crossing ferryboat, is compelled to go astern of them and collides with one of them in doing so, it is solely at fault. The *Bronx*, (C. C. A. 2d Cir. 1918) 250 Fed. 843, 163 C. C. A. 157.

**Vol. II, p. 436, art. 25.** [First ed., vol. II, p. 180.]

**Avoiding anchored vessel.**—In The *Vedamore*, (C. C. A. 4th Cir. 1917) 247 Fed. 108, 159 C. C. A. 326, a tug with tow was held at

fault for failure to give sufficient clearance in passing a dredge anchored in the channel.

**Custom.**—A local custom based on peculiar conditions to pass starboard to starboard is not illegal. *The Transfer* No. 21, (C. C. A. 2d Cir. 1917) 248 Fed. 459, 160 C. C. A. 469.

**Dredge at anchor in channel.**—In *The Bern*, (C. C. A. 2d Cir. 1918) 255 Fed. 325, 166 C. C. A. 495, it was held that where a dredge at the time of a collision with a tug towing canal boats, was anchored in a channel at such a point as to obstruct navigation, it was solely liable for damages.

**Ferryboat and propeller both at fault.**—In *Carroll v. New York*, (C. C. A. 2d Cir. 1918) 249 Fed. 453, 161 C. C. A. 411, a ferryboat and a propeller were held both to be at fault for a collision in the East river, the former in failing to observe sooner the lights of the latter, which had the right of way under the starboard hand rule, and the latter in violating a harbor regulation as to speed and proximity to the shore.

**Vol. II, p. 440, art. 27.** [First ed., vol. II, p. 181.]

**Special circumstances.**—Ferryboat crossing course of tug and tow, held bound to navigate under the special circumstances rule and not entitled to stand in the starboard hand rule. *The Pierrepont*, (C. C. A. 2d Cir. 1917) 248 Fed. 682, 160 C. C. A. 582.

In *The Dorset*, (E. D. Va. 1918) 250 Fed. 867, the collision occurred in the daytime between a steamship, being moved by a tug from her slip into a river, and a tow on a 600-foot hawser in charge of another tug proceeding down the river. When some distance way the latter tug gave a signal of two whistles which was similarly answered

by the steamship, whereupon the tug proceeded at full speed upon its course and safely passed the steamship, but its tow collided with it. It was held that both tugs were at fault for failure to navigate so as to avoid collision after the exchange of signals, the tug with tow also at fault for using a longer hawser than permitted by the harbor regulations, and the steamer for giving such a signal and continuing to back from her slip into the channel, which was very narrow.

**Steamers backing out of berths.**—This rule applies to a steamer backing out of its berth preparatory to getting on its definite course. *The Bouker* No. 2, (C. C. A. 2d Cir. 1918) 254 Fed. 579, 166 C. C. A. 137; *The Transfer* No. 17, (C. C. A. 2d Cir. 1918) 254 Fed. 673, 166 C. C. A. 171; *The M. Moran*, (C. C. A. 2d Cir. 1918) 254 Fed. 766, 166 C. C. A. 212.

**Vol. II, p. 442, art. 29.** [First ed., vol. II, p. 181.]

**Duty of lookout.**—"A lookout's duty is to report as soon as he sees, not only any vessel with which there is danger of collision, but any which may in any way affect the navigation of his own. He may not himself engage in speculation about the probabilities of collision, or the relative movements of the two. That responsibility rests upon the master alone." *The Madison*, (C. C. A. 2d Cir. 1918) 250 Fed. 850, 163 C. C. A. 164.

**Failure of lookout to report vessel.**—A vessel whose lookout fails to report the proximity of another vessel with which it subsequently collides has the burden of showing that such failure did not contribute to the collision. *The Madison*, (C. C. A. 2d Cir. 1918) 250 Fed. 850, 163 C. C. A. 164.

## COMMERCE DEPARTMENT

**Vol. II, p. 479, sec. 7.** [First ed., vol. X, p. 62.]

**Lease of islands in Alaska.**—To same effect as original annotation, see *Whelpley v. Gros-vold*, (C. C. A. 9th Cir. 1918) 249 Fed. 812, 162 C. C. A. 46.

**Vol. II, p. 484, sec. 1.** [*Commercial attachés, etc.*]

**Eligibility of retired naval officer to appointment as commercial attaché.**—A retired naval officer whose compensation as such amounts to \$2,500 per annum is ineligible to appointment as a commercial attaché under this Act. (1914) 30 Op. Atty-Gen. 298.

## COPYRIGHT

**Vol. II, p. 546, sec. 1 (a).** [First ed., 1909 Supp., p. 81.]

**Sale of play by play broker to moving picture companies.**—The mere possession of the manuscript of a play by a play broker is not of itself sufficient to give him authority to make a contract for the sale of the copyright to moving picture companies, and

in a suit against these companies by the author for an infringement of the copyright by producing the play on the screen the defendants have the burden of showing that the broker had the play for sale and that they purchased it. *Stodart v. Mutual Film Corp.*, (S. D. N. Y. 1917) 249 Fed. 507, *affirmed* without opinion (C. C. A. 2d Cir. 1918) 249 Fed. 513, 161 C. C. A. 439.

**Vol. II, p. 548, sec. 1 (e).** [First ed., 1909 Supp., p. 81.]

**Counsel fees and punitive damages.**—Evidence examined and held to show that letters sent by defendant to plaintiff were the notices required under section 25, clause (e), and were not, when taken in connection with the defendant's replies thereto, contracts for the use of the plaintiff's composition, and that the trial court should have exercised its discretion under section 1(e) to allow a reasonable counsel fee and punitive damages. *Feist v. American Music Roll Co.*, (C. C. A. 3d Cir. 1918) 251 Fed. 245, 163 C. C. A. 401. The same case is again reported in (E. D. Pa. 1918) 253 Fed. 860, where the court said: "The decree in this case was reversed (251 Fed. 245), with direction to this court to exercise its discretion concerning the allowance of a reasonable counsel fee and punitive damages under section 1, clause (e), Act March 4, 1909, c. 320, 35 Stat. 1075. The controversy in the case has been upon the question whether the use by the defendant of the plaintiff's copyrighted musical compositions was under the compulsory license provisions of the act as contended by the plaintiff, or under a voluntary license as contended by the defendant. That question has now been decided in favor of the plaintiff. I am of the opinion that the plaintiff should be allowed a reasonable counsel fee. If the fee asked by plaintiff's counsel, \$750, were awarded, the court would be applying, in fixing the amount of the fee, the punitive provisions of the act, which apply only to damages. The fee, to be a reasonable one, must be based upon the professional services rendered in the preparation and trial of the case and in the appellate proceedings. The amount of royalties due, as fixed by the former decree, is \$373.74. The amount in controversy has its bearing upon the amount of the fee. No complicated questions of law or fact were involved. In my judgment, a fee of \$150 is adequate and reasonable. Passing to the question of damages, they may be imposed in case of failure to pay within 30 days after demand. The court may, no doubt, take into consideration the intent and acts of the defendant in failing to make payment and its willful disregard of the provisions of the act. The defendant was in default in failing to render monthly reports and to make payment within 30 days after demand. There was nothing in these features of the case indicating an intention of concealment or piracy in the use of the copyrighted works. In fact, the liability of the defendant for the statutory two cents royalty was consistently admitted throughout the transactions. Moreover, there is nothing upon the record to show bad faith of the defendant in defending against the application of the compulsory license provision, and, if punitive damages were based upon the resistance of the defendant to liability to punitive damages, the court would be punishing the defendant for setting up what the court, in its former decision,

considered to be a good defense against such liability, but which has been held to be error in law. Punitive damages will therefore be awarded, based upon failure to make payment within 30 days after demand, and, in aggravation thereof, failure to make monthly reports. The sum of \$100 is, in my judgment, an ample allowance for damages, and will be awarded."

**Vol. II, p. 551, sec. 2.** [First ed., 1909 Supp., p. 82.]

**Abandonment of common-law right.**—To the same effect as the original annotation, see *Societe des Films Menchen v. Vitagraph Co.*, (C. C. A. 2d Cir. 1918) 251 Fed. 258, 163 C. C. A. 414.

**Vol. II, p. 553, sec. 5.** [First ed., 1909 Supp., p. 83.]

**What may be copyrighted — News matter.** — In *International News Service v. Associated Press*, (1918) 248 U. S. 215, 39 S. Ct. 68, 63 U. S. (L. ed.) —, the court commenting on the subject of news matter and whether it was property and the subject of copyright said: "In considering the general question of property in news matter, it is necessary to recognize its dual character, distinguishing between the substance of the information and the particular form or collection of words in which the writer has communicated it. No doubt news articles often possess a literary quality, and are the subject of literary property at the common law; nor do we question that such an article, as a literary production, is the subject of copyright by the terms of the act as it now stands. In an early case at the circuit Mr. Justice Thompson held in effect that a newspaper was not within the protection of the copyright acts of 1790 and 1802 (*Clayton v. Stone*, 2 Paine, 382; 5 Fed. Cas. No. 2872). But the present act is broader; it provides that the works for which copyright may be secured shall include 'all the writings of an author,' and specifically mentions 'periodicals, including newspapers.' Act of March 4, 1909, ch. 320, §§ 4 and 5, 35 Stat. 1075, 1076. Evidently this admits to copyright a contribution to a newspaper, notwithstanding it also may convey news; and such is the practice of the copyright office, as the newspapers of the day bear witness. See Copyright Office Bulletin No. 15 (1917), pp. 7, 14, 16-17. But the news element—the information respecting current events contained in the literary production is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day. It is not to be supposed that the framers of the Constitution, when they empowered Congress 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries' (Const., art. I, § 8, par. 8),

tended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it."

**A photograph.**—To the same effect as the original annotation, see *Altman v. New Haven Union Co.*, (D. C. Conn. 1918) 254 Fed. 113, wherein the court said: "Prior to 1865 it was held that a photograph was not a 'print, cut or engraving,' within the meaning of the earlier law, and was not therefore a proper subject of copyright. Congress, however, in 1865, extended copyright protection to negatives and photographs by expressly including them among the articles for which copyright was provided. Act March 3, 1865, c. 126, 13 Stat. 540. This express designation of photographs has been continued in all subsequent statutes. Act July 8, 1870, c. 230, § 86, 16 Stat. 212 (R. S. § 4952); Act March 3, 1891, c. 565, 26 Stat. 1107; Act Jan. 7, 1904, c. 2, 33 Stat. 4; Act March 3, 1905, c. 1432, 33 Stat. 1000. Although it was questioned whether a photographer is an author, and a photograph a writing, within the constitutional provision under which copyrights may be granted, the constitutionality of the act was sustained. *Thornton v. Schreiber*, 124 U. S. 612, 8 Sup. Ct. 618, 31 L. Ed. 577; *Burrow-Giles Lith. Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349; *Harper v. Kalem Co.*, 169 Fed. 61, 94 C. C. A. 429. Accordingly, since the act of 1865, photographs have been, and now are, copyrightable as such, and photographers have frequently been protected in the enjoyment of a copyright in their photographic productions. *Thornton v. Schreiber*, *supra*. The basis and justification of such copyrights is the undeniable fact that a photograph may embody original work and artistic skill, and be in fact an artistic production, the result of original intellectual conception on the part of its author. *Pegano v. Chas. Beseler*, (D. C.) 234 Fed. 963; *Gross v. Seligman*, 212 Fed. 930, 129 C. C. A. 450; *Bamforth v. Douglass Post Card Co.*, (C. S.) 158 Fed. 355. The fact that the photographer arranged the light, the grouping, the posing, and other details of a photograph, so as to produce an artistic and pleasing picture, is sufficient to sustain a copyright for such photograph. *Burrow-Giles Lith. Co. v. Sarony*, *supra*; *Pagano v. Beseler Co.*, *supra*."

**Musical composition.**—An orchestral arrangement for a copyrighted song may be independently copyrighted. *Edmonds v. Stern*, (C. C. A. 2d Cir. 1918) 248 Fed. 897, 161 C. C. A. 15.

**Vol. II, p. 562, sec. 8.** [First ed., 1909 Supp., p. 83.]

**Agents.**—Under the Copyright Act no power exists in an "agent" to copyright anything; that privilege is reserved to the "authors or proprietors." *Societe des Films Menchen v. Vitagraph Co.*, (C. C. A. 2d Cir. 1918) 251 Fed. 258, 163 C. C. A. 414.

**Photographer.**—In *Altman v. New Haven Union Co.*, (D. C. Conn. 1918) 254 Fed. 113, a photographer making a group picture of a high school class was held to be the owner of the negative on the facts there shown and therefore entitled to a copyright. The court said: "The relevant facts upon which this decision must be based are found to be as follows:

"The graduating class of the New Haven High School of 1914, acting through a committee duly appointed, arranged with The New Haven Printing Company to print its Class Book, which was to contain, among other things, a group photograph of the class.

"In order to secure this photograph, a committee of the class was appointed to make the necessary arrangements, to the end that a proper photograph could be secured, which could also be sold separately to such of the individual members of the class as desired to secure a copy.

"After conferring with various photographers, arrangements were finally made with the plaintiff, whereby he was to take the picture of the class on the front steps of the High School building, and for which he was to receive \$1.50 for each photograph sold to such members of the class as desired to purchase a copy at that price. The plaintiff was under no other contract as to price than as stated; i. e., no arrangement or contract was made whereby he was to receive any pay for his services as a photographer. At the appointed time the class, some 500 in number, assembled on the front steps of the High School. The plaintiff is, and has been for some years past, one of the leading photographers of the city, and has had a wide and varied experience in taking all kinds of indoor and outdoor photographs, and thoroughly understands the art. He grouped the members of the class, arranged their positions, and did all of the work necessary to secure a proper negative, from which an acceptable photograph could be made, and which resulted in a pleasing, satisfactory, and, so far as such a production may be, an artistic photograph, at least sufficiently so as to bring it within the realm of those things which may be copyrighted in accordance with the provisions of the Copyright Law of 1909, as amended.

"As soon as the photograph was developed, steps were immediately taken by the plaintiff to protect his rights in the same by applying to the Copyright Office in Washington, and pursuant to the steps so taken, and in conformity with law, on May 23, 1914, plaintiff received his certificate of registration under the seal of the Copyright Office. The negative from which the photographs were printed was marked by the plaintiff in conformity with the provisions of law, so that all photographs made from the negative were properly and legally marked.

"Where the photographer takes the portrait for the sitter under employment by the latter, it is the implied agreement that the property in the portrait is in the sitter, and

neither the photographer nor a stranger has a right to print or make copies without permission from the sitter. *Moore v. Rugg*, 44 Minn. 28, 46 N. W. 141, 9 L. R. A. 58, 20 Am. St. Rep. 539. Where, however, the photograph is taken at the expense of the photographer and for his benefit, the sitter loses control of the disposition of the pictures, and the property right is in the photographer. *Press Pub. Co. v. Falk*, (C. C.) 59 Fed. 324. So here, no other conclusion is possible, under the evidence, save the one here reached, that the plaintiff was the lawful owner of the right in the photograph, bound only to sell each photograph at a price not to exceed \$1.50 to each member of the class desiring to purchase one. By no possible stretch of the evidence could it be said that the class had or owned the right in the photograph."

**Vol. II, p. 567, sec. 11.** [First ed., 1909 Supp., p. 84.]

**Failure to comply strictly with copyrighted rules as invalidating copyright.**—A copyright of an unpublished song under this section is valid, where all the necessary steps have been taken, although the composer deposits a printed rather than a typewritten or manuscript copy as required by the regulations of the Copyright Office, and there is a slight variance as to the date of delivery of the copy. *Turner v. Crowley*, (C. C. A. 9th Cir. 1918) 252 Fed. 749, 164 C. C. A. 589. "But, as we read the evidence, it shows that the plaintiff, before publication, sent a copy of the title, words, and music of the song to the Register of Copyright at Washington, D. C., as an unpublished work, and received from that official a certificate of registration. It is said that under the rules of the Copyright Office (rule 20, subdivision 1), in order to secure copyright of an unpublished work, it was necessary for plaintiff to 'deposit one typewritten or manuscript copy of the work.' Plaintiff, however, having proved that she deposited a printed copy, by every reasonable construction the legal effect must be the same as if there had been a deposit of a written or typewritten manuscript. Plaintiff forwarded two copies of the words and music, and made a second registration after publication, and received certificate of copyright. The certificate issued after publication recited that the copies were received September 5, 1914, and that the date of publication was September 10, 1914, while the first certificate for the unpublished work recites that the copy was received by the Register of Copyright on September 26, 1914. The certificate showing that the date of publication was September 10, 1914, varies from the allegations of the plaintiff's complaint, wherein it is alleged that, in order to secure copyright, on September 21, 1914, she mailed to the Librarian of Congress a printed copy of the title, words, and music of the song, together with the necessary fees. This variance, possibly due to an error on the part of plaintiff, or to a

clerical error in the certificate of registration, ought not to deprive the plaintiff of the benefit of her original registration to secure copyright of the unpublished song. We assume that the rules of copyright require reasonable strictness of interpretation; but, where it is shown by a claimant that the essential steps have been taken to secure copyright of an unpublished work prior to publication, slight variance in dates ought not to destroy the proof of copyright. *Macgillivray on Copyright*, p. 257. But in the present case, even if the first registration could not be sustained, surely plaintiff, by proof of the second registration, fulfilled the terms of the Copyright Act, inasmuch as the record proves that that copyright notice was appended to the published copies of the song. *Bobbs-Merrill v. Straus*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086."

**Vol. II, p. 573, sec. 15.** [First ed., 1909 Supp., p. 85.]

**Lithographic prints as "works of art."**—Whether certain lithographic prints produced in Germany are "works of art" within the meaning of this section, is a question of fact which should be determined by the Copyright Office rather than by the Attorney General. (1915) 30 Op. Atty-Gen. 422.

**Vol. II, p. 581, sec. 25.** [First ed., 1909 Supp., p. 87.]

**Number of infringements and damages awarded for each.**—This section at the beginning says that the liability is imposed for infringing "the copyright in any" copyrighted "work." The words are in the singular and each copyright is treated as a distinct entity. *Westermann Co. v. Dispatch Printing Co.*, (1919) 249 U. S. 100, 39 S. Ct. 194, 63 U. S. (L. ed.) (reversing (C. C. A. 6th Cir. 1916) 233 Fed. 609, 147 C. C. A. 417) wherein the facts as stated by the court were as follows:

This was a bill for an injunction against future infringement of certain copyrights and to recover damages for past infringement. The injunction was granted and in this both parties acquiesced. In addition, the District Court found that there were seven cases of infringement and awarded \$10 as nominal damages for each case—\$70 in all. The plaintiff appealed, insisting that for each case it was entitled under the copyright law to an award of not less than \$250. The Circuit Court of Appeals sustained that contention, but held that what the District Court regarded as seven cases was only one and directed that the decree be modified by awarding \$250, instead of \$70, as damages. 233 Fed. Rep. 609. A writ of certiorari granted on the plaintiff's petition brings the matter here.

Whether there were seven cases of infringement or only one, and whether the damages

should have been assessed at not less than \$250 for each case, are the questions to be considered. The facts bearing on the solution of these questions are as follows:

The plaintiff designs and produces pictorial illustrations of styles in women's apparel and supplies the same to dealers in such apparel for use in advertising their goods. All the illustrations are separately copyrighted and all authorized copies carry the required copyright notice. The plaintiff grants exclusive licenses to use the illustrations for limited periods, each license being restricted to a particular locality. The dealer obtaining the license pays a fixed charge for it. Ordinarily the fact that the license is exclusive makes it attractive, serves as an incentive for paying the charge and is a helpful feature of the plaintiff's business. But when infringers use the illustrations the strength of that feature diminishes and the plaintiff's business suffers accordingly.

At the time of the infringing acts in question the Morehouse-Martens Company, a dealer at Columbus, Ohio, had an exclusive license from the plaintiff covering the use of the illustrations in that locality.

The defendant publishes at Columbus a daily newspaper, each issue comprising as many as 30,000 copies widely circulated. Without the consent or authority of the plaintiff or its licensee the defendant reproduced and published in its newspaper six of the plaintiff's copyrighted illustrations. They were published separately, each in a distinct issue and in all the copies. Five were published once and the other one twice, the illustrations being used in each instance as part of an advertisement by some competitor in trade of the plaintiff's licensee. The two advertisements having the same illustration were by different advertisers and were separated by an interval of twenty-six days.

The court reversed the judgment of the Circuit Court of Appeals on the question of the number of cases of infringement, taking the view held by the District Court. On this question the court said: "The statute says that the liability thus defined is imposed for infringing 'the copyright in any' copyrighted 'work.' The words are in the singular not the plural. Each copyright is treated as a distinct entity, and the infringement of it as a distinct wrong to be redressed through the enforcement of this liability. Infringement of several copyrights is not put on the same level with infringement of one. On the contrary, the plain import of the statute is that this liability attaches in respect of each copyright that is infringed. Here six were infringed, each covering a different illustration. Thus there were at least six cases of infringement in the sense of the statute. Was there also another? The illustration covered by one of the copyrights was published on two separate occasions, each time in a different advertisement. There was no connection between the two advertisements other than that the inclusion of the same illustration in both. Each was by a different

advertiser and was published at his instance and for his benefit. The advertisers were not joint, but independent, infringers, neither having any connection with what was done by the other. By publishing their advertisements, the defendant participated in their independent infringements. In these circumstances, we think the second publication of the illustration must be regarded as another and distinct case of infringement. Whether it would be otherwise if that publication had been merely a continuation or repetition of the first, and what bearing the "third" and "fourth" subdivisions of section 25, before quoted, would have on the solution of that question, are matters which we have no occasion to consider now. They are mentioned only to show that no ruling thereon is intended. We conclude, as did the District Court, that there were seven cases of infringement in the sense of the statute."

Taking up the subject of damages the court said: "On the question of the amount of damages to be awarded for each case we are in accord with the Circuit Court of Appeals. Both parties recognize that under the proofs the damages must be assessed under the alternative provision requiring the infringer, in lieu of actual damages and profits, to pay such damages as to the court shall appear to be just, etc. The fact that these damages are to be 'in lieu of actual damages' shows that something other than actual damages is intended—that another measure is to be applied in making the assessment. There is no uncertainty as to what that measure is or as to its limitations. The statute says, first, that the damages are to be such as to the court shall appear to be just; next, that the court may, in its discretion, allow the amounts named in the appended schedule, and finally, that in no case shall they be more than \$5,000 nor less than \$250, except that for a newspaper reproduction of a copyrighted photograph they shall not be more than \$200 nor less than \$50. In other words, the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid, but with the express qualification that in every case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum. Within these limitations the court's discretion and sense of justice are controlling, but it has no discretion when proceeding under this provision to go outside of them."

Publication in several editions of newspaper as single.—The publication of a copyrighted map in the regular edition of a newspaper and in a noon edition on the same day may be treated as a single infringement. *Sauer v. Detroit Times Co.*, (E. D. Mich. 1917) 247 Fed. 687, wherein the court said: "I think that, under all the circumstances, including the fact that the defendant appears to have acted in good faith, and ceased its infringement and surrendered its infringing

plates as soon as its attention had been called to the matter, it is equitable to consider, and it should be held, that the acts of the defendant constituted one infringement, for the purpose of computing the damages, and that the plaintiff should recover the minimum amount allowed by the statute for one infringement, namely, \$250 and costs."

**Liability of lessor for lessee's infringement.**

—The owner of a concert hall, who has no interest in a performance held therein except the rental, is not liable for an infringement of copyright because he permits the lessee's artist to render certain copyrighted music after being advised, subsequent to the execution of the lease, not to permit the performance without the consent of the plaintiff. *Fromont v. Aeolian Co.*, (S. D. N. Y. 1918) 254 Fed. 592. In discussing the liability of lessors in such cases, Mayer, J., said: "Plaintiff asks this court to hold, under such circumstances, that the owner of a building or a room, who has had no connection whatever with the performance of a copyrighted work, other than to let the said premises without any notice or knowledge, shall be held as an infringer. Of course, if, as in at least one English case, the owner of the premises had arranged for the infringing production, and was to receive profit therefrom, the situation would be quite different. If this court were to sustain the view advanced by the plaintiff, it might well result in the owners of buildings, such as the defendant owns, or buildings such as are occupied by hotels and restaurants and department stores, in being held as co-infringers merely because, either by permission or contract arrangement, performances are had where some performer, without any prior agreement with the owner of the building, publicly performed some copyrighted work. It is matter of common knowledge that entertainments of all kinds are given, not merely in theaters or other regular places of amusement, but in hotels, and assembly rooms, department stores, and open grounds, such as the stadium and the Polo Grounds, and other large fields adapted for the giving of concerts or pageants.

"It is significant, although, of course, not controlling, that there is not to be found in the reports of American cases any case which has dealt with a cause of action similar to that here urged. To hold the defendant liable would, in my view, be to stretch both the purpose and the provisions of the Copyright Law (Act March 4, 1909, c. 320, 35 Stat. 1075) far beyond even the imagination of the Legislature. While unquestionably this exceedingly useful statute was passed primarily to protect authors, composers, and artists of various kinds, and to secure for them the reward of their labors, yet the act is constructed in such a manner as to safeguard the public against financial loss and damage unexpectedly and unwittingly incurred. Thus all of the preliminary provisions as to copyrighting are surrounded with great care. The notice of copyright must be given

in a particular way, as the statute points out. The provisions as to damages and penalties are carefully set forth and guarded.

"Viewing the act and its purpose, it seems to me that a defendant cannot be called a co-infringer who is in no sense an inducing party to the infringement, who derives no profit from the infringement, excepting in the very remote way in which it is urged that this defendant landlord derived profit here; and where, as here, a defendant enters into an ordinary everyday business contract, without any knowledge whatever of a threatened infringement, and thus becomes bound under the contract, it seems to me that the construction contended for by plaintiff would result in visiting upon innocent landlords a penalty which the statute never contemplated."

**Enlarged edition of work as infringement of earlier edition.**—A history of the World War in two volumes held not infringed by a four volume work on the same subject by the same author. *Kennerley v. Simonds*, (S. D. N. Y. 1917) 247 Fed. 822.

**Subsection (b)—No actual damage sustained.**—To warrant the recovery of the sum allowed by the act it is not necessary that any actual damages shall have been sustained. *Sauer v. Detroit Times Co.*, (E. D. Mich. 1917) 247 Fed. 687.

In *Waterson, etc., Co. v. Tollefson*, (S. D. Cal. 1918) 253 Fed. 859, it was held that the minimum damages for an infringement of a copyrighted musical composition should be \$250 where no actual damages were shown. The court said: "As before stated, the infringement complained of concerns the performance of a 'musical composition,' as distinguished from other infringements referred to in section 25 of the Act of March 4, 1909 (35 Stat. 1081, c. 320). I confess that, on the first reading of this statute, I was of the opinion that \$10, being the sum specifically mentioned in clause 'fourth' of the section cited as recoverable for such an infringement, should be the amount allowed as liquidated damages, in the absence of proof of actual damage. However, upon more careful study of the section and consideration of its various terms, and more particularly upon considering and reading the section as it appeared previous to its amendment in 1909, I am of the opinion that this is one of the 'other cases' referred to in clause 'b' of section 25 supra, and that the minimum damages to be awarded for the infringement shown should be \$250.

"The provision for an allowance of 'ten dollars' must be held to apply where a large number of infringements have been shown; this figure may be used by the court as a basis for its computation of the entire damages by assessing each infringement at \$10, if such method of computation, under all the circumstances, 'shall appear to be just'; but in the event the total number of infringements, computed on the \$10 basis, do not amount to \$250, nevertheless, pursuant to the mandatory terms of the statute con-

tained in the provision last above referred to relating to 'other cases,' the court may not award damages in a sum less than \$250. So, also, no matter how many separate infringements may be proved, no 'actual' damages being shown, the court may not mulct the defendant in damages in excess of the maximum sum mentioned, to wit, \$5,000."

*Innocent infringements.*—One who reproduces and distributes free as advertising matter an article taken from a copyrighted magazine with the permission of the magazine, but without knowledge of the rights of the owner of the copyright, is liable to damages in an amount commensurate with the injury caused by the infringement. *Insurance Press v. Ford Motor Co.*, (C. C. A. 2d Cir. 1918) 255 Fed. 896.

*Infringement of song as warranting allowance of one dollar for each copy made.*—In *Turner v. Crowley*, (C. C. A. 9th Cir. 1918) 252 Fed. 749, 164 C. C. A. 589, an award of damages amounting to \$7,000 for the infringement of the copyright of a song, the award being based on the fact that 7,000 copies were found in the possession of the defendant, was held excessive and the amount reduced to \$560, it appearing that the retail price of each copy was only fifteen cents. The court said: "Appellee offered no proof of actual loss or of profits, but we gather from the testimony that at a retail price of 15 cents a copy for the song the profit to the plaintiff would not have exceeded 8 cents per copy. If, therefore, the plaintiff had received 8 cents per copy upon 7,000 copies found in the possession of Turner & Dahmken, her total damage would have been \$560, which we think would be a fair estimate. Plaintiff said that she expected and authorized orchestrations of her song to be used, but did not authorize use of it as made by defendant. The allowance of \$7,000, or \$1 per copy of the song and music, seems to have been based upon the view that \$1 per copy is a fixed sum, to be allowed under any circumstances of infringement after notice. But, as we do not so construe the law, the duty of the court was to award damages as justified by the nature and circumstances of the case as developed upon the trial. Thus, while the discretion of the court may be used to award damages where no proof of actual damage is offered, yet the award should have relation to such inferences as are reasonably deducible from the whole case of infringement, and such damages are not to be awarded as based upon the idea of punishment. 13 *Corpus Juris*, p. 1179. The allowance of attorney's fees was proper (*Haas v. Leo Feist, Inc.* [D. C.] 234 Fed. 105), and as the case before the court showed the exact number of copies which were found in the possession of the infringers, and no accounting in other respects was called for, there was no need of reference to a master. The decree is affirmed in all respects except as to the award of \$7,000 damages. In respect to that item the direction is that the

sum awarded shall be \$560, and the decree is modified accordingly, and, as so modified, it is affirmed."

Commenting on the subject of damages generally the court said: "In *Hendricks v. Thomas Publishing Co.*, 242 Fed. 37, 154 C. C. A. 629, the Court of Appeals for the Second Circuit, through Judge Hough, commenting upon the language of section 25 of the Copyright Act relating to the assessment of damages and profits, traced it as the growth of years resulting from the efforts of Congress 'to avoid that strictness of construction which historically attaches to any statute inflicting penalties and to confer upon an injured copyright owner some pecuniary solace even when the rules of law render it difficult if not impossible, as it often is, to prove damages or discover profits,' and held that the statute limits the discretion of the court to a minimum award of \$250, and a maximum of \$5,000, in lieu of actual damages, and that it was the intent of Congress to preserve the right of the plaintiff to pursue damages and profits by the historic methods of equity if he chooses so to do and to give the new right of application to the court for such damages as shall appear to be just in lieu of actual damages. *Gross v. Van Dyk Gravure Co.*, 230 Fed. 412, 144 C. C. A. 554, was approved by the court. In the last case Judge Learned Hand said that it was the duty of the court under section 25b to estimate the damages by the best inference it can even though the complainant would fail for lack of evidence if the issue were tried before a jury and that it was intended that a plaintiff should not fail for lack of proof. Weil on Copyright deduces from the later decisions that a copyright proprietor now has three means of monetary compensation afforded him upon infringement of his rights. He may recover profits made by the infringer. He may recover actual damages in addition to such profits or in lieu of profits, and actual damages he may, if he so elects, recover arbitrarily as damages, not by way of penalty, and which in the case of musical compositions, as referred to in section 5 of the Copyright Act, are fixed at \$1 per copy found in the possession of the infringer, or made or sold by him. There is also in section 25b, following the exceptions named in the statute, a provision to the effect that the exceptions "shall not deprive the copyright proprietor of any other remedy given him under this law nor shall the limitations as to the amount of recovery apply to infringements occurring after actual notice to a defendant either by service of process in a suit or other written notice served upon it." As it was very clearly proved upon the trial of the present case that notice of infringement was served upon the appellants and that there was a continuance of the infringement after such notice was served, this provision must be considered in reviewing the damages which the lower court allowed. In our opinion the rule of the better authorities is that the court may, in its dis-



cretion and subject to the qualification that the damages must be just, allow \$1 for each copy made or sold by or found in the possession of the infringer or his agents or employees; and penalties in the strict sense being done away with, the court has power to award more than \$5,000, where there has been an infringement after notice, provided the evidence warrants a finding that the complainant was damaged in excess of \$5,000. *Westermann Co. v. Dispatch Printing Co.*, 233 Fed. 609, 147 C. C. A. 417."

Subsection (e) — "Notice of intention."— In *Feist v. American Music Roll Co.*, (C. C. A. 3d Cir. 1918) 251 Fed. 245, 163 C. C. A. 401, it was held that certain letters sent by the defendant to the plaintiff were the notices required by this clause of section 25.

**Vol. II, p. 592, sec. 34.** [First ed., 1909 Supp., p. 90.]

Effect of decision in state court.— In *DeBekker v. Frederick A. Stokes Co.*, (S. D. N. Y. 1918) 248 Fed. 838, it appeared that the rights of the complainant were based on a decree of a state court vesting a copyright in him and divesting the defendant thereof. It was held that he could not sue in the federal court for infringement merely because dissatisfaction with the damages allowed as for breach of contract in the state court, since his rights depended on the state decision and he could not go behind it.

**Vol. II, p. 593, sec. 36.** [First ed., 1909 Supp., p. 91.]

- I. What constitutes infringement.
- II. Injunctions and accounting.

**I. WHAT CONSTITUTES INFRINGEMENT**  
(p. 594)

**Infringement of play by motion picture.**— A copyrighted play is infringed by a motion picture play having the same characters, the scene laid in the same place and the plot based on the same incident as the plaintiff's play. That the title of the plaintiff's play was old and that an earlier novel contained similar incidents are immaterial, for an old title does not render the entire copyright invalid and an author, while not entitled to protection of an old plot used by him, is entitled to be protected as to additions which he has made to it and his treatment of it. *Stodart v. Mutual Film Corp.*, (S. D. N. Y. 1917) 249 Fed. 507, affirmed without opinion (C. C. A. 2d Cir. 1918) 249 Fed. 513, 161 C. C. A. 439.

A bill was held to be insufficient to show an infringement of a copyright for a moving picture play in the case of *Societe des Films Menchen v. Vitagraph Co.*, (C. C. A. 2d Cir. 1918) 251 Fed. 258, 163 C. C. A. 414.

**Dramatic composition.**— In *Underhill v. Belasco*, (S. D. N. Y. 1918) 254 Fed. 838, it was held that a copyrighted play depicting

convent life was not infringed by a play of entirely different theme which also related to convent life and contained convent scenes of similar character.

**Permission to use earlier edition.**— Permission to use a copyrighted map does not warrant the use of the same map with additions copyrighted later. *Sauer v. Detroit Times Co.*, (E. D. Mich. 1917) 247 Fed. 687. The court said: "It is undisputed that this 1916 map differed in some respects from that of the previous year. The defendant admits it 'contains a few subdivisions marked on it that Exhibit 6 (the 1915 map) does not contain,' but contends that these new subdivisions covered a space on the map of 'possibly a square inch' and that, therefore, the two maps should be considered as substantially the same. I am unable to agree with this contention. It seems to me clear that in considering differences between maps the substantial character between such differences cannot be tested in terms of inches. It appears that the main purpose in publishing new editions of these city maps was to keep pace with the growing development of the city and adding to the map of the previous year the new subdivisions platted and placed upon the market since the previous year. The object of the defendant in using this new map was to aid in advertising these new subdivisions, and for this purpose the old map would have been inadequate. The very reason for publishing the 1916 map, instead of the earlier one, was the desire to obtain the benefit of the latest map. The permission thus relied on by defendant as excusing its conduct in publishing the 1916 map was not broad or general enough to cover any map except that furnished at the time."

**II. INJUNCTIONS AND ACCOUNTING (p. 601)**

**Preliminary injunction.**— A preliminary injunction enjoining the defendants from publishing, printing, reprinting, and selling a certain musical composition in violation of the plaintiff's copyright, will be denied where it appears that the affidavits made by the defendants deny allegations made by the plaintiff and make further allegations and that the plaintiff was guilty of laches in applying for an injunction in that he knew of the alleged acts of infringement by the defendants something like a year before he applied for the injunction. *Flanagan v. Coleman*, (E. D. N. Y. 1918) 255 Fed. 178.

**Defenses.**— *Ignorance of the plaintiff's copyright, or honest intention*, affords no defense to a suit to enjoin an infringement of a copyright of a photograph. *Altman v. New Haven Union Co.*, (D. C. Conn. 1918) 254 Fed. 113, wherein the court said: "And as a last defense the defendant pleads, and the court finds as a fact, that its infringement was entirely innocent. Under the law, is that a defense? The law is decisive and clear on this point, and rules against the defense, for it has been repeatedly held that ignorance of a copyright or honest inten-

tion affords no defense to an action for infringement. In *Morrison v. Pettibone*, (C. C.) 87 Fed. 330, at page 332, the court said: 'The authorities are clear that the question of knowledge or intent does not enter into consideration upon the issue of infringement.' In *Stern v. Jerome H. Remick & Co.*, (C. C.) 175 Fed. 282, Judge Hand said: 'It is not necessary that the defendant should have intended to violate the copyright of the plaintiff. He had means of knowledge from the copyright office that the song had been in fact copyrighted; and he, like any one else, took his chances when he published the song without any inquiry.' Judge Hollister, in *Meccano v. Wagner*, (D. C.) 234 Fed. 912, at page 921, said: 'Intention is held to be immaterial, if infringement otherwise appears.' The author's property is absolute when perfected by copyright, and the intent or purpose of an invasion is nowhere made an excuse for it."

**Joint and independent infringers.**—A person who publishes a copy of a photograph in ignorance of the fact that it is an infringement of the copyrighted original, is an independent, and not a joint, infringer. *Altman v. New Haven Union Co.*, (D. C. Conn. 1918) 254 Fed. 113.

**Admissibility of evidence.**—A receipt given by the plaintiff to another infringer on the settlement of a previous suit, is not admissible in evidence as a bar to a recovery but

may be admitted as bearing upon the equities between the parties. *Altman v. New Haven Union Co.*, (D. C. Conn. 1918) 254 Fed. 113.

## Vol. II, p. 609, sec. 42. [First ed., 1909 Supp., p. 91.]

**Scope of assignment.**—The assignment of the copyright of a song does not carry a separate copyright taken out on an orchestral arrangement. *Edmonds v. Stern*, (C. C. A. 2d Cir. 1918) 248 Fed. 897, 161 C. C. A. 15.

## Vol. II, p. 621, sec. 62. [First ed., 1909 Supp., p. 95.]

**Publication.**—No publication other than the deposit in the office of the librarian is essential to the validity of the copyright. *Cardinal Film Corp. v. Beck*, (S. D. N. Y. 1918) 248 Fed. 368, wherein the court said: "Section 62 of the Copyright Law, which provides that the date of publication in the case of a work, of which copies are reproduced for sale or distribution, shall be held to be the earliest date when copies of the first authorized edition were placed on sale, sold or publicly distributed by the proprietor of the copyright, or under his authority, was an enactment to fix the date from which the copyright term should begin to run, and not a general definition of what constituted publication."

# COSTS

## Vol. II, p. 624, sec. 823. [First ed., vol. II, p. 276.]

**Contingent fee of attorney.**—A contract by one having a claim against the United States for private property taken by the United States military authorities during the Civil War, with an attorney to pay him a fee equal to 50 per cent. of the amount which may be collected upon the claim, and giving the attorney a lien on any warrant that may be issued in payment of the claim, is valid under this section. *Newman v. Moyers*, (1917) 47 App. Cas. (D. C.) 102 Am. Cas. 1918E 528.

## Vol. II, p. 628, sec. 824. [First ed., vol. II, p. 278.]

**On decree pro confesso.**—A docket fee may be taxed on the entry of a decree pro confesso in equity. *Peerless Light Co. v. Leviton*, (S. D. N. Y. 1916) 247 Fed. 606.

## Vol. II, p. 641, sec. 974. [First ed., vol. II, p. 289.]

**Preliminary hearing before commissioner.**—On a conviction of a violation of the White Slave Traffic Act a motion to tax

against the defendant the costs upon the commissioner's hearing in the preliminary examination will be denied. *U. S. v. Schwartz*, (N. D. Ia. 1918) 249 Fed. 755, wherein the court said: "The government has filed an elaborate brief in support of its contention that, under section 974 of the Revised Statutes, the costs upon the preliminary hearing of a person before a United States commissioner held to appear before the grand jury are taxable as a part of the costs of the prosecution if the defendant is convicted, and should be included in the judgment against him upon his conviction. Such has not been the practice in this district since its creation.

"This question was before Judge Trieber in *United States v. Briebach*, (D. C.) 245 Fed. 204, where, upon a careful consideration of the statute and applicable authorities, he held that such costs were not a part of the prosecution of the defendant, and were not properly taxable, and ordered them excluded from the taxation of costs in that case, where they had been taxed by the clerk against the defendant at the instance of the Attorney-General. . . .

"Section 1014 of the Revised Statutes [see vol. II, p. 654] expressly provides that the hearing before a commissioner or other mag-

istrate under that section shall be 'at the expense of the United States.' It seems clear that neither of these sections directly authorizes the costs of the hearing before the commissioner to be taxed against the defendant. The commissioner, of course, is not a court, and has no power to enter a judgment against a person brought before him upon a preliminary hearing, for any purpose. *Todd v. United States*, 158 U. S. 278, 15 Sup. Ct. 889, 39 L. Ed. 982. He can only inquire and determine whether or not there are reasonable grounds to hold the person to appear before the court having cognizance of the offense with which he is charged; and proceedings before the commissioner as an examining magistrate are not the commencement of a prosecution for the offense of which the person may be accused. *Virginia v. Paul*, 148 U. S. 107, 119, 13 Sup. Ct. 536, 37 L. Ed. 386.

"The rule is familiar that costs can only be awarded by a court to a successful litigant when the statute clearly so authorizes; and they should not be so awarded upon a strained or technical construction of the statute. The amendment of sections 5399 and 5406 of the Revised Statutes by sections 135 and 136 of the Criminal Code [see vol. III, pp. 688, 692], whereby were added the words, 'or in any examination before a United States commissioner or officer acting as such,' were obviously intended to meet the decision of the

Supreme Court in *Todd v. United States*, 158 U. S. above; but such amendment does not constitute the commissioner a judge, or a court of the United States, nor render a preliminary examination before a commissioner a proceeding 'in any court of the United States.'

"As well might it be claimed that the fees of witnesses before a grand jury and of the marshal in summoning them before that body, in case an indictment is found, shall be taxed as a part of the prosecution of the cause, in the event an indictment is found and the defendant convicted upon a plea of guilty or a trial thereof, shall be taxed as a part of the prosecution of said cause, and this motion to tax 'all costs of the prosecution' is broad enough to include such fees and costs; but apparently the government does not contend that such fees could rightly be so taxed. The opinion of Judge Trieber in *United States v. Briebach*, above, and the cases there cited, so clearly state the rule that seems to me correct that it is unnecessary to consider the matter further."

**Vol. II, p. 644, sec. 983.** [First ed., vol. II, p. 291.]

**Cost of printing record.**—The cost of printing the record in a patent case is properly taxed. *Christensen v. General Electric Co.*, (N. D. N. Y. 1918) 248 Fed. 284.

## CRIMINAL LAW

**Vol. II, p. 654, sec. 1014.** [First ed., vol. II, p. 321.]

**Following state practice**—generally—"*Mode of process.*"—To same effect as original annotation, see *Safford v. U. S.*, (C. C. A. 2d Cir. 1918) 252 Fed. 471, 164 C. C. A. 655, wherein the court said: "The defendant contends that the language 'agreeably to the usual mode of process against offenders in such states' means only 'the process itself, such as warrants, commitments, etc., as distinguished from procedure, which may embrace hearings.' We think it means procedure, and the Code of Criminal Procedure of the state of New York (sections 188-200) provides for just such examinations. *United States v. Dunbar*, 83 Fed. 151, 27 C. C. A. 488; *Cohen v. United States*, 214 Fed. 23, 130 C. C. A. 417; *United States v. Greene*, (D. C.) 100 Fed. 941."

**Authority of examining magistrate.**—A *United States commissioner* has authority to conduct a hearing and administer oaths in the case of a person charged with perjury under section 125 of the Penal Laws. *Safford v. U. S.*, (C. C. A. 2d Cir. 1918) 252 Fed. 471, wherein the court said: "At the outset and throughout the case the defend-

ant's attorneys objected that the United States commissioner had no authority to conduct a hearing or administer an oath to the defendant, or to do more than issue a warrant of arrest and either imprison or admit him to bail. If this is so, the defendant would not be guilty of perjury under the statute, even if he had knowingly testified falsely, because the crime can only be committed if the officer has authority under the laws of the United States to administer the oath. Section 125, U. S. Criminal Code. Ever since circuit court commissioners, now called United States commissioners, were appointed, it has been the practice for them to conduct judicial hearings for the purpose of inquiring whether any crime has been committed, and, if so, whether there is reasonable ground for connecting the prisoner with it, and thereupon either discharging him, imprisoning him, or admitting him to bail. It would be a scandal to arrest and imprison citizens without giving them a hearing, and we would not interfere with this uniform and wholesome practice except under absolute necessity."

**Form of bail bond.**—Under the provisions of this section the form of a bail bond taken by a United States commissioner should con-

form in all substantial particulars to the requirements of the laws of the state in which the commissioner is sitting so far as such laws are applicable. Accordingly, such a bail bond is sufficient where it states, in accordance with the requirements of a state statute, that the offense with which the defendant is charged is a felony. *U. S. v. Buchanan*, (W. D. Tex. 1919) 255 Fed. 915.

#### REMOVAL OF ACCUSED TO TRIAL DISTRICT (p. 667)

**The District of Columbia.**—To same effect as original annotation, see *Easterday v. McCarthy*, (C. C. A. 2d Cir. 1919) 256 Fed. 651, 168 C. C. A. 45, *affirming* (S. D. N. Y. 1918) 250 Fed. 800.

In *U. S. v. McCarthy*, (S. D. N. Y. 1918) 250 Fed. 800, Judge Learned Hand said: "The theory of Judge Brown in *Re Dana*, 68 Fed. 886, has been definitely overruled, that Revised Statutes, § 1014, does not apply to offenses committed in the District of Columbia, at least when they are crimes against the general laws of the United States. *Benson v. Henkel*, 198 U. S. 1, 25 Sup. Ct. 569, 49 L. Ed. 919; *In re Price*, (C. C.) 83 Fed. 830; *Price v. McCarty*, 89 Fed. 84, 32 C. C. A. 162. That theory rested upon the idea that the removal must be to courts existing at the time of the passage of the Judiciary Act and before the District of Columbia had been set apart, or at least that it must be to courts deriving their authority from the Judiciary Act. Judge Brown, however, went further than this, and held that in any event, disregarding that point, the removal could not apply to offenses which arose under the 'local laws,' as he called them, of the District of Columbia. His notion as to these was that it would put the District of Columbia at a relative advantage over the states, which was not to be understood. The contrary of such a doctrine was announced obiter in *Benson v. Henkel*, 198 U. S. 1, 14, 25 Sup. Ct. 569, 49 L. Ed. 919, and decided by Judge McPherson in *United States v. Campbell*, (D. C.) 179 Fed. 762, and perhaps in result in *United States v. Wimsatt*, (D. C.) 161 Fed. 586, though it is not clear whether the indictment there was not, as in *Re Price*, *supra*, under R. S. § 5356. I see no reason to suppose that a crime created by an act of Congress, applying specially to the District of Columbia, should not be removable under section 1014, if for no other reason than because it cannot be tried there otherwise. Concededly there is no extradition between the District of Columbia and a state. It is certainly unreasonable to suppose that there is no way of removing to the District of Columbia one who has offended against a local law, but who cannot be reached by bench warrant."

Contentions that the removal to the District of Columbia of a person there charged with an offense against the United States amounts to an invasion of defendant's constitutional right to a speedy trial on indictments relating to the same transactions,

found against him in the district from which the removal was sought, and that the consent of the federal District Court for that district to such removal ought not to have been given without requiring from the representative of the government a statement of reasons, raised nothing more than a question of discretion, the determination of which is not reviewable by the Supreme Court. *Rumely v. McCarthy*, (1919) 250 U. S. 283, 39 S. Ct. 483, 63 U. S. (L. ed.) —, *affirming* (S. D. N. Y. 1919) 256 Fed. 565.

**Indictment—Technical objections.**—To the same effect as the original annotation, see *Conetto v. U. S.*, (C. C. A. 9th Cir. 1918) 251 Fed. 42, 163 C. C. A. 292.

**Want of probable cause.**—Want of probable cause is not shown so as to defeat the removal to another federal district for trial of a person there charged with an offense against the United States, viz., the failure to make a report to the Alien Property Custodian as required by the Act of October 6, 1917 (see 1918 Supp., p. 846), by the assertion—even if well founded—that to compel such disclosure makes the defendant a witness against himself, where the accusatory averments of the indictment, admitted to be true, make out a *prima facie* case of an offense against the laws of the United States, indictable in the district to which removal is sought, since the constitutional point merely raises a probability that a defense will be interposed and that thus a controversy will arise the determination of which is within the proper jurisdiction of the court in which the indictment was found. *Rumely v. McCarthy*, (1919) 250 U. S. 283, 39 S. Ct. 483, 63 U. S. (L. ed.) —, *affirming* (S. D. N. Y. 1919) 256 Fed. 565.

#### Vol. II, p. 676, sec. 1024. [First ed., vol. II, p. 337.]

**Discretion of court.**—To same effect as original annotation, see *Foster v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 207.

**Offenses held to have been properly joined.**—Counts for violations of different sections of the Oleomargarine Act may be joined in one indictment under the provisions of this section. *Kreuzer v. U. S.*, (C. C. A. 8th Cir. 1919) 254 Fed. 34, 165 C. C. A. 444.

**Indictments held to have been properly consolidated.**—An indictment for conspiracy to commit an offense against the United States may be consolidated under this section with an indictment for the commission of the offense. *Vane v. U. S.*, (C. C. A. 9th Cir. 1918) 254 Fed. 28, 165 C. C. A. 438.

#### Vol. II, p. 681, sec. 1025. [First ed., vol. II, p. 340.]

**Following language of statute.**—"An indictment is generally sufficient which charges a statutory crime substantially in the words of the statute, except in such cases where

other precedents have been firmly established in analogous offenses at common law, or where such a charge would not fairly inform the accused of the nature of the charge preferred against him." *Jelke v. U. S.*, (C. C. A. 7th Cir. 1918) 255 Fed. 264, 166 C. C. A. 434.

**Particularity.**—"The allegations of the information need only be so specific as fairly to inform the defendant of the crime intended to be alleged, and to make available a plea of former acquittal or conviction, if a second prosecution were instituted for the same offense." *Dr. J. H. McLean Medicine Co. v. U. S.*, (C. C. A. 8th Cir. 1918) 253 Fed. 694, 165 C. C. A. 288.

An indictment under Penal Laws, section 225 [7 Fed. Stat. Ann. 851], charging a postmaster with refusing to remit money order funds of his post office to a designated depository and with having failed to account for such funds upon demand by the Postmaster-General through a duly authorized inspector, is sufficient although it does not allege by what means the depository was designated and the inspector made the authorized agent of the department, as no prejudice can result to the defendant from the alleged imperfect averment, and, if imperfect, it is cured by this section. *Foster v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 207.

**Reference to sections of act.**—The fact that an indictment under section 37 of the Penal Laws for conspiracy to violate the Selective Service Act, by the writing and publication of a newspaper urging persons of military age not to register, names only section 5 of the act, whereas the offense is also based upon section 6, is immaterial in view of the provisions of this section, as the act and not the mere numbered sections thereof is material. *Sugar v. U. S.*, (C. C. A. 6th Cir. 1918) 252 Fed. 79, 164 C. C. A. 191, wherein the court said: "Possibly the language of the indictment is not as clear as it might be because it, unnecessarily, names section 5 of the Selective Draft Act as the legislation involved, when, in fact, the offense charged must, in connection with section 37 *supra*, have its basis not only in that section, but also in section 6 of the act. In these circumstances, and in view of section 1025, R. S., *Bennett v. United States*, 194 Fed. 632, 114 C. C. A. 402, and *Daniel v. United States*, 196 Fed. 465, 116 C. C. A. 233, we hold that the indictment is based on those provisions of the act the language of which covers the offense charged, whether that language is found in section 5 or elsewhere—the act, and not the mere numbered sections of it, being the substantial thing to be regarded, and particularly when the language of the indictment clearly points out what conduct is aimed at and sought to be punished."

**Recital instead of direct allegation.**—In *Dosset v. U. S.*, (C. C. A. 8th Cir. 1918) 248 Fed. 902, 161 C. C. A. 20, the statute was applied to sustain an indictment for intro-

ducing liquor into Indian territory which stated the character of the territory by recital rather than by direct averment.

**Duplicity.**—On a motion for a new trial, an indictment will not be held to be defective because it charges in separate counts offenses against different statutes. *U. S. v. Stilson*, (E. D. Pa. 1918) 254 Fed. 120, wherein the court said: "In the supplemental paper book which has been submitted the point is made that the indictment under which the defendants were tried is bad for duplicity. The proposition of law that it is bad pleading to incorporate in one count two offenses, made such by different statutes, and calling for different measures of punishment, is a proposition the soundness of which must be admitted. *Ammerman v. United States*, 216 Fed. 326, 132 C. C. A. 470. This admission, however, does not carry with it the further admission that the principle is applicable to this indictment.

"The first count presents the fact of the United States being in a state of war, and that during the time of the existence of this state the defendants entered into a conspiracy to have committed certain acts which at such time were offenses against the law. One of them was the offense of causing insubordination. Another was to obstruct enlistments. And it further charges that in pursuance or furtherance of this unlawful conspiracy the defendants committed certain overt acts, and indicates the conspiracy charge to be that which is defined, and the punishment of which is provided for, in section 4 of the Act of June 15, 1917, c. 30, 40 Stat. 219.

"The second count differs from the first, in that it charges that the object of the conspiracy was to bring about the offense of inducing men in the military service to desert; the offense being that defined, and the punishment of which is provided for, in the fifth section of the Act of May 18, 1917, c. 15, 40 Stat. 80.

"It is true that we have two acts of Congress declaring and defining the offense of conspiracy. One is that which was re-enacted in the 1909 Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1088). The other is that which is to be found in section 4 of the Act of June 15, 1917. A conspiracy to have committed any of the acts which are offenses against the law in the Act of June 15, 1917, would have been, within the limitations imposed, an offense against the law under the Criminal Code provision of 1909. The two enactments are substantially the same in their provisions, section 4 of the 1917 act being a re-enactment of the act of 1909, except that its provisions are limited to the acts declared by that act to be offenses, while the act of 1909 applies to any act which is an offense against the law. It would not, we assume, be asserted that an indictment charging a conspiracy to have committed any of the offenses defined in the Act of June 15, 1917, would not have been good under section 4 of that act. It would not, we assume again,

be asserted that an indictment for a conspiracy to have committed the offenses defined in the other sections of the act would not have been a good indictment under the provisions of the Criminal Code of 1909, if there had been no section 4 in the act of 1917.

"The offense which the defendants are charged to have conspired to have committed by the second count of the indictment is an offense defined by the Act of May 18, 1917, and is, we think, properly charged as an offense against the 1909 enactment. In the sense intended by counsel, the charge of conspiracy in count 1 is in legal intentment a different offense from the conspiracy charge in count 2. Had the two offenses been charged in one count of the indictment the count would have been bad for duplicity, and on demurrer would have been so held. It does not follow, however, that an indictment charging the two offenses in separate counts would be open to the same criticism."

**Raising questions of procedure by demurrer.**—If the wish is to secure a ruling upon the question argued, the record should be put in such shape as to present that question only. The approved practice in the courts of the United States is to discourage the raising of mere procedure questions by demurrers to indictments by reason of formal defects or otherwise. This discouragement extends to raising by demurrer questions which can as well or better be raised as trial questions. R. S. 1025 is a command to ignore all defects in pleadings except such as "tend to the prejudice of the defendant." It is the right of the people, as well as the defendants, that there shall be open public inquiries into every charge of crime, and that the guilt of the defendant shall be submitted to a jury as the lawfully constituted tribunal to pass upon it. This, of course, does not lessen the responsibility of prosecuting officers and grand juries to see to it that no defendant shall be unjustly harassed by unfounded charges, nor does it relieve the trial judge of the duty of unflinchingly pronouncing judgment that the evidence is insufficient to convict, if such be the case, and of seeing to it that no man be unjustly convicted, if entitled to an acquittal under the facts or the law. It does mean, however, that when officials charged with that responsibility have submitted an indictment, and a grand jury has found a true bill, the court shall not usurp the functions of the trial jury, and shall not dismiss the indictment unless it charges no offense against the law, or discharge the defendants unless the evidence will not warrant a conviction. *U. S. v. Werner*, (E. D. Pa. 1918) 247 Fed. 708.

**Failure to allege character of drugs.**—The failure of an indictment for violation of section 2 of the Harrison Act [4 Fed. Stat. Ann. 178] to allege that cocaine is a derivative of coca leaves and that morphine and heroin are salts and derivatives of opium, is a harmless imperfection in view of this section. *Melanson v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 783, 168 C. C. A. 129, wherein the

court said: "The first count is criticised because it contains no direct averment that cocaine is a derivative of coca leaves, and that morphine and heroin are salts or derivatives of opium. It is averred in the first count of each indictment that the respective defendants, at the time of the commission of the offense, knew that cocaine was a derivative of coca leaves, and that morphine and heroin were salts and derivatives of opium. It is difficult to see how they could know this to be a fact, unless it was a fact, and the averment that it was known by them to be a fact implies the averment that it was a fact. It certainly informs the defendants sufficiently of the charge against them, and, if an imperfect averment, is a harmless imperfection, carrying no consequences, in view of R. S. § 1025."

**Vol. II, p. 687, sec. 1026.** [First ed., vol. II, p. 343.]

Order made in accordance with statute. *U. S. v. Werner*, (E. D. Pa. 1918) 247 Fed. 708.

**1918 Supp., p. 122, sec. 3.**

**Constitutionality.**—A public speech so expressed that its natural and intended effect is to obstruct the military recruiting or enlistment service is not protected by the constitutional guaranty of freedom of speech from condemnation under this section by reason of the immunity of the general theme, viz., socialism, its growth, and prophecy of its ultimate success, or because it is part of a general program to obstruct war, and expressed a general and conscientious belief. *Debs v. U. S.*, (1919) 249 U. S. 211, 39 S. Ct. 252, 63 U. S. (L. ed.) —.

The provision of the Espionage Act may not be invalidated on the theory that some of the matters dealt with are treasonable and punishable as treason or not at all, and that such acts as were not treasonable could not be punished. Nor may the provisions be invalidated as abridging free speech. *Frohwerk v. U. S.*, (1919) 249 U. S. 204, 39 S. Ct. 249, 63 U. S. (L. ed.) —.

This section does not violate the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech or of the press. *Schenck v. U. S.*, (1919) 249 U. S. 47, 39 S. Ct. 247, 63 U. S. (L. ed.) —.

**Effect of 1918 amendment to section.**—The amendment of 1918 did not invalidate a prosecution for acts committed before the amendment. *Frohwerk v. U. S.*, (1919) 249 U. S. 204, 39 S. Ct. 249, 63 U. S. (L. ed.) —.

**Liability of corporations.**—On the ground that it is responsible for the acts of its agents, an incorporated publishing company may be held criminally liable for violating this section by printing and publishing a pamphlet advocating insubordination. *U. S. v. Nearing*, (S. D. N. Y. 1918) 252 Fed. 223,

wherein the court said: "Finally, the defendants urge that a corporation cannot be guilty of the crime of conspiracy, or of any crime involving specific intent. This question simply turns upon how far the law has gone in imputing to a corporation the acts of its agents. Specifically it turns upon how far a publishing company, authorized to publish a pamphlet, is responsible for the acts of its officers, when actuated by the requisite intent. It is a question upon which the law has always tended towards larger and larger liability. In torts the liability is now established in the kindred case of libel (*Evening Journal v. McDermott*, 44 N. J. Law, 430, 43 Am. Rep. 392), as in malicious prosecution (*Cornford v. Carleton Bank*, [1889] 1 Q. B. 392). Certainly corporations may be guilty of criminal frauds. *Cohen v. U. S.*, 157 Fed. 651, 85 C. C. A. 113; *Kaufman v. U. S.*, 212 Fed. 613, 129 C. C. A. 149, Ann. Cas. 1916C, 466. Now, there is no distinction in essence between the civil and the criminal liability of corporations, based upon the element of intent or wrongful purpose. Each is merely an imputation to the corporation of the mental condition of its agents. It was, it is true, for long supposed that the criminal liability of corporations could not extend beyond the neglect of those positive duties imposed by law; but that depended upon the theory that acts of malfeasance being illegal must be *ultra vires*. It did not survive a more generous view of the doctrine of *ultra vires*. *Joplin Mercantile Co. v. U. S.*, 213 Fed. 926, 935, 131 C. C. A. 160, Ann. Cas. 1916C, 470, a case affirmed without consideration of this question in *Joplin Mercantile Co. v. U. S.*, 236 U. S. 531, 35 Sup. Ct. 291, 59 L. ed. 705. That the criminal liability of a corporation is to be determined by the kinship of the act to the powers of the officials who committed it is true enough, but neither the doctrine of *ultra vires*, nor the difficulty of imputing intent or motive, should be regarded any longer to determine the result."

"Willfully."—The word "willfully" as used in the provision of this section making it an offense for one to "willfully cause or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States," means "intentionally" or "with the purpose of." *Von Bank v. U. S.*, (C. C. A. 8th Cir. 1918) 253 Fed. 641, 165 C. C. A. 267.

"Military and naval forces" as including Red Cross and Y. M. C. A.—The National Red Cross, being a part of the sanitary service of the military and naval forces of the United States, and the Y. M. C. A. being recognized by the President as an adjunct to such forces, must be regarded as being a part of the "military and naval forces of the United States" within the meaning of this section, and this conclusion is not prevented because the Treaty of Geneva of August 22, 1864, recognizes the former organization and provides that its members are to be treated as

neutrals if captured. Accordingly, one who makes false statements concerning these organizations to persons soliciting funds on their behalf, with the intent to interfere with the collection of such funds, is guilty of a violation of this section. *U. S. v. Nagler*, (W. D. Wis. 1918) 252 Fed. 217.

Disloyal utterances.—The provisions of this section do not apply to all disloyal utterances but only to those which affect the military and naval forces and persons subject to the recruiting and enlistment service. *U. S. v. Schutte*, (D. C. N. D. 1918) 252 Fed. 212.

Advice or counsel.—This section applies not only to gratuitous advice or counsel against enlistment to persons eligible for military service but also to the utterance of words which do not advise or counsel but which are apt to dissuade them and are uttered with that intent. *U. S. v. Nearing*, (S. D. N. Y. 1918) 252 Fed. 223.

"Support or favor."—Intent is a necessary element of the offense of supporting or favoring the cause of any country with which the United States is at war, the words "support or favor" as used in this section importing willfulness and intent. *U. S. v. Schulze*, (S. D. Cal. 1918) 253 Fed. 377.

"Obstructing recruiting or enlistment service"—*Selective Draft Act*.—An obstruction of the Selective Service Act (see vol. IX, p. 1136) is within the prohibition of this section. *U. S. v. Prieth*, (D. C. N. J. 1918) 251 Fed. 946.

A conspiracy to obstruct the draft is included in the words "obstruct the recruiting or enlistment service." *Schenck v. U. S.*, (1919) 249 U. S. 47, 39 S. Ct. 247, 63 U. S. (L. ed.) —, wherein the court said: "Recruiting heretofore usually having been accomplished by getting volunteers the word is apt to call up that method only in our minds. But recruiting is gaining fresh supplies for the forces, as well by draft as otherwise. It is put as an alternative to enlistment or voluntary enrollment in this act. The fact that the Act of 1917 was enlarged by the amending Act of May 16, 1918, c. 75, 40 Stat. 553, of course, does not affect the present indictment and would not, even if the former act had been repealed. Rev. Stats. § 13."

A person may be convicted of a conspiracy to obstruct recruiting by words of persuasion circulated in newspapers. *Frohwerk v. U. S.*, (1919) 249 U. S. 204, 39 S. Ct. 249, 63 U. S. (L. ed.) —, wherein the court said: "It is said that the first count is bad because it does not allege the means by which the conspiracy was to be carried out. But a conspiracy to obstruct recruiting would be criminal even if no means were agreed upon specifically by which to accomplish the intent. It is enough if the parties agreed to set to work for that common purpose. That purpose could be accomplished or aided by persuasion as well as by false statements, and there was no need to allege that false reports were intended to be made or made."

It is argued that there is no sufficient allegation of intent, but intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it. The overt acts are alleged to have been done to effect the object of the conspiracy and that is sufficient under § 4 of the Act of 1917. Countenance we believe has been given by some courts to the notion that a single count in an indictment for conspiring to commit two offenses is bad for duplicity. This court has given it none. *Buckeye Powder Co. v. DuPont Powder Co.*, (1919) 248 U. S. 55, 60, 61, [39 S. Ct. 38, 63 U. S. (L. ed.) —]; *Joplin Mercantile Co. v. U. S.*, (1915) 236 U. S. 531, 548 [35 S. Ct. 291, 59 U. S. (L. ed.) 705, 713]. The conspiracy is the crime, and that is one, however diverse its objects."

A conspiracy to obstruct the operation of the Selective Service Act exists although the alleged conspiracy was formed after the day originally set for registration, June 5, 1917. *U. S. v. Prieth*, (D. C. N. J. 1918) 251 Fed. 946.

**"Obstruct."**—The word "obstruct" as used in this section should be given a broad meaning in order to carry out the undoubted intention of Congress and should be held to mean to hinder, impede, embarrass, and retard, in whole or in part, the recruiting and enlistment service of the United States. *Doe v. U. S.*, (C. C. A. 8th Cir. 1918) 253 Fed. 903, 166 C. C. A. 3.

As here used "obstruct" does not mean that same physical force, obstacle, or impediment must be employed. Thus, a speech by the defendant in which he made the statement that persons enlisting in the army for service in France would be used for fertilizer, is an obstruction to the recruiting or enlistment service in violation of this section. *O'Hare v. U. S.*, (C. C. A. 8th Cir. 1918) 253 Fed. 538, 165 C. C. A. 208.

In *Deason v. U. S.*, (C. C. A. 5th Cir. 1918) 254 Fed. 259, 165 C. C. A. 547, it was held that the word "obstruct" was used in this section not as the equivalent of "prevent," but rather as meaning "to make difficult," and that there was a violation of this section if the defendant's words or acts rendered enlistments more difficult although no actual prevention of enlistments was shown. The court said: "The exact contention of the defendant's counsel is that the statutory word 'obstruct' is equivalent to the word 'prevent,' and that success in the sense of an actual prevention of the performance of duty is essential to be proven before a conviction can be had. We do not agree with this contention. It is true that the statute does not punish an attempt to obstruct, and the indictment does not charge an attempt to obstruct. Yet there may be an unsuccessful obstruction that is more than an attempt. We construe 'obstruct,' not as the equivalent of 'prevent,' but rather as the equivalent of 'to make difficult' or 'to present obstacles to the accomplishment of a thing.' The obstacles may

have failed to prevent accomplishment, but if they served to make accomplishment more difficult, either in the instant case for the members of the local exemption board against whom the threats were made, or in the future performance of their duties as such members, then we think the service was obstructed, within the meaning of the statute, to the injury of the service or of the United States, though the local board in the case of defendant overcame the obstruction and performed their duty by refusing to reclass him on his demand. That a threat of the nature indicated by the record would make it more difficult for the members of the local board to do their duty, both in defendant's case and in classifying future drafted men, is obvious. Presenting such an obstacle to the performance of the duty of the board in classifying under the draft act, we do not think the government was required to go further, and prove that the obstruction prevailed to the extent of causing a miscarriage in a particular case. It was enough that it proved that the natural and inevitable tendency of such threats was to make it more difficult for the members of the board who were threatened to do their duty impartially than it would otherwise have been."

To same effect, see *U. S. v. Nearing*, (S. D. N. Y. 1918) 252 Fed. 223.

*The measure of liability* for obstructing the enlistment service ought not to be larger than for causing insubordination. *U. S. v. Nearing*, (S. D. N. Y. 1918) 252 Fed. 223.

*Mere use of abusive language regarding the United States and the President* at a place where no recruiting or enlistment service is in progress or in contemplation, is not a violation of this section. *U. S. v. Mayer*, (W. D. Ky. 1918) 252 Fed. 868.

*Acts which tend to hinder* or make it more difficult for the government to recruit or enlist men into the service, constitute violations of this section even though they do not actually prevent enlistments or recruiting. *Rhuberg v. U. S.*, (C. C. A. 9th Cir. 1919) 255 Fed. 865. To same effect see *Coldwell v. U. S.*, (C. C. A. 1st Cir. 1919) 256 Fed. 805, 168 C. C. A. 151.

*Grievance expressed over timber rights.*—A person is not guilty of willfully obstructing the recruiting and enlistment service of the United States, or of willfully causing and attempting to cause disloyalty, insubordination, and mutiny in the military forces of the United States in violation of this section, because he uses coarse and obscene language in a conversation with forest officers concerning a grievance over a timber right in forest reservation, if he says nothing regarding enlistments and does not know that the officers are engaged in recruiting. *Doll v. U. S.*, (C. C. A. 8th Cir. 1918) 253 Fed. 646, 165 C. C. A. 272.

*Obstructing enlistments and causing insubordination.*—A person who states in the presence of a soldier of the national army and others, that he will never go into the



United States army, that the Kaiser can defeat England and France and that he will soon come to the United States and that every one will be forced to acknowledge him victorious, is guilty of violating this section, as such statements might obstruct the enlistment and recruiting service of the United States and might also cause insubordination in the military and naval forces. *U. S. v. Dembowski*, (E. D. Mich. 1918) 252 Fed. 894.

**Causing insubordination.**—In so far as the statute forbids causing insubordination, it forbids incitement to the commission of crime, since all insubordination is a crime committed by the independent will of others. It must therefore be taken as forbidding those acts which would make the authors accessories before the fact to insubordination, disloyalty, refusal of duty, and the like. Indeed, it is doubtful whether that clause adds to the criminal responsibility at common law of those who should cause or attempt to cause others to commit such crimes. *U. S. v. Nearing*, (S. D. N. Y. 1918) 252 Fed. 223.

**Attempting to cause insubordination and refusal of military duty.**—In *U. S. v. Boutin*, (N. D. N. Y. 1918) 251 Fed. 313, the indictment charged the defendant with circulating a pamphlet which, among other things, contained the following statement:

"We must teach the whole world that human beings are not here to knife one another for the sake of personal interest or to carry a point of ambition. We are here for a short visit, and should treat each other like brother and sister, whether we are born on this side or the other side of the iron post, or on the other side of a great body of water. We should all respect and help one another. War is pure ignorance. After a few years we die, and never, never return. It shows on its face that we are worse than the savage. He is the one forced to shoulder the gun, to kill and be killed, and just as long as the fancy class teaches that it is right, that it is patriotic to fight (murder) for your country, just so long will war reign."

In overruling a demurrer to the indictment, *Ray*, District Judge, said:

"It is sufficient to say that the teachings of the pamphlet tend to suppress patriotic feelings, and to cause unrest and insubordination among those who, under the Selective Draft Law, are called into the service, or made subject to military service, and that the teachings of this pamphlet, if read, also tend to incite and cause refusal of duty on the part of those subject to military duty and service under the Selective Draft Law (Act May 18, 1917, c. 15). The teachings of this pamphlet may be repudiated and rejected by a majority of the readers, but that fact makes it none the less pernicious and of a nature calculated to cause or bring about a refusal of duty on the part of those chosen for military duty and subject to military duty under the Selective Draft Act. Such sentiments, inculcated into the minds of those drafted into the service of the United States, tend to de-

stroy military ardor and inclination to cheerfully perform military duty. It is for a jury to say whether or not the statements and teachings of the pamphlet will or will not have that effect, and whether or not the teachings of the pamphlet were intended by the writer thereof to have that effect. This pamphlet plainly teaches, or attempts to teach, that fighting for your country, to maintain its rights, is the equivalent of murder. By section 273 of the United States Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1143) 'murder' is defined thus: 'Murder is the unlawful killing of a human being with malice aforethought.' This document teaches, and was intended to teach, if the writer meant what he said, that the one who is called to the colors and goes into the battle line and does his duty there is guilty of the unlawful killing, or engaged in the unlawful killing or attempt to kill, his fellows with malice aforethought. This is not only a false and a misleading statement, but one well calculated to promote the success of the enemies of the United States, and cause or bring about a refusal to perform duty in the military and naval forces of the United States. The teaching of the pamphlet is equivalent to stating that the United States in prosecuting this war against the German Empire is engaged in the commission of, or attempt to commit, numerous murders, and that all men in the military forces of the United States, who go on the fighting line and do their duty, are engaged in an attempt to commit murder. Does not this tend to cause insubordination and refusal of duty? And may not a jury find that the one who promulgates such a doctrine is attempting to cause refusal of duty in the military and naval forces of the United States?"

Men between the ages of 18 and 45 are not by virtue of that fact alone made a part of the military or naval forces of the United States within the meaning of this section, and the use in their presence of abusive language regarding the United States and the President is not punishable hereunder as an attempt to cause insubordination in such forces. *U. S. v. Mayer*, (W. D. Ky. 1918) 252 Fed. 868.

**Newspaper articles.**—The publication and circulation of a newspaper containing matter calculated and intended to induce persons available and eligible for enlistment and recruiting in the military forces to fail and refuse to enlist for service therein, and to induce persons liable to military service pursuant to the Selective Service Act to refuse to submit to registration and draft for service in the military forces, is a violation of this section. *U. S. v. Prieth*, (D. C. N. J. 1918) 251 Fed. 946, wherein it was held that the section is not confined to such obstructions as are in the nature of a tort, directed against the persons actually engaged in the recruiting or enlistment service or the service itself.

**Conspiracy to cause insubordination.—Rules governing.**—In a prosecution under

this section for conspiracy to cause insubordination, the same rules govern as in an attempt to obstruct enlistments, and the results are immaterial if the words used are likely to cause insubordination and are uttered with that intent. *U. S. v. Eastman*, (S. D. N. Y. 1918) 252 Fed. 232.

*Advice or counsel.*—In a prosecution under this section for conspiracy to cause insubordination and obstruct the enlistment service, words which do not themselves amount to advice or counsel to violate the law, nevertheless make their author criminally responsible if they are in fact the cause of the forbidden results, and if they are uttered or written with the specific intent of producing those results. *U. S. v. Nearing*, (S. D. N. Y. 1918) 252 Fed. 223.

*Failure to purchase Liberty Bonds.*—A citizen may not be prosecuted under this section for failure to purchase Liberty Loan bonds and thrift stamps and for a failure to contribute to Red Cross drives, provided he does not attempt to persuade others to follow his example. Likewise, he is not liable to prosecution under this section for giving his reasons for not subscribing for Liberty Loan bonds and thrift stamps and contributing to Red Cross drives, when requested to do so in the privacy of his own home and in the presence of nobody except the members of a duly authorized committee, especially when the reasons are mere matters of opinion apparently honestly held. *U. S. v. Pape*, (S. D. Ill. 1918) 253 Fed. 270.

*Making false reports or statements.*—In *Kirchner v. U. S.*, (C. C. A. 4th Cir. 1918), 255 Fed. 301, 166 C. C. A. 471, the court, in answering the contention that false reports or statements in order to be an offense under this section must be made to, or within the hearing of, persons who are, or who are liable to become, members of the military or naval forces, said: "The success of the military and naval forces is aided or hampered in large measure by the spirit of the civilian population. Shipbuilders, munition makers, coal miners, lumber producers, buyers and sellers of Liberty Bonds and War Savings Stamps, women and girls making Red Cross supplies, merely begin the list of civilians whose patriotic ardor is almost as essential to the success of our military and naval forces as is the spirit of the men composing these forces. Excepting only those who are too unintelligent to understand, there is no class of our population on whom some false statements may not have a pernicious effect in the direction of restraining patriotic endeavor. In drawing the indictment it was unnecessary for the pleader to negative the fact that the statements alleged against the defendant were made only in the hearing of those too unintelligent to understand them. The return of the indictment necessarily imported that the defendant's statements were made to some person who understood them and repeated them before the grand jury. It follows that, unless the false statement be made only to children of very tender years

or to imbeciles, the intent to interfere with the operation or success of the military or naval forces may exist. The crime denounced is not that of interfering with the success of our forces. If the false statement is willfully made with the intent denounced, the offense is complete; and if the effect of the statement may reasonably be to chill the ardor or restrain the efforts of any of those who hear the statement, the proscribed intent may exist. The statute does not discriminate between an intent to indirectly interfere with the operation or success of the military forces; and hence we have no reason for making such distinction."

*Publication of false statements in book.*—Where a book contains false statements to the effect that our entry into the war was for the purpose of saving England from defeat and to aid capitalists and munition manufacturers, and is evidently intended to arouse dissatisfaction with the war and to induce readers to oppose its continuance, its publication constitutes a violation of this section, as being the willful making of false statements with intent to interfere with military operations, to cause insubordination and to obstruct the recruiting or enlistment service. *U. S. v. Binder*, (E. D. N. Y. 1918) 253 Fed. 978.

The possession of an I. W. W. certificate of membership by one accused of using abusive language regarding the United States and the President, without any evidence being introduced regarding the real aims and objects of that organization, does not support a charge of attempting to obstruct recruiting and enlistments and to cause insubordination in violation of this section. *U. S. v. Mayer*, (W. D. Ky. 1918) 252 Fed. 868.

*Indictment—Duplicity.*—Under this section the making of false reports with intent to interfere with military operations, the willful causing or attempting to cause insubordination, and the obstruction of the recruiting or enlistment services, are three separate offenses which cannot be joined in one count of an indictment as a single offense committed by different acts. But an indictment under this section is not duplicitous because it charged in one count an attempt to cause insubordination and the causing of insubordination, as they are merely different modes of causing one offense. *U. S. v. Dembowaki*, (E. D. Mich. 1918) 252 Fed. 894.

*Following language of section.*—An indictment for conveying false reports is insufficient where it merely follows the language of the section, which is general in its nature, and does not inform the accused what the reports were, wherein they were false, nor to whom they were made. *Foster v. U. S.*, (1918) 253 Fed. 481.

But an indictment for willfully obstructing the recruiting and enlistment service, is sufficient where it follows the language of the statute in charging the offense. *Doe v. U. S.*, (C. C. A. 8th Cir. 1918) 253 Fed. 903, 166 C. C. A. 3.

An indictment charging the defendant with having made false reports with intent to interfere with the operation of the military and naval forces, is sufficient where it merely follows the words of this section. *Collins v. U. S.*, (C. C. A. 9th Cir. 1918) 253 Fed. 609, 165 C. C. A. 637.

*Effect of defendant's utterances.*—An indictment for a violation of this section which charges the defendant with making a speech to a public meeting with intent to cause insubordination in the military or naval forces of the United States, is sufficient although it does not allege that the utterances "caused any injury to the military or naval service and to the United States." *Coldwell v. U. S.*, (C. C. A. 1st Cir. 1919) 256 Fed. 805, 168 C. C. A. 151.

*Obstructing recruiting by public speech.*—An indictment charging that defendant obstructed and attempted to obstruct the military recruiting and enlistment service of the United States, and to that end and with that intent delivered to an assembly of people a public speech therein set forth, is sufficient in form to charge an offense under this section forbidding obstructions or attempts to obstruct such recruiting or enlistment service. *Debs v. U. S.* (1919) 249 U. S. 211, 39 S. Ct. 252, 63 U. S. (L. ed.) —.

*Obstructing recruiting by public speech.*—An indictment for obstructing the recruiting and enlistment service is sufficient, where it charges that the defendant made a public speech in which, with intent to obstruct the recruiting and enlistment service, he stated that persons enlisting in the army for service in France would be used for fertilizer. *O'Hare v. U. S.*, (C. C. A. 8th Cir. 1918) 253 Fed. 538, 165 C. C. A. 208.

*Distribution of pamphlets.*—A count of an indictment which charged that the defendant unlawfully, willfully, and feloniously made and distributed to a person named and others false reports and false statements through a pamphlet called "Pure Common Sense," and alleged that statements quoted from the pamphlet were false, and that they were willfully made and conveyed, and that such false statements and reports were made and conveyed with intent to interfere with the operation and success of the military and naval forces of the United States and to promote the success of its enemies, was held good on demurrer. *U. S. v. Boutin*, (N. D. N. Y. 1918) 251 Fed. 313, wherein the court said: "If the statements are false, and were made with the intent charged, and were made and conveyed as charged, then the crime was complete. It is immaterial what the court may think as to whether such statements charged in the indictment were in fact false, as the court cannot act on its own information or opinion, but must act on the allegations of the indictment itself."

*Making false statements.*—An indictment for making false statements in violation of this section should show that the language was willfully uttered, that it was of such character as to cause some of the results de-

nounced by this section, and that it was uttered on an occasion such that a reasonable mind could say that it might produce one or more of the results mentioned in this section. Thus, an indictment which alleges that the defendant willfully stated that "this is a rich man's war and it is all a damn graft and swindle," but which fails to set forth in any manner the circumstances under which the language was used, is insufficient. *U. S. v. Schutte*, (D. C. N. D. 1918) 252 Fed. 212. Regarding the defect in the indictment, the court said: "So far as the indictment discloses, it may have been spoken to persons who have and could have no relationship to the military or naval forces, or the recruiting and enlistment service of the United States. If it were spoken under such circumstances, it would not be a violation of the statute. Suppose the language had been spoken to men all of whom were past 40 years of age, or to a woman's club; would any one claim that the purpose of the speaker was to produce the results forbidden by the statute? It is elementary criminal law that when language does not constitute a crime if uttered under some circumstances, and does constitute a crime if uttered under other circumstances, it is incumbent upon the government to specify in the indictment the circumstances under which it was uttered sufficiently to show that its utterance would probably produce the forbidden result. This cannot be left to speculation or inference, but must be clearly and directly charged. The circumstances are an element of the crime. It is not enough to charge that the language was uttered with intent to violate the law. That would be a mere legal conclusion, when proper pleading requires a statement of facts. The question is not for the pleader, but for the court, and the facts must be set forth, so that the court can say whether or not they constitute the crime."

*Conspiracy.*—An indictment for a conspiracy to violate this section by causing insubordination and obstructing the enlistment service, need not allege the means by which the conspiracy was attempted to be put in effect. Where, however, it is alleged that pamphlets were to be distributed among persons subject to military service and persons already in the service as a means of carrying out the conspiracy, the individuals need not be named. *U. S. v. Nearing*, (S. D. N. Y. 1918) 252 Fed. 223.

In *U. S. v. Prieth*, (D. C. N. J. 1918) 251 Fed. 946, it was contended that an indictment was defective because it did not allege that the articles which the defendants conspired to publish, or those which they did publish, in furtherance of the conspiracy, were intended to be publications which the defendants might not lawfully publish, or that they were untrue in fact. The court said: "But this contention completely ignores the allegations of the indictment that the defendants willfully, unlawfully, and feloniously conspired to obstruct the recruiting and enlistment service . . . by newspaper articles

... calculated and intended by the defendants to induce persons available not to enlist,' etc. Without attempting to discourse upon the limitations of the 'freedom of the press,' it is sufficient, I think, to observe that the before-quoted words stamp the defendants' object as a felonious one, and make their conspiracy, under the statute, a criminal act. The propaganda such as these defendants, as would appear from the articles annexed to the indictment, were carrying on, ordinarily, was intended to be within the law and beyond the pale of punishment, as recent experience has taught. The test is, however, not whether the defendants thought that their publications were lawful or true, but whether they intended to accomplish a particular object, namely, the obstruction of enlistments and recruiting."

An indictment for violating this section by the publication and circulation of newspaper articles tending to induce persons not to enlist and to fail to register under the Selective Service Act, is not defective because it neither sets forth the names of the persons whom the conspiracy was designed to induce not to enlist and to refuse to submit to the draft, nor alleges that their names were unknown to the grand jury. *U. S. v. Prieth*, (D. C. N. J. 1918) 251 Fed. 946, wherein the court said: "Those whom the conspirators contemplated would be induced not to enlist were all eligible persons, to whose attention the newspaper articles should come, either directly or indirectly, and who would be affected by what was contained therein. Manifestly, in the very nature of things, the names of such persons would be unknown, either to the grand jurors or to the defendants. An allegation, therefore, that their names were unknown to the grand jurors, would have been idle and useless, so far as acquainting the defendants with the nature and cause of the accusation against them. That had already been sufficiently described. All that was required was that the indictment should acquaint the defendants with the nature and cause of the accusation, set forth the charge with sufficient definiteness to enable them to make their defense and to avail themselves of the record of conviction or acquittal, for their protection against further prosecution, and to inform the court of the facts charged, so that it might decide as to their sufficiency, in law, to support a conviction, if one should be had, and that the elements of the offense should be set forth with reasonable particularity of time, place, and circumstance."

*Attempting to cause insubordination.*—Although in an indictment under this section for attempting to cause insubordination it is usually necessary to allege that the words were uttered under such circumstances that they were in the course of events likely to reach members of the military forces, an allegation that the words were contained in a magazine distributed throughout New York and the United States is sufficient. *U. S. v. Eastman*, (S. D. N. Y. 1918) 252 Fed. 232.

*Amendment of indictment.*—An indictment which is duplicitous because it charges in one count three of the offenses denounced by this section, may not be amended by allowing the United States attorney to elect which offense he will prosecute and to nol. pros. the others, as such an election would amount to an amendment of the indictment in violation of the Fifth Amendment to the Constitution. *U. S. v. Dembowski*, (E. D. Mich. 1918) 252 Fed. 894.

*Defenses.*—In a prosecution for making false reports aiding the enemy, the fact that the motive of the defendants in being parties to the publication of such reports was to promote the interests of an organization with which they were connected, rather than disloyalty, is not a defense. *U. S. v. Schafer*, (E. D. Pa. 1918) 254 Fed. 135.

*Evidence.*—The records of certain convictions for violating the *Selective Draft and Espionage Acts* are admissible on the trial of another person for violating the latter Act by obstructing the military recruiting or enlistment service by the delivery of a public speech in which he attacked such convictions, since such evidence tended to show what he was talking about, and to explain the true import of his expressions of sympathy for the defendants, and to throw light on the intent of his speech. *Debs v. U. S.*, (1919) 249 U. S. 211, 39 S. Ct. 252, 63 U. S. (L. ed.) —.

*An anti-war proclamation*, which the defendant in an indictment charging the obstruction of the military recruiting or enlistment service, contrary to the section by delivering a public speech, had, shortly before his speech, approved in spirit and substance, such proclamation recommending "continuous, active, and public opposition to the war through demonstrations, mass petitions, and all other means within our power," is admissible against him as evidence that if in his speech he used words tending to obstruct the military recruiting or enlistment service, he meant that they should have that effect. *Debs v. U. S.*, (1919) 249 U. S. 211, 39 S. Ct. 252, 63 U. S. (L. ed.) —.

*Statements made prior to Act.*—In a prosecution for obstructing enlistments, statements made by the defendant prior to the passage of this Act are admissible in evidence as showing the intent with which he made statements after the passage of the Act and which are relied upon as a ground for conviction. *Deason v. U. S.*, (C. C. A. 5th Cir. 1918) 254 Fed. 269, 165 C. C. A. 547.

Statements made by the defendant, prior to the entry of the United States into the war against Germany, which tend to show his attitude toward Germany and limited to that purpose, are admissible as evidence in a prosecution under this section for making statements tending to obstruct recruiting or enlistments. *Rhuberg v. U. S.*, (C. C. A. 9th Cir. 1919) 252 Fed. 865.

*Threats against President.*—In a prosecution under this section for making false reports and statements with intent to interfere

with the success of the military and naval forces of the United States and for doing other acts in violation thereof, evidence that the accused made threats against the President, not connected with the offenses for which he was being tried, is inadmissible. *Hall v. U. S.*, (C. C. A. 4th Cir. 1919) 256 Fed. 748, 168 C. C. A. 94.

*Circulars opposing conscription.*—In a prosecution for making statements with intent to cause insubordination and to obstruct the recruiting and enlistment service, circulars opposing conscription alleged to have been distributed by the defendant are admissible in evidence as showing the intent with which the defendant made the statements. *Coldwell v. U. S.*, (C. C. A. 1st Cir. 1919) 256 Fed. 805, 168 C. C. A. 151.

*Conspiracy to violate section.*—On the trial of an indictment charging conspiracy to violate this section by sending documents through the mails tending to obstruct the draft such documents if seized are admissible in evidence against one of the defendants who was general secretary of Socialist headquarters where the documents were obtained, it appearing that he was largely instrumental in sending out the documents. *Schenck v. U. S.*, (1919) 249 U. S. 47, 39 S. Ct. 247, 63 U. S. (L. ed.) —, wherein the court said: "It is argued that the evidence, if admissible, was not sufficient to prove that the defendant Schenck was concerned in sending the documents. According to the testimony Schenck said he was general secretary of the Socialist party and had charge of the Socialist headquarters from which the documents were sent. He identified a book found there as the minutes of the executive committee of the party. The book showed a resolution of August 13, 1917, that 15,000 leaflets should be printed on the other side of one of them in use, to be mailed to men who had passed exemption boards, for distribution. Schenck personally attended to the printing. On August 20 the general secretary's report said: 'Obtained new leaflets from printer and started work addressing envelopes,' etc.; and there was a resolve that Comrade Schenck be allowed \$125 for sending leaflets through the mail. He said that he had about fifteen or sixteen thousand printed. There were files of the circular in question in the inner office which he said were printed on the other side of the one-sided circular and were there for distribution. Other copies were proved to have been sent through the mails to drafted men. Without going into confirmatory details that were proved, no reasonable man could doubt that the defendant Schenck was largely instrumental in sending the circulars about. . . . It is objected that the documentary evidence was not admissible because obtained upon a search warrant, valid so far as appears. The contrary is established. *Adams v. New York*, 192 U. S. 585; *Weeks v. United States*, 232 U. S. 383, 395, 396. The search warrant did not issue against the defendant but against the Socialist headquarters at 1326 Arch

street, and it would seem that the documents technically were not even in the defendants' possession. See *Johnson v. United States*, 228 U. S. 457. Notwithstanding some protest in argument the notion that evidence even directly proceeding from the defendant in a criminal proceeding is excluded in all cases by the Fifth Amendment is plainly unsound. *Holt v. United States*, 218 U. S. 245, 252, 253."

*Variance.*—Evidence that the defendants, publishers of a newspaper, received no dispatches from news agencies, but that before publishing dispatches taken from other papers they changed them in such a manner as to give aid to the enemy, sufficiently supports an indictment under this section for making false reports by changing original news dispatches before publication. *U. S. v. Schafer*, (E. D. Pa. 1918) 254 Fed. 135.

An indictment under this section for obstruction of recruiting and enlistments, which alleges that the defendant made certain statements in the presence of two named persons, is supported by proof that the statements were made in the presence of one of them. *Rhuberg v. U. S.*, (C. C. A. 9th Cir. 1919) 255 Fed. 865.

Evidence of statements by the accused, similar in nature to those set out in an indictment for making false statements or reports in violation of this section, is admissible. *Kirchner v. U. S.*, (C. C. A. 4th Cir. 1918) 255 Fed. 301, 166 C. C. A. 471.

*Instructions.*—In a prosecution for a violation of this section by making a speech to a public meeting with intent to cause insubordination in the military forces and to obstruct recruiting and enlistments, the court may properly submit to the jury the question of the likelihood of the utterances to produce insubordination or cause obstruction to recruiting. *Coldwell v. U. S.*, (C. C. A. 1st Cir. 1919) 256 Fed. 805, 168 C. C. A. 151.

*Questions for the jury.*—In a prosecution under this section for making false statements, it is a question of fact for the jury to determine whether the language used by the defendant did produce any of the results forbidden herein. *U. S. v. Schutte*, (D. C. N. D. 1918) 252 Fed. 212.

In a prosecution under this section for statements alleged to have been made by the defendant in a speech to a public meeting, whether the statements constituted, under the circumstances, an attempt "to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States" or an obstruction of "the recruiting or enlistment service of the United States to the injury of the service or of the United States," are questions for the jury. *Coldwell v. U. S.*, (C. C. A. 1st Cir. 1919) 256 Fed. 805, 168 C. C. A. 151.

## 1918 Supp., p. 124, sec. 4.

See preceding note for cases relating to conspiracy to violate provisions of the Act.

**1918 Supp., p. 128, sec. 1.**

**Review of issuance.**—A commissioner's issuance of a search warrant under the provisions of this title may be reviewed on motion by the court. *In re Rosenwasser*, (E. D. N. Y. 1918) 254 Fed. 171, wherein it was said: "The various sections giving the commissioner the power under the warrant to determine whether probable cause actually exists, and to pass upon the materiality of the articles seized, do not restrict the right of the court to consider whether the record shows a basis for the entire proceeding. If there was no probable cause for the issuance of the original search warrant, the court can still set aside the entire action."

**1918 Supp., p. 128, sec. 2. [Grounds for issuance.]**

**In general.**—This Act "contemplates the issuance of search warrants only when felonies have been committed that are presently prosecutable within the United States." *Veeder v. U. S.*, (C. C. A. 7th Cir. 1918) 252 Fed. 414, 164 C. C. A. 338.

**1918 Supp., p. 129, sec. 5.**

**Contents of affidavit.**—"Probable cause must be shown from the facts alleged. It is not sufficient to aver nothing beyond the belief of an individual that such facts could be set forth. The conclusion from the averments of facts must be that of the magistrate, and not the opinion of the affiant. *United States v. Tureaud*, (C. C.) 20 Fed. 621; *United States v. Baumert*, (D. C.) 179 Fed. 735, and cases therein cited. But the averments of the facts need not be by an eyewitness. Allegations on information can be stated, if the facts so referred to and the source of the information are stated. The expression of belief in those facts is customary and required, but does not of itself constitute an allegation which will take the place of the statement of the alleged facts themselves. *Beavers v. Henkel*, 194 U. S. 73, 24 S. Ct. 605, 48 L. Ed. 882. But the evidence need not be given in detail, nor need the allegations be made by all the parties who will be called to prove them at the hearing. A direct affidavit that facts exist from which probable cause is inferable is sufficient. So is a statement that information as to the facts has been obtained from named sources, if the facts are recited. *Beavers v. Henkel*, *supra*, 194 U. S. at page 86, 24 Sup. Ct. 605, 48 L. Ed. 882." *In re Rosenwasser*, (E. D. N. Y. 1918) 254 Fed. 171.

In determining whether probable cause exists for the issuance of a search warrant, the commissioner may consider not only the affidavit upon which the warrant is requested, but also the complaint and affidavit upon which the warrant for arrest for the crime charged is sought. *In re Rosenwasser*, (E. D. N. Y. 1918) 254 Fed. 171.

**Description of books sought.**—Affidavits for search warrants under this Act to seize certain books alleged to have been used in the commission of a felony, are insufficient where they allege mere conclusions regarding the commission of the offense and do not sufficiently describe the books sought to be seized. *In re Tri-State Coal, etc., Co.*, (W. D. Pa. 1918) 253 Fed. 605.

**Materiality of documents sought.**—The affidavit need not set forth the entire details for exactly passing upon the materiality of every document which the search warrant may properly produce. General allegations showing materiality to the issue would seem to be sufficiently specific. *In re Rosenwasser*, (E. D. N. Y. 1918) 254 Fed. 171.

**1918 Supp., p. 130, sec. 13.**

**Corporation records may be taken under a search warrant even though they may be evidence against the corporation and against individual defendants arrested at the time of the execution of the warrant.** *In re Rosenwasser*, (E. D. N. Y. 1918) 254 Fed. 171.

**1918 Supp., p. 132, sec. 1.**

**Use of mails to obstruct recruiting and enlistment service.**—In *Shaffer v. U. S.*, (C. C. A. 9th Cir. 1919) 255 Fed. 886, it was held that the use of the mails by the defendant, when the United States was at war, to distribute a book in which it was stated that patriotism was identical with murder and the spirit of the devil, that the war was wrong and its prosecution a crime, was a violation of this section. Elaborating on the question of what may be considered such an obstruction, the court said: "We think it should not be said, as a matter of law, that the reasonable and natural effect of the language quoted from the publication was not to obstruct—that is, not to impede, retard, or render more difficult—the recruiting or enlistment service, and thus to injure the service of the United States. Printed matter may tend to obstruct the recruiting and enlistment service, even if it contains no mention of recruiting or enlistment, and no reference to the military service of the United States. It is sufficient if the words used and disseminated are adapted to produce the result condemned by the statute. The service may be obstructed by attacking the justice of the cause for which the war is waged, and by undermining the spirit of loyalty which inspires men to enlist or to register for conscription in the service of their country. The greatest inspiration for entering into such service is patriotism, the love of country. To teach that patriotism is murder and the spirit of the devil, and that the war against Germany was wrong and its prosecution a crime, is to weaken patriotism and the purpose to enlist or to render military service in the war."

## 1918 Supp., p. 135, sec. 3.

"Attempt."—One who willfully advises, solicits, and attempts to influence another to

commit a violation of this section, may be convicted for an attempt. *U. S. v. De Bolt*, (S. D. Ohio 1918) 253 Fed. 78.

## CUSTOMS DUTIES

## Vol. II, p. 730, par. 17. [First ed., 1914 Supp., p. 60.]

A compound or combination, in the general understanding, is necessarily something composed of more than one component material, and these expressions in this paragraph are not applicable to a natural product. *Monticelli Bros. v. U. S.*, (1917) 8 U. S. Cust. App. 21.

The expression "medicinal compounds, combinations, and all similar articles" means, first, strictly medical compounds and combinations, and, second, compounds or combinations similar thereto in that, while not strictly medical because possessing properties which adapt them to other uses, are nevertheless susceptible of medicinal uses and, in the form and condition imported, are specially designed therefor and so chiefly used. *Monticelli Bros. v. U. S.*, (1917) 8 U. S. Cust. App. 21.

"Medicinal."—The use of the word "medicinal" in this paragraph, with reference to compounds or combinations, requires that the compound or combination should have healing or curative properties, and probably that it should be commonly so regarded and used. *Monticelli Bros. v. U. S.*, (1917) 8 U. S. Cust. App. 21.

The expression "all similar articles," used in this paragraph, with reference to compounds or combinations, applies only to a compound, combination, mixture, or preparation composed of more than one substance or material. *Monticelli Bros. v. U. S.*, (1917) 8 U. S. Cust. App. 21.

## Vol. II, p. 734, par. 36. [First ed., 1914 Supp., p. 62.]

**Desiccated chicle.**—Chicle, the sap having been drawn from the tree and coagulated by artificial heat into hard chunks in Mexico, shipped to Canada and there ground and dried, the grinding and drying bearing no relation to transportation and being a process in the manufacture of chewing gum, known commercially as desiccated chicle, is dutiable under this paragraph, as chicle "advanced in value by drying, straining, or any other process or treatment whatever beyond that essential to the proper packing," and not as "chicle, crude." *Sheldon & Co. v. U. S.*, (1917) 8 U. S. Cust. App. 9, *distinguishing U. S. v. Sheldon & Co.*, (1912) 2 U. S. Cust. App. 485.

## Vol. II, p. 735, par. 44. [First ed., 1914 Supp., p. 62.]

"Oils, rendered"—"Oils, distilled and essential."—The expressions "Oils, rendered," in this paragraph, and "Oils, distilled and essential," in paragraph 46, do not exclude all distilled and essential oils from this paragraph and all rendered oils from paragraph 46. *Stone & Downer Co. v. U. S.*, (1918) 8 U. S. Cust. App. 368.

"Oleine"—"Dressing oil."—Heavy oils, derived from a wool-grease base by distillation, invoiced as "oleine," "dressing oil," "soluble oleine," and "leather dressing oil," are dutiable, not under paragraph 46, as distilled oils, but under this paragraph, as animal oils not specially provided for. *Stone & Downer Co. v. U. S.*, (1918) 8 U. S. Cust. App. 368.

**Adeps lanae anhydrous**—Lanolin.—Scientific authorities, dictionaries, and encyclopedias do not class *adeps lanae anhydrous* as lanolin. Presumptively commercial usage is the same, and, in the absence of any showing of commercial usage to the contrary, the board's classification of it as "wool grease . . . refined or improved in value or condition," and not as "lanolin," under this paragraph, will be affirmed. *U. S. v. Merck*, (1917) 8 U. S. Cust. App. 172.

## Vol. II, p. 735, par. 45. [First ed., 1914 Supp., p. 62.]

Sweet almond oil and castor oil, in small bottles each containing not more than 3 to 4 ounces, are dutiable *eo nomine* under this paragraph, and not as "chemical and medicinal compounds, combinations, and all similar articles" under paragraph 17 of this Act. *Monticelli Bros. v. U. S.*, (1917) 8 U. S. Cust. App. 21.

**Linoleum cement.**—Merchandise invoiced as linoleum cement, to be used, after grinding and mixing with other ingredients, in the manufacture of lincrusta wall paper, is dutiable as oxidized linseed oil under this paragraph. *Germania Importing Co. v. U. S.*, (1917) 8 U. S. Cust. App. 219.

## Vol. II, p. 736, par. 46. [First ed., 1914 Supp., p. 63.]

**Acetone oil.**—A by-product obtained in the distillation of acetone from acetate of lime, known commercially as "acetone oil," but not

known commercially as an oil, shown not to be an oil, used in the same industries and for many of the same purposes as acetone, is a kind of acetone, and not a kind of oil. It is classifiable as acetone under this paragraph, and not as a distilled oil under paragraph 3. *McEnany v. U. S.*, (1918) 8 U. S. Cust. App. 329.

**Vol. II, p. 744, par. 83.** [First ed., 1914 Supp., p. 66.]

**Nonrefillable device for bottles.**—Where bottles of whisky are imported, fitted with nonrefillable devices to be used with the bottles during the consumption of the whisky to keep the bottles automatically closed, the devices are not nondutiable packing charges of the whisky but are correctly assessed with duty as parts of the bottles under this paragraph, which levies duty upon bottles. *Draz & Co. v. U. S.*, (1918) 8 U. S. Cust. App. 382.

**Vol. II, p. 745, par. 84.** [First ed., 1914 Supp., p. 67.]

**"Ornamented or decorated in any manner."**—The expression "ornamented or decorated in any manner" in this paragraph should not be construed to mean that an article, to be dutiable under the paragraph, must have been ornamented or decorated by a process different from that of its manufacture. Thus, thin glass bottles, having figures of sprays of leaves and fruits molded into the glass as a part of the manufacture of the bottles, are dutiable under this paragraph as "glass bottles . . . ornamented or decorated in any manner," and not under paragraph 83 as "plain green or colored, molded or processed . . . glass bottles." *Smith & Co. v. U. S.*, (1918) 8 U. S. Cust. App. 256.

**Vol. II, p. 749, par. 95.** [First ed., 1914 Supp., p. 68.]

**Brooches, pendants, etc., composed of paste.**—Brooches, pendants, bracelets, combs, hatpins, and hairpins, composed of metal and paste, paste chief value, are classifiable as manufactures in chief value of paste under this paragraph, and not as jewelry under paragraph 356. *Bloomington Bros. v. U. S.*, (1918) 8 U. S. Cust. App. 314.

**Vol. II, p. 752, par. 104.** [First ed., 1914 Supp., p. 69.]

**"Structural shapes."**—The expression "structural shapes," in this paragraph, refers to many other kinds of structures than buildings, ships, and similar erections. It was intended by Congress to import a capacity to sustain heavy weights or to resist great tension, or both. *Simon v. U. S.*, (1918) 8 U. S. Cust. App. 273.

**Steel channels—steel bars or grates.**—Steel channels for use in the construction of a large and ponderous brewery mash box filter are dutiable eo nomine under this paragraph.

Steel bars or grates for the same use are dutiable as "structural shapes" under the same paragraph. Cast-iron frames, plates, centerpieces, heads or ends, and posts for the same use are castings of iron "not made up into articles or finished machine parts" within paragraph 125. It is error to classify any of them as manufactures of metal, under paragraph 167. *Simon v. U. S.*, (1918) 8 U. S. Cust. App. 273.

**Vol. II, p. 756, par. 125.** [First ed., 1914 Supp., p. 71.]

**"Not made up into articles."**—The expression "not made up into articles," in this paragraph, does not contemplate finished castings which are to be used as materials for the manufacture of something else, but finished castings which have been advanced beyond the stage of materials and have become manufactures ready for ultimate use. *Simon v. U. S.*, (1918) 8 U. S. Cust. App. 273.

**Machine.**—A machine is a mechanical contrivance for utilizing, applying, or modifying energy or force, or for the transmission of motion. A brewery mash filter is not a machine within the meaning of the expression "finished machine parts" in this paragraph. *Simon v. U. S.*, (1918) 8 U. S. Cust. App. 273.

**Vol. II, p. 757, par. 127.** [First ed., 1914 Supp., p. 72.]

**Steel tubes.**—Seamless tubes of chromium steel, finished as tubes, but designed to be used, not as tubes but as material for the manufacture of other articles (such as "ball races" for ball bearings) are dutiable as "all other iron or steel tubes, finished, not specially provided for in this section" under this paragraph, and not as "all steels by whatever process made, containing alloys such as . . . chromium . . ." under paragraph 110. *Ball v. U. S.*, (1917) 8 U. S. Cust. App. 144.

**Vol. II, p. 759, par. 135.** [First ed., 1914 Supp., p. 73.]

**Needlecases.**—The definitions of needlecases found in the dictionaries involve the idea that a needlecase is a "case of metal or other material for the holding of needles," and this definition has been enlarged by this paragraph, for tariff purposes, so as to permit such a case to accommodate and its contents to include other articles. To be a needlecase within the paragraph, however, an article must be primarily a needlecase in the common acceptance of the term. *Cross Co. v. U. S.*, (1917) 8 U. S. Cust. App. 196.

**Vol. II, p. 761, par. 151.** [First ed., 1914 Supp., p. 74.]

**Combination collar and cuff buttons** composed of a metal shank with a hinged metal top, the back or base of the button being



faced with celluloid or bone, the component material of chief value being metal, are dutiable as metal buttons under this paragraph, and not as buttons not specially provided for under paragraph 339 of this Act. *U. S. v. Buss & Co.*, (1917) 8 U. S. Cust. App. 5.

**Vol. II, p. 761, par. 152.** [First ed., 1914 Supp., p. 74.]

**"Regulus of copper."**—A matte composed more largely of lead than copper in quantity, more largely of silver than either lead or copper in value, and not ready for the process of smelting to recover the copper content cannot properly be called a copper matte, and is not admissible free of duty as "regulus of copper," under paragraph 461, but is dutiable by similitude as a lead-bearing ore under this paragraph. It is not dutiable under paragraph 153 as "lead dross, lead bullion, etc." *U. S. v. Consol. Kansas City Smelting, etc., Co.*, (1917) 8 U. S. Cust. App. 226.

**Vol. II, p. 765, par. 167.** [First ed., 1914 Supp., p. 76.]

**Curling irons** are not classifiable as "nippers and pliers" under paragraph 160, Tariff Act of 1913, but as articles in chief value of metal under this paragraph. *Bloomington Bros. v. U. S.*, (1918) 8 U. S. Cust. App. 314.

**Surgical instruments with pivoted jaws.**—Surgical forceps and other instruments, with two lever handles working on a pivot, and with cutting, gripping, or punching jaws, are dutiable as manufactures of steel under this paragraph, and not as nippers and pliers under paragraph 166. *U. S. v. Interoccean Forwarding Co.*, (1917) 8 U. S. Cust. App. 155.

**Leather-cased desk sets.**—A desk set consisting of a long pair of shears and a letter opener in a sort of leather scabbard is dutiable as a nonenumerated metal article not plated with gold or silver, under this paragraph. *U. S. v. Glück*, (1917) 8 U. S. Cust. App. 12.

**Watch bracelets.**—Wristlets or straps for holding wrist watches are not articles worn on the person for comfort, convenience, or adornment, nor are they parts of any such article or like any such article made dutiable under paragraph 356, because so worn. They are separate entities just as belts are, and, being in chief value of metal, are classifiable under this paragraph as miscellaneous articles in chief value of metal. *U. S. v. Wittnauer Co.*, (1918) 8 U. S. Cust. App. 370; *U. S. v. Strasburger & Co.*, (1918) 8 U. S. Cust. App. 376.

**Trimnings in chief value of lame or bullions.**—Trimnings composed in chief value of bullions or lame are dutiable, not as trimnings under either paragraph 358 or 150, but as articles composed in chief value of metal, under this paragraph. *U. S. v. Veit, Sou & Co.*, (1918) 8 U. S. Cust. App. 291.

**Evidence—Presumption in favor of collector.**—Appellant entered the merchandise in controversy upon an invoice which specified different parts shown to be a complete marine engine in a knockdown condition. It was for use in the construction of four American-built vessels, which required nine such engines. It was short shipped as to the bedplate and crank shaft, which came in another shipment more than a month later. It was installed in one of the vessels, but there is nothing to show whether or not it was fitted with a bedplate and crank shaft imported at the same time and which, though designed for some other vessel, was so standardized as to make it equally available for use on the first one. The collector found that the complete engine was imported in a "knockdown condition" and installed in one of the vessels. With no evidence to impeach his findings, the decision of the Board of United States General Appraisers sustaining the collector's classification of the merchandise as miscellaneous metal manufactures under this paragraph, rather than as outfit and equipment or machinery building materials under section 4, paragraph J, subsection 5, should be sustained. *Carlin v. U. S.*, (1918) 8 U. S. Cust. App. 392.

**Vol. II, p. 769, par. 169.** [First ed., 1914 Supp., p. 76.]

**"Cabinet wood."**—The term "cabinet wood," in this paragraph, is not limited to woods used in the manufacture of movable furniture. The fact that a wood is chiefly used for the interior trimming of rooms does not per se exclude it from classification under this paragraph. If considerable mechanical skill and artistic conception are employed and required to produce a highly ornamental and decorative appearance in the interior trim, wood so used may be properly classified as cabinet wood under this paragraph. That highly ornamental and decorative results are often produced in the interior trimmings of rooms and that the skill required to produce such results rises to the dignity of cabinet work are common knowledge. *Mexican Hardwood Lumber Co. v. U. S.*, (1918) 8 U. S. Cust. App. 300.

**Juanacosta lumber**, shown to be chiefly used for the interior trim of rooms and not for making movable furniture, is dutiable as cabinet wood under this paragraph, and not entitled to free entry under paragraph 647. *Mexican Hardwood Lumber Co. v. U. S.*, (1918) 8 U. S. Cust. App. 300.

**Vol. II, p. 769, par. 172.** [First ed., 1914 Supp., p. 76.]

**Boxes containing lemons.**—The expression, "boxes . . . containing . . . lemons," in this paragraph, does not mean that boxes, to be dutiable hereunder, must have a substantial value after the lemons have been sold out of them. The usual and ordinary lemon boxes

containing lemons when imported are dutiable under the paragraph, notwithstanding they are so frail as to have little or no value after having discharged their function as containers of lemons and are not salable except possibly for kindling or some very inferior use. *Maynard & Child v. U. S.*, (1918) 8 U. S. Cust. App. 297.

**Vol. II, p. 769, par. 173.** [First ed., 1914 Supp., p. 76.]

**"Chair reeds."**—The provision in this paragraph for "chair reeds" is more specific than that for "reeds unmanufactured," in paragraph 648. Hence, selected and extra selected reeds, although within the latter provision, are classifiable under the former if in fact they are such. *Peabody & Co. v. U. S.*, (1917) 8 U. S. Cust. App. 204.

**Vol. II, p. 770, par. 175.** [First ed., 1914 Supp., p. 77.]

**Raffia**, being material derived from the raffia palm, which is a tree, is classifiable either as "wood" or as "like material," under this paragraph. Cane is also classifiable as wood under this paragraph. *Steinhardt & Bros. v. U. S.*, (1918) 8 U. S. Cust. App. 404.

**Baskets.**—Woven basket-work frames of stained bamboo or like material, having the shape of vases, fern pots, jardinières, lamp stands, or similar articles, fitted with tin bowls or buckets of the same shape and size to make them water-tight and hence more serviceable, and trays of the same construction fitted with glass bottoms, the wood in each case being chief value, are not removed from the classification of baskets by reason of such tin or glass fittings. They are dutiable under this paragraph as baskets, and not under paragraph 176 as manufactures in chief value of wood, not specially provided for. *Moremura Bros. v. U. S.*, (1917) U. S. Cust. App. 211, *distinguishing* *U. S. v. Muhlens*, (1913) 4 U. S. Cust. App. 496; *U. S. v. Vantine*, (1913) 4 U. S. Cust. App. 516.

Baskets made of raffia, wood, cane, and willow, and lined with silk, the silk being greater in value than any one of the other component materials, but less than all, are classifiable, not under paragraph 318, as miscellaneous manufactures in chief value of silk, but under this paragraph, as baskets "in chief value of . . . wood," or "like material." *Steinhardt & Bros. v. U. S.*, (1918) 8 U. S. Cust. App. 404.

**Vol. II, p. 771, par. 177.** [First ed., 1914 Supp., p. 77.]

**Cuban sugar.**—Under the rates of duty imposed by this paragraph, which became effective on March 1, 1914, the twenty per cent preferential on Cuban sugar imported

into the United States continues on and after that date. (1914) 30 Op. Atty.-Gen. 259.

**Vol. II, p. 777, par. 201.** [First ed., 1914 Supp., p. 79.]

The term "sauces of all kinds" as used in this section includes not only dressings or condiments used with meat, fish, or vegetables, but also numerous things made chiefly of fruit pulp and many other products of culinary skill, such as sauces for puddings and various other dressings or preparations used at meals. It is narrower than the term "fruits, preserved" used in paragraph 217. Thus, merchandise known commercially as "Melba sauce" (a liquid which flows quite freely, is sweetish to the taste, contains a pulpy substance or something which simulates it, and has a raspberry flavor), used as a sauce, dressing, or preparation to be poured over and taken with fruit, is dutiable under this paragraph as a "sauce" rather than as a "preserved fruit" under paragraph 217 of this Act. *U. S. v. Meyer*, (1917) 8 U. S. Cust. App. 27.

**Vol. II, p. 777, par. 210.** [First ed., 1914 Supp., p. 79.]

**Cut tulip flowers.**—Tulip flowers severed from the plant are not dutiable as "tulips," but as "cut flowers" under this paragraph. *U. S. v. American Express Co.*, (1917) 8 U. S. Cust. App. 195.

**Tulip bulbs.**—The change made by Congress from the adjective "tulip," paragraph 263 of this Act, to the noun "tulips," in this paragraph, must be given a meaning; accordingly, tulip bulbs are not dutiable as "tulips," but as "other bulbs," under this paragraph. *U. S. v. Maltus & Ware*, (1917) 8 U. S. Cust. App. 199.

**Vol. II, p. 778, par. 212.** [First ed., 1914 Supp., p. 79.]

**Flaxseed.**—Where flaxseed is imported directly from the farms, contains a percentage of wild buckwheat, wild mustard, wheat, barley, oats, chaff, and foxtail, but practically no dirt, and after importation is separated into flaxseed and screenings, each being bought and sold as such, the flaxseed is dutiable as such under this paragraph, and the screenings as a nonenumerated unmanufactured article under paragraph 385. *Consolidated Elevator Co. v. U. S.*, (1918) 8 U. S. Cust. App. 267.

**"Allowance."**—The term "allowance" in this paragraph refers to draft or tare or some abatement from the full weight of imported merchandise. Segregation is not an "allowance." *Consolidated Elevator Co. v. U. S.*, (1918) 8 U. S. Cust. App. 267.

**"Other impurities."**—The proviso of this paragraph "that no allowance shall be made for dirt or other impurities in seeds provided

for in this paragraph" should be so construed as to limit the "other impurities" to such as correspond to the one named, at least in the essential particular of having no separate tariff status for dutiable purposes. It should not be so construed as to abrogate the rule that where two or more articles subject to different tariff rates are present in an importation they may be separately assessed at the several rates provided for each. Consolidated Elevator Co. v. U. S., (1918) 8 U. S. Cust. App. 267.

**Vol. II, p. 785, par. 235.** [First ed., 1914 Supp., p. 81.]

**Peppers.**—This paragraph classifies peppers of all kinds, at least such as are, generally speaking, spices. This is made quite certain by the fact that, to those peppers made dutiable by preceding acts, this paragraph adds pepper, black or white, which theretofore had been given free entry. Vandegrift & Co. v. U. S., (1917) 8 U. S. Cust. App. 1.

**Paprika,** not being provided for eo nomine by this Act, being in fact a capsicum or red pepper, and not being shown to be commercially designated otherwise, is dutiable as such under this paragraph. Being ground, it is subject to the additional ad valorem duty of 20 per cent imposed by the paragraph on ground spices. It is not classifiable under paragraph 385 of this Act as a nonenumerated article, unmanufactured, or in whole or in part manufactured. Vandegrift & Co. v. U. S., (1917) 8 U. S. Cust. App. 1.

**Vol. II, p. 789, par. 246.** [First ed., 1914 Supp., p. 83.]

**Fluid malt extract in iron drums of 12½ gallons** is dutiable as "malt extract, fluid, in casks" under this paragraph. U. S. v. Hirsh & Schofield, (1917) 8 U. S. Cust. App. 163.

**"Casks."**—In paragraph 385 Congress intended to include all kinds of malt extract, in whatever condition imported and whether in bulk or smaller packages. To effectuate the intent of Congress, the word "casks" in this paragraph will be held to include iron drums. U. S. v. Hirsh & Schofield, (1917) 8 U. S. Cust. App. 163.

**Vol. II, p. 791, par. 252.** [First ed., 1914 Supp., p. 84.]

**Cotton cloth printed with bedspread designs.**—Pieces of cotton cloth 70 to 80 inches wide and 30 yards long, printed with designs about 90 inches long, repeated at regular intervals throughout their length, generally used for making bedspreads by cutting between the designs, but suitable also for making curtains, portières, table spreads, and couch covers, are not dutiable as "articles made from cotton cloth" under paragraph 266 of this Act, but as "cotton cloth . . . printed" under this paragraph. Snow's

United States Sample Express Co. v. U. S., (1977) 8 U. S. Cust. App. 17.

**Reliquidation.**—Where a protest claiming classification of cotton cloth under this paragraph, according to yarn number, is sustained by the board of general appraisers without any finding as to yarn number or direction to the collector regarding such finding, it is the duty of the collector to find the yarn number as directed by paragraph 253 and the regulations of the Treasury Department, and a protest against his reliquidation at the highest rate provided for in this paragraph, without such findings, will be sustained. Lord & Taylor v. U. S., (1918) 8 U. S. Cust. App. 345.

**Vol. II, p. 792, par. 253.** [First ed., 1914 Supp., p. 84.]

**Articles made from cotton cloth.**—To become an article made from cotton cloth within the meaning of this paragraph and paragraph 266, the cloth, whether in the piece or not, must have been so dealt with by manufacturing processes that it has acquired either special characteristics which do not properly belong to cotton cloth or a form and individuality which identify the product of such processes as a definite, particular article so far advanced that it is committed to a specific use and is no longer available for the general purposes for which the unprocessed cotton cloth was suitable. Snow's United States Sample Express Co. v. U. S., (1917) 8 U. S. Cust. App. 17.

**Vol. II, p. 795, par. 258.** [First ed., 1914 Supp., p. 85.]

**Upholstery goods.**—The common and usual signification of the term "upholstery goods" includes nets or nettings in the piece. The term has never been proven in this court to have any commercial meaning different from its common meaning. The provision for "Jacquard figured upholstery goods, composed wholly or in chief value of cotton, . . . in the piece or otherwise," in this paragraph, was intended by Congress to cover Jacquard figured cotton nets or nettings in the piece notwithstanding the provisions of paragraph 358 for nets, nettings, laces, etc., of whatever yarns, threads, or filaments composed. U. S. v. Mills & Gibb, (1918) 8 U. S. Cust. App. 422.

In re-enacting unrestricted in this paragraph the term "upholstery goods" from paragraph 326, Tariff Act of 1909, after having had its attention specifically directed to the decision of the United States Court of Customs Appeals that the term included all the interior textile decorations and fittings of apartments, Congress must be presumed to have used it in this sense. U. S. v. Mills & Gibb, (1918) 8 U. S. Cust. App. 422.

**Curtains and Jacquard figured upholstery.**—Regardless of relative specificity of the terms employed, the intention of Congress, in

the enactment of this paragraph, was to make the language "curtains, . . . and other Jacquard figured upholstery goods, composed wholly or in chief value of cotton or other vegetable fiber; any of the foregoing in the piece or otherwise," inclusive of all goods falling therewithin and to exclude therefrom all other provisions of the Act. *U. S. v. Snow's United States Sample Express Co.*, (1918) 8 U. S. Cust. App. 351.

Scalloped Jacquard figured madras muslin curtains in the piece and otherwise and materials therefor are dutiable under this paragraph and not under paragraph 358 as "articles or fabrics . . . scalloped by hand or machinery . . . by whatever name known." *U. S. v. Snow's United States Sample Express Co.*, (1918) 8 U. S. Cust. App. 351.

**Jacquard figured nettings.**—Jacquard figured nets or nettings, wholly or in chief value of cotton, imported in the piece, are dutiable under this paragraph as Jacquard figured upholstery goods, and not under paragraph 358, as nets or nettings. *U. S. v. Mills & Gibbs*, (1918) 8 U. S. Cust. App. 422.

**Evidence—Relevancy.**—Inasmuch as this Act does not classify upholstery goods or fabrics according to the industry which produced them, evidence that the making of nettings and laces is a separate industry from that which produces certain other upholstery goods and tapestries has no relevancy to an issue as to whether Jacquard figured cotton nets or nettings should be classified as Jacquard figured upholstery goods under this paragraph or as nets or nettings under paragraph 358. *U. S. v. Mills & Gibbs*, (1918) U. S. Cust. App. 422.

**Vol. II, p. 796, par. 262.** [First ed., 1914 Supp., p. 86.]

**"Made of."**—The expression "made of" may mean wholly of only or include wholly of and in chief value of, according to the context. Unless it should be construed in this paragraph to mean wholly of only, the provision for fabrics made of cotton or other vegetable fiber would include the next provision of the paragraph for fabrics "of which cotton or other vegetable fiber is the component material of chief value," and reduce it to surplusage. Accordingly the provision of the paragraph for fabrics made of cotton or other vegetable fiber and india rubber means made wholly of such. *Steinhardt & Bros. v. U. S.*, (1918) 8 U. S. Cust. App. 372.

**"Component material of chief value."**—While the rule prescribed by statute, paragraph 336, is that "component material of chief value" shall be held to mean that single component material which shall exceed in value any other single component material in the article or fabric, nevertheless Congress may, and oftentimes does, expressly prescribe that, in the determination of a particular question of chief value, the combined values of one or more single component materials

must be treated as one. This is the case with this paragraph, where the component material of chief value may be "cotton or vegetable fiber and india rubber," and with paragraph 319, where it may be "artificial or imitation silk . . . and india rubber." *Steinhardt & Bros. v. U. S.*, (1918) 8 U. S. Cust. App. 372.

Artificial silk is not a vegetable fiber within the meaning of those terms as used in this paragraph and paragraph 319. *Steinhardt & Bros. v. U. S.*, (1918) 8 U. S. Cust. App. 372.

Cotton and india rubber hat elastics and silk and india rubber sleeve and garter elastics should not be classified as braids, under paragraph 358, but the cotton goods should be classified as "fabrics with fast edges not exceeding twelve inches in width . . . of cotton . . . and india rubber," under this paragraph, and the silk goods to be dutiable as "webbings . . . of which silk and india rubber are the component materials of chief value," under paragraph 316. *Calhoun, Robbins & Co. v. U. S.*, (1918) 8 U. S. Cust. App. 360.

**Vol. II, p. 801, par. 288.** [First ed., 1914 Supp., p. 88.]

**Lap robes—Steamer rugs.**—Woven woolen spreads of mixed colors, some with fringed ends and some with bound edges, used to cover the legs and body in automobiles, on couches, in carriages at seacoast resorts, and in hospitals and sanitariums, are not dutiable under paragraph 289 of this Act as blankets, but as woolen manufactures, under this paragraph. *Riley & Co. v. U. S.*, (1917) 8 U. S. Cust. App. 116.

**Vol. II, p. 803, par. 289.** [First ed., 1914 Supp., p. 88.]

**"Blanket."**—The history of the enactment of successive tariff acts, together with administrative and judicial decisions under them, shows that Congress used the word "blanket" as meaning a heavy cover for a bed or a horse, with a thick, soft nap on both sides. The word should be given that meaning in this paragraph. *Riley & Co. v. U. S.*, (1917) 8 U. S. Cust. App. 116.

**Vol. II, p. 805, par. 294.** [First ed., 1914 Supp., p. 89.]

**Wilton velvet rugs.**—Seamless Wilton velvet rugs of various sizes are not classifiable under paragraph 300, Tariff Act of 1913 ("Oriental, Berlin, Aubusson, Axminster, and similar rugs"), or under paragraph 386 covering no enumerated articles, but are dutiable, by virtue of paragraph 303, at the rate imposed on velvet carpeting by this paragraph. *U. S. v. Carson*, (1918) 8 U. S. Cust. App. 240; *U. S. v. Fenton*, (1918) 8 U. S. Cust. App. 239.

**Vol. II, p. 805, par. 300.** [First ed., 1914 Supp., p. 89.]

**Machine-made Axminster rugs** are dutiable *eo nomine* under this paragraph. *U. S. v. Gertzen Co.*, (1918) 8 U. S. Cust. App. 428.

**Vol. II, p. 805, par. 304.** [First ed., 1914 Supp., p. 89.]

**Other like animals.**—The expression "other like animals," used in this paragraph and paragraph 307, with reference to wool and hair, regards similarity in the hair, and not in the animals themselves. *Bloomingtondale Bros. v. U. S.*, (1917) 8 U. S. Cust. App. 105.

**Vol. II, p. 806, par. 305.** [First ed., 1914 Supp., p. 89.]

**"Angora goat."**—A more or less degenerate goat, known as the "Cape Angora," produced by breeding the original Angora with the Cape Colony goat, whose hair is shown to be dealt in, used, and known as mohair, is an Angora goat within the meaning of that expression in this paragraph. *U. S. v. Beadenkopf Co.*, (1918) 8 U. S. Cust. App. 283.

Cape Angora goatskins with the hair on, imported for leather use, the hair to be removed and sold for use as mohair, are not admissible free as *entreties* under paragraphs 603, 604, or 650 of this Act, but the hair is dutiable under this paragraph as "hair of the Angora goat, alpaca, and other like animals, and all hair on the skin of such animals." *U. S. v. Beadenkopf Co.*, (1918) 8 U. S. Cust. App. 283.

**"Other like animals."**—The expression "Other like animals," in this paragraph, has reference to resemblance in the growth on the skins and not in the other physical characteristics of the animals. *U. S. v. Beadenkopf Co.*, (1918) 8 U. S. Cust. App. 283. See also *Crimmins & Pierce v. U. S.*, (1915) 6 U. S. Cust. App. 137.

**Vol. II, p. 806, par. 307.** [First ed., 1914 Supp., p. 89.]

**Angora rabbit hair yarn.**—Yarn made of the hair of the Angora rabbit, commercially known as Angora wool yarn, is not dutiable as a manufacture of fur under paragraph 348 of this Act. It is more specifically described by this paragraph than by the definition of "wool" in paragraph 304 ("wool or hair of the sheep, camel, or other like animals") and is dutiable accordingly. *Bloomingtondale Bros. v. U. S.*, (1917) 8 U. S. Cust. App. 105.

**Vol. II, p. 808, par. 318.** [First ed., 1914 Supp., p. 90.]

**Down-filled silk quilts.**—Down-filled silk quilts, silk being the component material of chief value, are dutiable as manufactures in chief value of silk under this paragraph and

not as "quilts of down" under paragraph 347. *U. S. v. Altman & Co.*, (1917) 8 U. S. Cust. App. 148.

**Vol. II, p. 810, par. 319.** [First ed., 1914 Supp., p. 90.]

**Webbing of artificial silk, cotton and india rubber.**—Webbing, 34.30 per cent artificial silk, 39.31 per cent cotton, and 26.39 per cent rubber in value, is classifiable, not as being made of cotton and india rubber, under paragraph 262, but as being in chief value of artificial silk and india rubber, under this paragraph. *Steinhardt & Bros. v. U. S.*, (1918) 8 U. S. Cust. App. 372.

**Vol. II, p. 811, par. 324.** [First ed., 1914 Supp., p. 91.]

**Surface-coated paper.**—Paper known as "Perlmutter" paper, one surface of which has not been treated, the other having been treated with a layer of gelatin and then a layer of lacquer, presenting a shiny, glossy and variegated appearance, is not classifiable under this paragraph as "Papers, wholly or partly covered with gelatin or flock, papers with white coated surface or surfaces," but as a surface coated paper not specially provided for. *Bendix Paper Co. v. U. S.*, (1918) 8 U. S. Cust. App. 366.

**Vol. II, p. 816, par. 333.** [First ed., 1914 Supp., p. 93.]

**"Curtains and other articles."**—The language "Curtains and other articles" in this paragraph taxing articles made of beads, does not mean that the "other articles" must be *ejusdem generis* with "curtains." Thus, rosaries composed in chief value of beads are dutiable as articles made of beads under this paragraph. *U. S. v. American Express Co.*, (1917) 8 U. S. Cust. App. 157.

**Necklaces of paste beads.**—Necklaces in chief value of paste beads are not classifiable as jewelry under paragraph 356, but as manufactures in chief value of paste beads under this paragraph. *Bloomingtondale Bros. v. U. S.*, (1918) 8 U. S. Cust. App. 314.

**Imitation pearl beads, strung temporarily upon flimsy cotton strings, selected and graded as to size so that the beads graduate from the largest in the center to the smallest at either end, are classifiable as "imitation pearl beads . . . strung loosely on thread for facility in transportation only," and not as articles of beads under this paragraph, for however useful for trade purposes may be the selecting and grading, the fact remains that the stringing was done for facility in transportation only, as the beads have to be restrung more durably and fitted with clasps before being practical for use as chains or necklaces.** *Lorsch & Co. v. U. S.*, (1918) 8 U. S. Cust. App. 246.

**Exceptions from application of paragraph.**—Under the rule of *expressio unius est ex-*

clusio alterius, it would seem that the expressed exception of articles not embroidered nor appliqué from the provision of this paragraph, for articles made of beads would leave all other articles made of beads dutiable under the paragraph. *U. S. v. American Express Co.*, (1917) 8 U. S. Cust. App. 157.

**Vol. II, p. 819, par. 339.** [First ed., 1914 Supp., p. 93.]

**"Buttons."**—A galalith article, shaped like a curling stone, perforated for the reception of a metal shank or wire loop to make it into a shoe button, is not classifiable under the provision for "buttons," but under that for "parts of buttons and button molds or blanks," in this paragraph. *U. S. v. Hensel*, (1918) 8 U. S. Cust. App. 244.

**Agate collar buttons.**—Collar buttons, known commercially as "agate buttons," though not made of natural agate, are dutiable as "agate buttons," under this paragraph and not as collar buttons composed wholly of agate. *U. S. v. Buss & Co.*, (1917) 8 U. S. Cust. App. 5.

**Material composing buttons—Evidence.**—Testimony by a dealer in buttons and not in the materials used in their manufacture, with no testimony tending to show his knowledge of, or familiarity with, the commercial designation of button materials, that certain buttons were "made of a material which is commercially known as agate" falls far short of establishing that the material was definitely, uniformly, and generally, in any wholesale trade dealing therein, known as "agate." *U. S. v. Buss & Co.*, (1917) 8 U. S. Cust. App. 5.

**Vol. II, p. 822, par. 347.** [First ed., 1914 Supp., p. 94.]

**Goose skins dressed with the down on, not suitable for millinery ornaments,** are dutiable as "downs on the skin, . . . dressed, . . . and not suitable for use as millinery ornaments" under this paragraph, and not, by virtue of paragraph 386, by similitude, as "furs dressed on the skin" under paragraph 348. *U. S. v. Herskovits & Son*, (1917) 8 U. S. Cust. App. 203, *distinguishing* *Herskovits v. U. S.*, (1911) 1 U. S. Cust. App. 321.

**Millinery ornaments of dyed straw.**—Leaves and flowers for millinery ornaments, made of straw which has been dyed, but the fibers of which have not been separated, are excluded by the dyeing from classification under paragraph 368, as manufactures of straw in its natural state, but are dutiable as articles composed in chief value of artificial and ornamental leaves and flowers under this paragraph. *U. S. v. Gage Bros. & Co.*, (1918) 8 U. S. Cust. App. 306; *U. S. v. International Forwarding Co.*, (1918) 8 U. S. Cust. App. 378; *U. S. v. Rosenthal-Sloan Millinery Co.*, (1918) 8 U. S. Cust. App. 380.

**Feather wall ornaments.**—Colored feathers, fastened upon white cards in the shape of

birds, used to decorate walls in the same manner as pictures are, are not dutiable as feathers of any kind, but as articles made of feathers, under this paragraph. *U. S. v. Beach*, (1918) 8 U. S. Cust. App. 365.

**"Artificial and ornamental fruits."**—The words "artificial and ornamental," modifying the word "fruits" in this paragraph, refer to the per se character, and not the intended use, of the fruits. This is indicated by the fact that in the same paragraph feathers in various physical conditions are dutiable at one rate and "artificial or ornamental feathers suitable for use as millinery ornaments" at another. Hence, artificial and ornamental pears and apples, chiefly used as pincushions, are dutiable as "artificial and ornamental fruits." *Morimura Bros. v. U. S.*, (1917) 8 U. S. Cust. App. 111.

**Vol. II, p. 823, par. 348.** [First ed., 1914 Supp., p. 95.]

**"Fur"—"Hair"—"Wool."**—Hair which is so short that it is commercially unfit to be spun into yarn or for the making of textiles, and is chiefly employed in the making of furs or fur garments, or for other fur uses, is that kind of hair which is known as fur, within the meaning of this paragraph, though it be taken from the back of a sheep. Hair which possesses all the characteristics of fur, but is so long and of such quality that it can be spun into yarn and converted into cloth and is chiefly used for that purpose, should be classified as a wool under paragraph 304 or as hair other than fur under paragraph 307. *Bloomingtondale Bros. v. U. S.*, (1917) 8 U. S. Cust. App. 105.

**Sheepskins devoted to fur uses.**—Sheepskins, entire or pieced by sewing in the shapes of rectangles and crosses, with the natural growth thereon and the flesh side dressed, used as ordinary fur skins are used, and not bearing so great an amount of wool as to make it commercially practicable to remove the wool and use it for wool purposes, are not classifiable as wools on the skin under paragraph 650 of this Act, nor as wool advanced under paragraph 286, and are not within the definition of wool in paragraph 304, but are dutiable as "furs dressed on the skin" under this paragraph. *Ayres, Bridges & Co. v. U. S.*, (1917) 8 U. S. Cust. App. 87.

**Vol. II, p. 825, par. 356.** [First ed., 1914 Supp., p. 95.]

**"Suitable for use."**—The expression "suitable for use," in this paragraph, does not, in the tariff sense, imply or require chief use, but is limited or qualified to susceptibility for the use expressed. Thus, brass and German-silver foxtail chain, valued at less than 30 cents per yard, shown to be used in the manufacture of jewelry, is dutiable under this paragraph, as metal material "suitable for use in the manufacture of any of the foregoing articles," and not under paragraph 167

as metal articles or wares not specially provided for. *U. S. v. Lorsch & Co.*, (1917) 8 U. S. Cust. App. 109.

**Leather-cased pocket sets.**—Small leather cases, appropriate to be carried in the vest pocket, fitted with pocketknives, penknives or erasers, nail files, wooden lead pencils, and scissors (singly or in various combinations), are not specially designed or intended for the use of the traveler and are not dutiable as cases fitted with traveling sets under paragraph 360 of this Act, but are dutiable as "articles . . . designed to be . . . carried on or about the person" under this paragraph. *U. S. v. Glück*, (1917) 8 U. S. Cust. App. 12.

**Imitation jet and base metal articles.**—Articles of personal adornment composed of imitation jet and base metal are not regarded by people in general as jewelry, and are not classifiable as "jewelry, commonly . . . so known," under this paragraph. *Bloomington Bros. v. U. S.*, (1918) 8 U. S. Cust. App. 314.

**Vol. II, p. 827, par. 358.** [First ed., 1914 Supp., p. 96.]

**"Yarns, threads, or filaments."**—The expression "yarns, threads, or filaments," in this paragraph covers only such materials as are generally known to be for knitting, weaving, or sewing. *U. S. v. Veit Son & Co.*, (1918) 8 U. S. Cust. App. 390.

**Rubber threads.**—The rubber threads which form the framework or foundation about which the cotton or silk threads are worked into elastic braids are within the meaning of the expression "yarns, threads, or filaments," in this paragraph. *Calhoun, Robbins & Co. v. U. S.*, (1918) 8 U. S. Cust. App. 360.

**Elastics** were held administratively and judicially to be braids under the Tariff Act of 1897. Congress presumably used the word braids in that sense in the Tariff Act of 1909 and in this paragraph. *Calhoun, Robbins & Co. v. U. S.*, (1918) 8 U. S. Cust. App. 360.

**"Veilings."**—The term "veilings" as used in this Act is a designation which signifies a material chiefly or exclusively used for the making of veils. A veil is a piece of cloth or other material, usually thin and light, designed to be worn over the head and face as an ornament or to protect or wholly or partly conceal the face from view. The textile material which is used to mask or screen the features resting beneath the face panels of caskets would be commonly and popularly regarded as veiling. Thus, black, thin-woven silk chiffon, about 36 inches wide and 60 to 70 yards long, with two closely woven stripes down the middle to serve as selvages when the fabric is split, used after splitting to cover the face panels of burial caskets, is dutiable as veilings under this paragraph and not as woven fabrics in the piece composed in chief value of silk under paragraph 318. *Tiedeman & Sons v. U. S.*, (1917) 8 U. S. Cust. App. 134.

**Scalloped muslin curtains.**—The provision of this paragraph "all articles or fabrics

. . . scalloped by hand or machinery . . . by whatever name known" is equivalent to an enumeration of every scalloped article by its name, and amounts to an *eo nomine* designation of scalloped madras muslin curtains. *U. S. v. Snow's United States Sample Express Co.*, (1918) 8 U. S. Cust. App. 351.

**Vol. II, p. 831, par. 360.** [First ed., 1914 Supp., p. 96.]

**Sewing baskets, etc., in chief value of leather.**—Baskets, boxes, and cases, in chief value of leather, of such a size and so fitted as to indicate that they are primarily sewing sets and not needlecases, are not dutiable under paragraph 135 of this Act as needlecases by reason of the fact that they contain needles in combination with other articles, such as scissors, thimbles, stiletos, thread, knives, pins, buttons, tape, and hooks and eyes, but should be classified as baskets, boxes, and cases in chief value of leather under this paragraph. *Cross Co. v. U. S.*, (1917) 8 U. S. Cust. App. 196.

**Fitted leather cases.**—The provision of this paragraph for leather cases fitted and furnished with traveling and similar sets treats the leather case as the distinguishing characteristic and claims it with its fittings for duty to the exclusion of other paragraphs under which the constituent fittings might have been dutiable. *U. S. v. Glück*, (1917) 8 U. S. Cust. App. 12.

**Leather pocket toilets.**—Small leather cases, fastening with metal clasps, fitted with various toilet implements and preparations, invoiced as "pocket toilets, leather," are dutiable under this paragraph, as leather cases fitted and furnished with traveling and similar sets. *U. S. v. Glück*, (1917) 8 U. S. Cust. App. 12.

**Vol. II, p. 833, par. 368.** [First ed., 1914 Supp., p. 97.]

**"Natural state."**—Dyed straw is not straw in its "natural state" within the meaning of that expression in this paragraph. *U. S. v. Gage Bros. & Co.*, (1918) 8 U. S. Cust. App. 306; *U. S. v. International Forwarding Co.*, (1918) 8 U. S. Cust. App. 378.

**"India rubber"—"Hard rubber."**—The language of successive tariff Acts shows that Congress has regarded india rubber and hard rubber as different things for tariff purposes. These two expressions, occurring in this paragraph and paragraph 369, respectively, are construed to be different things. *Knauth, Nachod & Kühne v. U. S.*, (1917) 8 U. S. Cust. App. 102.

**Vol. II, p. 834, par. 369.** [First ed., 1914 Supp., p. 97.]

**Hard rubber druggists' sundries.**—Syringes, tubes, combs, and breast pumps in chief value of hard rubber are dutiable under this paragraph as "manufactures of . . . vulcanized

india rubber, known as 'hard rubber,' and not under paragraph 368 as "manufactures of india rubber . . . , commonly known as druggists' sundries." *Knauth, Nachod & Kühne v. U. S.*, (1917) 8 U. S. Cust. App. 102.

**Vol. II, p. 839, par. 385.** [First ed., 1914 Supp., p. 98.]

**Screenings.**—Screenings are a distinct non-enumerated unmanufactured article, subject to tariff duty under this paragraph. *Consolidated Elevator Co. v. U. S.*, (1918) 8 U. S. Cust. App. 267.

Wheat "scalpings" or screenings, the residue after screening from wheat as it comes from the thresher all the merchantable wheat—a commodity composed of buckwheat, rapeseed, mustard seed, flaxseed, dust, dirt, and shriveled, broken, and spoiled wheat kernels—not sold or used as wheat, but bought and sold as wheat screenings and used as sheep feed, or as an ingredient in the manufacture of chicken feed, are dutiable as a nonenumerated unmanufactured article under this paragraph. They are not "wheat" within the meaning of paragraph 644, it being shown that the wheat content cannot, as a commercial practicability, be separated, and that, even if that were done, it could not be marketed as wheat. *Williamson v. U. S.*, (1918) 8 U. S. Cust. App. 277.

**Malt extract.**—Malt extract cannot be classified under this paragraph, because this paragraph includes only what is "not provided for in this section," and malt extract is provided for in paragraph 246. *U. S. v. Hirsh & Schofield*, (1917) 8 U. S. Cust. App. 163.

**Vol. II, p. 848, par. 387.** [First ed., 1914 Supp., p. 99.]

**Phosphoric acid anhydride.**—The expression "Acids . . . phosphoric," used in this paragraph, includes phosphoric acid anhydride, for it is more specific than the term "acid anhydrides" in paragraph 1, since it includes anhydride of phosphoric acid only while that term includes anhydrides of all acids. Smaller packages of phosphoric acid anhydride are therefore not dutiable under paragraph 17 as chemical compounds or combinations put up in individual packages of two and one-half pounds or less gross weight, nor are larger packages dutiable as acid anhydrides under paragraph 1. *U. S. v. Merck & Co.*, (1917) 8 U. S. Cust. App. 141.

**Vol. II, p. 848, sec. 391.** [First ed., 1914 Supp., p. 99.]

**Farm tractors.**—The known general use of farm tractors demonstrates them commercially and practically necessary to agriculture; and such, when chiefly used for agricultural purposes, are entitled to classification as "agricultural implements," under this

paragraph. *Richardson Co. v. U. S.*, (1917) 8 U. S. Cust. App. 179.

**Carbureters for farm tractors.**—Carbureters, shown to be so designed and constructed that they can only be affixed to and made parts of certain tractors, which tractors are shown to be designed, constructed, and chiefly used for plowing and threshing—uses necessary and peculiar to the production of food and raiment for man—are entitled to free entry as parts of agricultural implements under this paragraph and are not dutiable as manufactures of metal under paragraph 167. *Richardson Co. v. U. S.*, (1917) 8 U. S. Cust. App. 179.

**Vol. II, p. 850, par. 404.** [First ed., 1914 Supp., p. 100.]

**Disks of tin plate,** about two inches in diameter, the by-product of the manufacture in Canada of cans from tin plate imported from the United States, are entitled to entry free of duty under this paragraph, as re-importations not advanced in value or improved in condition. *U. S. v. Saunders*, (1917) 8 U. S. Cust. App. 82.

**Vol. II, p. 853, par. 419.** [First ed., 1914 Supp., p. 101.]

**Beef weasands.**—Beef weasands are not admissible free of duty under this paragraph, as "integuments, tendons, and intestines of animals." *U. S. v. White*, (1917) 8 U. S. Cust. App. 115.

**Vol. II, p. 856, par. 450.** [First ed., 1914 Supp., p. 103.]

**"Common blue clay."**—Clay shown to be as blue as any used in the manufacture of glass melting pots answers the call of the word "blue," in the expression "common blue clay . . . suitable for the manufacture of glass melting pots," is admissible free under this paragraph, notwithstanding that it has a grayish tinge. The same clay packed in bags is not admissible free under this paragraph but is dutiable under paragraph 76. *Koons, Wilson & Co. v. U. S.*, (1918) 8 U. S. Cust. App. 333.

**Clay in casks.**—In construing the provision "clay in casks," of the Tariff Act of 1897, the board of United States general appraisers held that it covered clay in bulk in any form, and that the style of the packing did not determine whether or not the clay was to be classified under the paragraph. Since this decision Congress, by paragraph 534 of the Act of 1909 and this paragraph, extended the expression to "clay . . . in cases or casks." This makes manifest the fact that the attention of Congress was directed to the container when the Act of 1909 was adopted, and that it then restricted the clay to be classified under this paragraph to that imported in cases or casks." *Koons, Wilson & Co. v. U. S.*, (1918) 8 U. S. Cust. App. 333.



**Vol. II, p. 857, par. 457.** [First ed., 1914 Supp., p. 103.]

**Importation of coffee into Porto Rico.**—So much of the provisions of sections 2 and 3 of the Act of April 12, 1900, ch. 191 (see vol. VII, p. 1260) as refers to the importation of coffee into Porto Rico was repealed by the Tariff Act of August 5, 1909 (see vol. II, p. 724), and is no longer in force, but this paragraph which includes coffee in the free list is applicable to its importation into Porto Rico. (1914) 30 Op. Atty.-Gen. 275.

**Vol. II, p. 858, par. 479.** [First ed., 1914 Supp., p. 104.]

**Corundum.**—The expression "corundum" in this paragraph includes both natural and artificial corundum. *Larzelere & Co. v. U. S.*, (1917) 8 U. S. Cust. App. 64.

**Boro-carbone.**—Merchandise invoiced as "boro-carbone," an artificial corundum made by melting and crushing bauxite, is classifiable under this paragraph as corundum, and not as a crude artificial abrasive, neither may it be classified under paragraph 411 of this Act as crude bauxite, nor under paragraph 343, by similitude, as emery, ground. *Larzelere & Co. v. U. S.*, (1917) 8 U. S. Cust. App. 64.

**Sufficiency of protest.**—A protest claiming classification as a crude artificial abrasive under this paragraph is not sufficient to support a decision making classification as corundum under the same paragraph. *Larzelere & Co. v. U. S.*; (1917) 8 U. S. Cust. App. 64.

**Vol. II, p. 867, par. 557.** [First ed., 1914 Supp., p. 107.]

**"Crude."**—The term "crude," as used in tariff legislation and in this paragraph, is a relative term, its meaning depending upon its use in the context. Thus, where a collector classifies "marrons, baked" as "nuts" under paragraph 226 rather than as "marrons, crude" under this paragraph, and the evidence before him is such that he may have reached either conclusion, his decision will be affirmed. *U. S. v. Richard & Co.*, (1918) 8 U. S. Cust. App. 304.

**Vol. II, p. 871, par. 582.** [First ed., 1914 Supp., p. 108.]

**Theatrical properties.**—"This statute cannot be construed to mean that the importer of theatrical effects must have the actual possession thereof or accompany the same at the time of their arrival, or that he shall be a person emigrating to the United States. It is sufficient if they are brought by him from abroad for temporary use, and not for sale, and that they have been used by him while abroad." *Illinois Surety Co. v. U. S.*, (C. C. A. 9th Cir. 1918) 251 Fed. 823, 163 C. C. A. 657.

**Redelivery bond affecting theatrical properties.**—A redelivery bond given under this paragraph for the exportation of theatrical property within six months is not void as restricting exportation from only one port where such port is only mentioned as the place for redelivery of the goods to the collector for the purpose of furnishing proof of the identity thereof. *Illinois Surety Co. v. U. S.*, (C. C. A. 9th Cir. 1918) 251 Fed. 823, 163 C. C. A. 657, wherein the court said: "But it is said that the bond is void, because it is not conditioned as required by law; that it is conditioned for redelivery of the goods, and not for the payment of the duties. The statute, it is true, requires that the bond shall be given for the payment of such duties as may be imposed by law in case the goods are not deported within six months, and that in the bond under consideration there is no such provision, but the condition is for redelivery to the collector for exportation within six months. It is clear, however, that, if the bond had been drawn strictly under the terms of the statute, the condition thereof would, in effect, have been complied with by redelivery to the collector, and it is also clear that liability under the bond which was given would have been avoided if the duties had been paid. The bond is therefore not substantially different from the bond required by the statute. It is a bond to hold the United States harmless against the loss of duties on goods imported into the United States, and its obligation is complied with either by redelivery or by payment of the duties. Statutes requiring the execution of such bonds are remedial in their character, and should be construed liberally, to carry out the purpose of their enactment. . . . We think, also, that the bond is valid as a common-law obligation." It was further held in this case that a surety on the bond was in no position to say that the goods ought not to have been admitted temporarily free of duty, because unaccompanied by the importer, where the surety knew that they were admitted free, and with knowledge of that fact became surety on the bond.

**Vol. II, p. 872, par. 584.** [First ed., 1914 Supp., p. 109.]

**"Salts of cinchona bark."**—A salt of cinchona bark is a chemical impossibility and the provision for "salts of cinchona bark" in this paragraph, if literally interpreted, is meaningless. The expression will be construed to mean salts of quinia. The free list of the Tariff Act of 1913, as it passed the House, provided for "quinine and its combinations with acids and compounds, not subject to duty in this section." In lieu of this, the Senate restored the provision of former Acts for "salts of cinchona bark," and the House accepted the Senate's amendment. This must be taken to mean that no salts of cinchona bark should be dutiable, but that all of them should be admitted

free under this paragraph, even though some of them may be covered by general language in other paragraphs. *U. S. v. Merck & Co.*, (1917) 8 U. S. Cust. App. 137.

**Quinine glycerphosphate.**—With reference to quinine glycerphosphate, the expression "all . . . salts of cinchona bark," in this paragraph, is more specific than "glycerphosphoric acid and salts and compounds thereof" in paragraph 18, and classifies it. *U. S. v. Merck & Co.*, (1917) 8 U. S. Cust. App. 137.

**Vol. II, p. 875, par. 620.** [First ed., 1914 Supp., p. 110.]

**"Tagua nuts."**—It is not every change in the terms of a statute from the one for which it is a substitute that results in a change of its general purpose. Thus, the change from the language "vegetable ivory in its natural state," used in the Tariff Act of Aug. 5, 1909, ch. 6, to the language "tagua nuts" used in this paragraph does not show any change in meaning. *Andrews & Co. v. U. S.*, (1917) 8 U. S. Cust. App. 68.

**Tagua nuts cut into slabs** as a preparation for the making of buttons or like products, with no indication that the cutting into slabs has either devoted the nut to a new use or withdrawn it from any general uses to which it was adapted, are admissible free of duty as "tagua nuts" under this paragraph and not dutiable as nonenumerated partly manufactured articles under paragraph 385. *Andrews & Co. v. U. S.*, (1917) 8 U. S. Cust. App. 68.

**Vol. II, p. 876, par. 627.** [First ed., 1914 Supp., p. 110.]

**"Containers of tea."**—This paragraph, levying duty upon "cans, boxes, or other containers of tea packed in packages of less than 5 pounds," does not levy duty upon the container of the tea itself, but upon the container of the packages of tea. The provision is relative in its terms and does not apply to immediate containers of tea. Hence, where tea was imported packed in packages of less than 5 pounds each, these packages being assembled and placed in a large box or case for transportation, the container of the less than 5 pound quantity of the tea itself should have been admitted free of duty, and duty should have been levied upon the box or case, which was the immediate container of the packages of tea. *U. S. v. McCord Brady Co.*, (1917) 8 U. S. Cust. App. 208.

**Vol. II, p. 880, par. 650.** [First ed., 1914 Supp., p. 112.]

**Dressed animal skins with the wool or hair** are not, when it is not profitable to separate the wool or hair from the skin and use it for wool or hair purposes, within the terms "wools" or "hair" as used in this para-

graph and paragraphs 286 and 304 of this Act; they are, if devoted to fur uses, within the term "furs," as used in paragraph 348, such term not being limited to products of strictly fur-bearing animals, but including sheepskins with wool on, when devoted to fur uses, and not bearing so great an amount of wool as to make it commercially practicable to remove the wool and use it for wool purposes. *Ayres, Bridges & Co. v. U. S.*, (1917) 8 U. S. Cust. App. 87.

**Vol. II, p. 880, par. 652.** [First ed., 1914 Supp., p. 112.]

**"Mechanical process."**—In the expression of this paragraph, "such as are made wholly or in part by stenciling or any other mechanical process," the words "mechanical process" should be construed, under the rule of ejusdem generis, as relating to a mechanical process of like kind as stenciling; that is to say, a process for producing the representation or artistic effect, and not a process for fixing more permanently the production of the artist. The "firing" of a painting on earthenware is not a "mechanical process" within the paragraph. *Wells, Fargo & Co. v. U. S.*, (1917) 8 U. S. Cust. App. 125, *distinguishing Bour v. U. S.*, (S. D. N. Y. 1898) 91 Fed. 533.

**Earthenware vases and plaques painted in mineral colors and "fired,"** the original work of an artist and having no utilitarian purpose, are entitled to free entry under this paragraph, as paintings in mineral colors. They are not dutiable under paragraph 79 as plaques and vases "painted, colored, tinted, stained, enameled, gilded, printed or ornamented or decorated in any manner." *Wells, Fargo & Co. v. U. S.*, (1917) 8 U. S. Cust. App. 125.

**Vol. II, p. 884, par. J, subsec. 4.** [First ed., 1914 Supp., p. 129.]

**"For use as models" — "Not for sale."**—The expressions in this subsection "for use as models" and "not for sale" are employed in contradistinction to each other. If imported for sale, the statute implies that they would and be used as models, and if imported for use as models, they would not be for sale, that is, for present sale and not imported primarily for that purpose. The words "not for sale" imply a condition of mind, and that condition relates to the date of importation. *Louise & Co. v. U. S.*, (1918) 8 U. S. Cust. App. 430.

**Imported models of women's wearing apparel.**—Models of women's wearing apparel imported and used as models in importers' manufacturing establishments and sold abroad and exported within six months are entitled to free entry under this subsection as having been imported "for use as models . . . and not for sale." *Louise & Co. v. U. S.*, (1918) 8 U. S. Cust. App. 430.

**Vol. II, p. 885, par. J, subsec. 5.**

[First ed., 1914 Supp., p. 130.]

**"Materials necessary for outfit and equipment."**—In this subsection the words "materials necessary for the outfit and equipment" mean the outfit and equipment of "naval vessels or other vessels of the United States, vessels built in the United States for foreign account and ownership, or for the purpose of being employed in the foreign or domestic trade." They refer to all such vessels, and not just those that are being outfitted and equipped for the first time. *U. S. v. Germania Importing Co.*, (1917) 8 U. S. Cust. App. 129.

**Linoleum for United States vessels.**—Where linoleum was entered after this Act went into effect but before the promulgation of the Treasury Department's regulations pursuant to this subsection and subsection 6, and application for its free entry under section 5 of the Panama Canal Act of August 24, 1912, was made in the manner prescribed by the department's regulations pursuant to that Act, but it was assessed under paragraph 276 of this Act, it was held to be entitled to free entry under this subsection upon a showing by the importers that it was used as outfit and equipment for vessels of the United States. *U. S. v. Germania Importing Co.*, (1917) 8 U. S. Cust. App. 129.

**Auxiliary engines for sailing vessels.**—Engines imported for installation in American-built sailing vessels, to make them point closer to the wind and to propel them when the wind fails, are not classifiable under this subsection, as either materials necessary for the construction of such vessels or as articles necessary for their outfit and equipment, but should be classified as articles of metal under paragraph 167. *Toledo Shipbuilding Co. v. U. S.*, (1918) 8 U. S. Cust. App. 342.

**Spare pump parts.**—Spare or repair parts for pumps to be installed in American built vessels are admissible free of duty under this subsection. *U. S. v. Harlan, etc., Corp.*, (1917) 8 U. S. Cust. App. 236.

**Effect of Treasury regulations.**—While it was within the power of the Treasury Department to keep in force its regulations pursuant to section 5 of the Act of August 24, 1912 (Panama Canal Act), after the time that this Act went into effect and until the promulgation of its regulations pursuant to this subsection and subsection 6, it was not within its power to keep them in force in such manner as to extend the right of free entry to goods not within the terms of this Act. *U. S. v. Germania Importing Co.*, (1917) 8 U. S. Cust. App. 129.

**Vol. II, p. 902, sec. 1.** [First ed., 1909 Supp., p. 112.]

**Compensation of inspectors.**—The Act of March 4, 1909, c. 314, 35 Stat. L. 1065, provided in section 2 as follows: "That the Secretary of the Treasury be, and he is

hereby, authorized to increase and fix the compensation of inspectors of customs," etc. It was held that under this provision the Secretary of the Treasury could not decrease salaries. *Cochnowar v. U. S.*, (1919) 248 U. S. 405, 39 S. Ct. 137, 63 U. S. (L. ed.) —, *reversing* (1916) 51 Ct. Cl. 461.

**Vol. II, p. 902, sec. 1.** [First ed., 1914 Supp., p. 57.]

**The continuance in office of collectors of ports in enlarged districts until the expiration of their existing commissions, is duly authorized by this Act under which the President's order of March 3, 1913, reorganizing the customs service, was issued.** (1913) 30 Op. Atty-Gen. 204.

**Vol. II, p. 956, sec. 2621.** [First ed., vol. II, p. 581.]

**Weighers.**—A person appointed by a collector "clerk, class 3, new office, to act as acting U. S. weigher" was held to come within R. S. sec. 2634, authorizing the Secretary of the Treasury to fix the number and compensation of clerks to be employed by any collector rather than under this section. *MacMath v. U. S.*, (1918) 248 U. S. 151, 39 S. Ct. 31, 63 U. S. (L. ed.) —, *affirming* (1916) 51 Ct. Cl. 356.

**Vol. II, p. 1010, par C.** [First ed., 1914 Supp., p. 114.]

**Entry—Appraisalment.**—All goods lawfully imported must be entered; there can be no appraisalment without an entry and no certain determination or assessment of ad valorem duties without an appraisalment. *Sheldon & Co. v. U. S.*, (1917) 8 U. S. Cust. App. 215.

**Vol. II, p. 1018, par. H.** [First ed., 1914 Supp., p. 116.]

**Raising of value by consignee.**—If the consignee at the time of the entry corrects the valuation of the goods under section 3 I, it will prevent a forfeiture for undervaluation by the consignor. *U. S. v. Nineteen Bales, etc.*, (S. D. N. Y. 1917) 247 Fed. 380.

**Undervaluation by consignor.**—A fraudulent undervaluation by a consignor in a foreign country is sufficient to warrant a forfeiture though the consignee is innocent of the fraud. *U. S. v. Four Packages of Cut Diamonds*, (S. D. N. Y. 1917) 247 Fed. 354.

**False statement.**—A package imported from Cuba by registered mail distinctly marked "Loose diamonds, dutiable," is not forfeitable under this section as there is no such false statement either written or spoken in connection with the deposit in the mails as is contemplated by such section. *Four Packages of Cut Diamonds v. U. S.*, (C. C. A. 2d

Cir. 1919) 256 Fed. 305, on rehearing, *modifying and affirming* (C. C. A. 2d Cir. 1918) 255 Fed. 314, 166 C. C. A. 484, which *affirmed* (S. D. N. Y. 1917) 247 Fed. 354.

**Vol. II, p. 1019, par. I.** [First ed., 1914 Supp., p. 117.]

**"Manifest clerical error."**—Where the entry was made in gold instead of Mexican dollars, Mexican dollars being worth about half as much as gold, and there was no disclosure by the record that this error was made, there was no "manifest clerical error" within the meaning of that language in this paragraph, which forbids the assessment of duty "upon an amount less than the entered value." *Meyer v. U. S.*, (1918) 8 U. S. Cust. App. 312.

**Assessment upon amount less than entered value of merchandise.**—The provisions of this paragraph were designed by Congress to vest in the Secretary of the Treasury the sole and exclusive authority to direct assessment of duty upon an amount less than the entered value of the merchandise. Where goods were entered at a value higher than that stated in the invoice, with a certificate that this was done to meet advances made by the appraiser in similar pending cases, and the final appraisement was between the entered and invoice values, the refusal of the Secretary of the Treasury to direct the collector to assess duty upon less than the entered value is not reviewable upon appeal by the board of United States general appraisers or the United States Court of Customs Appeals. *Mills & Gibb v. U. S.*, (1917) 8 U. S. Cust. App. 31; *Park & Tilford v. U. S.*, (1917) 8 U. S. Cust. App. 61.

**Additional duty—clerical error.**—Goods were entered upon an invoice which stated a "gross sum" and separate items of inland freight, various items of packing charges, and certain items of insurance charges, war risk, and consular fees. Entrants declared the market value as the "gross sum" less the inland freight, which was correct, the statement "gross sum" in the invoice being correct as to this item and incorrect as to the insurance charges, war risk, and consular fees. The entry was returned by the customs officers to the importers indorsed "account for all charges on entry," whereupon the importers altered the entry so as to deduct also the insurance charges, war risk, and consular fees. Subsequently the importers made similarly incorrect entries of similar merchandise upon similarly incorrect invoices. The action of the customs officers in returning the entry indorsed "account for all charges on entry" was only the allowance by them to the importers of an opportunity to correct what seemed to them to be an error, and did not constitute "duress" or estoppel as to any of these entries. The error of the importers was neither "clerical" nor "manifest." The action of the appraiser in disal-

lowing these erroneous deductions was only an appraisal by him of the real market value, and not an appraisal of "costs, charges, and expenses." Additional duty was justly imposed under this paragraph. *Kridel, etc. v. U. S.*, (1918) 8 U. S. Cust. App. 250.

**Vol. II, p. 1043, sec. 5.** [First ed., 1912 Supp., p. 53.]

The word "cargo" as used in this section does not include passengers' baggage. (1913) 30 Op. Atty.-Gen. 123.

**Effect on previous overvaluation.**—If the consignee at the time of entry corrects the valuation it will avoid a forfeiture for a previous undervaluation by the consignor. *U. S. v. Nineteen Bales, etc.*, (S. D. N. Y. 1917) 247 Fed. 380.

**Vol. II, p. 1071, par. N.** [First ed., 1914 Supp., p. 120.]

**Illegal mail importation.**—Where diamonds, brought into this country by mail, are seized and denied entry by the collector of customs, and upon the recommendation of the United States district attorney, the Secretary of the Treasury authorizes the collector to release them upon the payment of a sum of money equal to the duty, plus 20 per cent, this sum of money is not duty. Whether or not it is a fee, charge, or exaction within the meaning of those terms as used in this paragraph is not decided. If it is, protest presented more than 15 days after its payment is too late. If it is a compromise or settlement of forfeiture proceedings, threatened or commenced, the board of general appraisers and this court are without jurisdiction of the subject matter. *Sheldon & Co. v. U. S.*, (1917) 8 U. S. Cust. App. 215.

**Allegations in protest—burden of proof.**—The provision of this paragraph that "No agreement for a contingent fee in respect to recovery or refund under protest shall be lawful. Compliance with this provision shall be a condition precedent to the validity of the protest and to any refund thereunder, and a violation of this provision shall be punishable by a fine not exceeding \$500, or imprisonment for not more than one year, or both," does not make it necessary for the protest to deny the existence of an agreement for a contingent fee, nor does it put upon the protestant the burden of proving that no such agreement has been made. *U. S. v. Emery-Bird-Thayer Dry Goods Co.*, (1917) 8 U. S. Cust. App. 150; *U. S. v. Intercean Forwarding Co.*, (1917) 8 U. S. Cust. App. 155.

**Sufficiency of protest.**—Four different kinds of merchandise were separately invoiced, imported, entered, and liquidated, each on a date different from any other. All of it was assessed at the same rate under the same paragraph. The protest did not state what the collector's classification was, simply describing it as "your decision assessing duty

at 60 per cent under paragraph 356." It described the merchandise vaguely as rosaries, medals, crosses, chains, and similar merchandise covered by entries below named." It claimed alternatively at a great number of different rates under a great number of different paragraphs, without any statement as to what classifications were claimed at the different rates under the different paragraphs other than "that said merchandise is properly dutiable at the rate applicable to the component material of chief value, or otherwise," with no statement as to what the component material of chief value was. It was held that it was too obscure to comply with the requirement of this paragraph, that the protest shall set forth "distinctly and specifically" the reasons for objecting. *Melham & Co. v. U. S.*, (1918) 8 U. S. Cust. App. 324.

**Vol. II, p. 1086, par. R.** [First ed., 1914 Supp., p. 122.]

**Determination of value.**—Where glue is bought at a gross price, packed in bags, the value per pound, for tariff purposes, is the gross price divided by the net weight in pounds. *U. S. v. Hirsch, Stein & Co.*, (1917) 8 U. S. Cust. App. 121.

**Vol. II, p. 1115, sec. M.** [First ed., 1914 Supp., p. 130.]

**Validity of Treasury regulations.**—The Secretary of the Treasury has no authority to promulgate a regulation requiring all manufacturers of cigars doing business under the Act to pay to the United States ten dollars per thousand for stamps to be used to indicate the character of the boxes, etc., containing cigars, the origin of the tobacco and the place of manufacture. *U. S. v. Rosenberg*, (S. D. Fla. 1918) 253 Fed. 285.

**Vol. II, p. 1117, par. N, subsec. 1.** [First ed., 1914 Supp., p. 132.]

**"Assayed according to commercial methods."**—It was not the intention of Congress that duty on ores should be assessed on a greater metal content than that commercially producible from the ores; and a method of assaying which shows the actual quantity of metal in the ore, which is greater than that producible from it by the ordinary smelting processes, exceeds the requirement of subsection 1, paragraph N, section 4, Tariff Act of 1913, that the ores shall be "assayed according to commercial methods." *U. S. v. Consolidated Kansas City Smelting & Refining Co.*, (1918) 8 U. S. Cust. App. 406.

**Vol. II, p. 1136, sec. 21.** [First ed., vol. II, p. 760.]

**Burden of proof as to fraud.**—The limitation of the right of a collector to reliquidate duties after one year from the time of entry to cases of fraud, which is made by this sec-

tion, prevents the casting upon the importer, on the hearing of an appeal to the board of general appraisers, of the burden of establishing that there had been no fraud, on any theory that the presumption of the correctness of official action was sufficient, without proof of fraud, to sustain the reliquidation. *Vitelli v. U. S.*, (1919) 250 U. S. 355, 39 S. Ct. 544, 63 U. S. (L. ed.) —, *reversing* (1916) 7 Cust. App. 243.

Error in construing the limitation of the right of a collector to reliquidate duties after one year from the time of entry to cases of fraud, made by this section, as having the effect of casting upon the importer, on the hearing of an appeal to the board of general appraisers, of the burden of establishing that there had been no fraud, requires the reversal of a judgment of the court of customs appeals, sustaining the reliquidation, even if there was adequate proof in the record to show the existence of fraud. *Vitelli v. U. S.*, (1919) 250 U. S. 355, 39 S. Ct. 544, 63 U. S. (L. ed.) —, *reversing* (1916) 7 Cust. App. 243.

**Vol. II, p. 1168, sec. 3082.** [First ed., vol. II, p. 748.]

**Importation by registered mail.**—A package imported from Cuba by registered mail plainly marked "Loose diamonds, dutiable" is not an importation knowingly made "contrary to law" in violation of this section, notwithstanding that a postal convention executed by the Postmaster General and approved by the President in 1906, to which Cuba was a party, prohibited the insertion in ordinary or registered correspondence of "articles liable to customs duties," the defendant being without knowledge of such prohibition. *Four Packages Cut Diamonds v. U. S.* (C. C. A. 2d Cir. 1919) 256 Fed. 305, *modifying and affirming* on rehearing (C. C. A. 2d Cir. 1918) 255 Fed. 314, 166 C. C. A. 484, which *affirmed* (S. D. N. Y. 1917) 247 Fed. 354, wherein the court said: "Such conventions are not treaties, because not made by and with the advice and consent of the Senate, and they are not laws, because not enacted by Congress. If we assume that as administrative regulations made by authority of Congress they have the force of law, the package was imported contrary to law. But the section is evidently intended to prevent smuggling. The word 'fraudulently' covers the acts of every one who directly smuggles, and the word 'knowingly' the acts of every one who consciously assists a smuggler. The question of intent is distinctly involved. The claimant, Goldstein, has been acquitted of any imputation of fraud, and E. Boyer, who registered the package at Havana, could not be held liable for fraudulently importing or assisting to import the package contrary to law, because he plainly marked it as containing 'Loose diamonds, dutiable.' He did not knowingly assist a smuggler, unless he had actual knowledge of the regulation and that the purpose

of sending the package through the mails was to defraud the customs. If imputed or constructive knowledge of the regulation were thought by Congress enough to justify forfeiture, the word 'knowingly' would not have been used. There being no evidence that Boyer knew of the existence of the regulation, or was conscious of assisting a smuggler contrary to law, we think this package is not subject to forfeiture."

**Vol. II, p. 1181, sec. 17.** [First ed., vol. II, p. 758.]

**Finding as adjudication.**—A finding favorable to the importer in the summary proceeding authorized by section 17 does not bar a subsequent proceeding by libel to enforce a forfeiture, the proceeding being an administrative one to secure the clemency of the Treasury Department. *U. S. v. Nineteen Bales*, (S. D. N. Y. 1917) 247 Fed. 380.

**Actions in name of United States.**—This section is clearly intended to bind the government. Most, if not all, of the actions therein specified would be brought in the name of the United States, or for its benefit. *U. S. v. Joles*, (D. C. Mass. 1917) 251 Fed. 417.

**Vol. II, p. 1183, sec. 22.** [First ed., vol. II, p. 761.]

**"Action to recover penalties."**—An action to recover the penal sums on bonds given for failure to file the names of the actual owners of the goods imported and for failure to produce corrected invoices, all duties and excess duties having been paid, is an action to recover penalties and is barred by the three-

year provision of this section. *U. S. v. Joles*, (D. C. Mass. 1917) 251 Fed. 417.

**Vol. II, p. 1186, sec. 3, par. 1.**  
[First ed., 1914 Supp., p. 122.]

**"Probable cause."**—In a prosecution by the United States under R. S. sec. 3082 (2 Fed. Stat. Ann. 1168) for the forfeiture of certain plumage of wild birds alleged to have been imported in violation of sec. 1, Schedule N of the Tariff Act of Oct. 3, 1913, ch. 16 (2 Fed. Stat. Ann. 711), the government has the burden, under this section, of proving "probable cause," which is synonymous with "reasonable cause," for the prosecution, and the finding of the court on such question is conclusive. *U. S. v. One Bag of Paradise, etc., Feathers*, (C. C. A. 2d Cir. 1919) 256 Fed. 301.

**Vol. II, p. 1194, sec. 3109.** [First ed., vol. I, p. 767.]

**Canadian boundary waters.**—This section, in imposing certain restrictions upon masters of foreign vessels which are not imposed upon masters of domestic vessels, is in conflict with the provisions of article 1 of the treaty concerning the boundary waters between the United States and Canada, concluded January 11, 1909, between the United States and Great Britain, and its provisions must be regarded as superseded by such treaty in so far as they are inconsistent therewith, and hence it is the duty of the administrative officers of the Government to fulfil the requirements of the treaty. (1915) 30 Op. Atty.-Gen. 351.

## DISCRIMINATING LAWS AND DUTIES

**Vol. III, p. 81, par. E.** [First ed., 1914 Supp., p. 127.]

**"Bounty or grant"** as used in this paragraph was held to include an allowance under British legislation of three pence per gallon upon plain British spirits exported,

and five pence per gallon upon British compounded spirits exported. *Nicholas v. U. S.*, (1919) 249 U. S. 34, 39 S. Ct. 218, 63 U. S. (L. ed.) —, *affirming* (1916) 7 Cust. App. 97, and *following* *U. S. v. Passavant*, (1898) 169 U. S. 16, 18 S. Ct. 219, 42 U. S. (L. ed.) 644.

## EDUCATION

**Vol. III, p. 100, sec. 4.** [First ed., vol. II, p. 851.]

**Duties of state officers.**—"Under the acts of Congress, the state treasurer, to whom the fund is transmitted by the Secretary of the Treasury, has, with reference to this fund, a mere clerical or ministerial duty to perform; that is, to pay over the fund immediately to

the treasurer of the board of trustees, in this case the board of regents, upon their order. The acts of the defendants, state treasurer, and state auditor in this instance of placing this fund in the general fund by making appropriate entries upon their books to that end were mere nullities. *County of Blaine v. Fuld et al.*, 171 Pac. 1138. Under the acts of Congress in question the state auditor has

no duty whatever to perform with respect to this fund and no authority over it. It is therefore apparent that the defendant state treasurer has but one duty to perform in the premises, and that is to pay over the sum in controversy immediately to the plaintiff, as treasurer of the board of regents." *Melgard v. Eagleson*, (1918) 31 Idaho 411, 172 Pac. 655.

**Vol. III, p. 103, sec. 1.** [First ed., vol. II, p. 854.]

**Administration of fund by state authorities.**—See notes under Act of July 2, 1862, vol. III, p. 100.

**Vol. III, p. 107, sec. 1.** [First ed., 1909 Supp., p. 122.]

**Administration of fund by state authorities.**—See notes under Act of July 2, 1862, vol. III, p. 100.

## ELECTIONS

**Vol. III, p. 120, sec. 1.** [First ed., 1912 Supp., p. 69.]

**Constitutionality.**—In *Blair v. U. S.*, (1919) 250 U. S. 273, 39 S. Ct. 468, 63 U. S. (L. ed.) —, *affirming* (S. D. N. Y. 1918) 253 Fed. 800, the constitutionality of this Act was challenged by witnesses summoned to testify before a grand jury in an investigation instituted thereunder, but the question was not passed on, the court holding that witnesses had no power to raise it, and saying: "The same constitutional question was stirred in *U. S. v. Gradwell*, (1917) 243 U. S. 476, 487 [37 S. Ct. 407, 61 U. S. (L. ed.) 857, 865]. but its determination was un-

necessary for the decision of the case, and for this reason it was left undetermined, as the opinion states. Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it. We do not think the present parties are so entitled, since a brief consideration of the relation of a witness to the proceeding in which he is called will suffice to show that he is not interested to challenge the jurisdiction of court or grand jury over the subject-matter that is under inquiry."

## EMINENT DOMAIN

**1918 Supp., p. 166.** [*Lands for military purposes, etc.*]

**State laws as governing proceedings.**—By express provision of the statute proceedings thereunder are prosecuted in accordance with the laws relating to suits for the condemnation of property. *U. S. v. First Nat. Bank*, (M. D. Ala. 1918) 250 Fed. 299, Ann. Cas. 1918E 36.

**Assessment of damages.**—In condemning land for temporary use by the government, the land being needed for the location and construction of a military training camp the rules to be followed in assessing damages were laid down by *Trieber, D. J.*, in *In re Condemnation of Lands for Military Camp*, (E. D. Ark. 1918) 250 Fed. 314, as follows:

"The owner is entitled to the rental value of his property, if it is tillable or occupied. If it appears from evidence at the trial that the improvements on a tract of land will necessarily have to be destroyed, either wholly or in part, the owner is entitled to compensation for their value, and in such cases the rental value will be for the land, without these improvements. By improvements I refer to houses, fences, barns, and other buildings.

"If the land is wild, and not subject to cultivation, the rental should be the prevailing rate of interest on its fair value.

"In addition to these payments, the government must obligate itself, and the judgment will so provide, that, when it surrenders the land to the owner, it will be returned to him in as good a condition as when it took possession, the natural wear and tear excepted. If the owners have been compensated in the action for the improvements, then, of course, it will not be required to replace them, or pay again for them. If the improvements, for which there has not been compensation, are not replaced, or the lands are not returned in as good condition as when the government took possession of them, natural wear and tear excepted, it is to pay such sums as damages as will enable the owner to put the land back in the condition it was, when the government took possession. This is necessary, as the government may cut trenches, build macadam roads, and otherwise make use of the land, which will, if not entirely, at least to some extent, destroy its value as farming land, for which these lands are only suitable.

"If the parties cannot agree upon the damages to be paid, if the government fails to

put the land back in the condition it was, when it entered upon it, the court will, upon the application of either party, have a jury assess the damages, and for that purpose the court will retain jurisdiction of this cause.

This, in the opinion of the court, is equitable and just to all parties, will protect the landowner, and will enable the government to make use of the land for military training, so necessary in this great emergency."

## ESTIMATES, APPROPRIATIONS AND REPORTS

Vol. III, p. 138, sec. 3679. [First ed., vol. II, p. 898.]

The words "voluntary service" in this section were not intended to be synonymous with "gratuitous service" and were not intended to cover services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be non-salaried. Hence, a retired army officer, receiving upward of \$2,500 per annum, may be employed as superintendent of an Indian school or agency, if no additional compensation is allowed, without contravening the provisions of this section. (1913) 30 Op. Atty.-Gen. 51.

Vol. III, p. 138, sec. 3679. [First ed., vol. X, p. 84.]

Gift of Grover Cleveland birthplace.—The proposed gift of the Grover Cleveland birthplace at Caldwell, N. J., upon the condition that the property be maintained as a suitable memorial, should not, as a matter of administrative policy, be accepted on behalf of the United States, without the consent of Congress and the President, as such a grant is a contract which is not authorized by law or under any appropriation. (1916) 30 Op. Atty.-Gen. 527.

## EVIDENCE

Vol. III, p. 197, sec. 882. [First ed., vol. III, p. 26.]

Original records.—Books, printed by authority of law from written public records of the Treasury Department, and produced from the custody of that department, where they are used as original records in the transaction of the daily business of the department, are admissible in evidence without the certification which this section requires in case of copies of public records. *Chesapeake, etc., Canal Co. v. U. S.*, (1919) 250 U. S. 123, 39 S. Ct. 122, 63 U. S. (L. ed.) (affirming (C. C. A. 3d Cir. 1917) 240 Fed. 903, 153 C. C. A. 589), wherein the court said: "The objection is that these are not books of original entry and that they are not certified as copies of public records are required to be by Rev. Stats., § 882.

"It is enough to say of this last contention that although the books admitted were printed from written public records, they were so printed by authority of law and were produced from the custody of the department of the Treasury, where they were used as original records in the transaction of the daily business of the department and therefore they did not require certification.

"They were public records, kept pursuant to constitutional and statutory requirement. Constitution of the United States, Article I,

§ 9, cl. 7; Act of Congress, approved September 2, 1789, c. 12, § 2, 1 Stat. 65; Rev. Stats., § 257; Act of Congress, approved September 30, 1890, c. 1126, 26 Stat. 504, 511; Act approved July 31, 1894, c. 174, § 15, 28 Stat. 162, 210. Thus, their character as public records required by law to be kept, the official character of their contents entered under the sanction of public duty, the obvious necessity for regular contemporaneous entries in them and the reduction to a minimum of motive on the part of public officials and employees to either make false entries or to omit proper ones, all unite to make these books admissible as unusually trustworthy sources of evidence."

Vol. III, p. 212, sec. 905. [First ed., vol. III, p. 37.]

The certificate of the judge is essential and attestation by the clerk is not sufficient without it. *Nease v. Broadwater Mercantile Co.*, (Tex. 1918) 206 S. W. 692.

Full faith and credit.—*Appeal from judgment pending.*—Whether the pendency of an appeal affects the finality of a judgment sued on in a state other than that where it was rendered will be determined by the law of the state where rendered. *Van Natta v. Van Natta*, (Tex. 1918) 200 S. W. 907.



Vol. III, p. 220, sec. 906. [First ed., vol. III, p. 39.]

**Faith and credit.**—In *Myres v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 779, 168 C. C. A. 125, the court said: "The plaintiff in error complains of the admission of certified copies of the deeds of the owners of the lands constituting the government reservation at Ft. Bliss, and the deed of the Governor of Texas, ceding jurisdiction over it to the United States, upon the ground that, under the Texas Civil Code, such certified copies are admissible, in civil or criminal proceedings, only when filed three days before the trial, and when notice of the filing is given the adverse party. The United States courts, in criminal procedure, do not follow

the practice of the state courts of the states in which they sit. Section 96, Rev. Stat. U. S. authorizes the use in the federal courts of authenticated documents from state courts and offices. It provides that such certified records 'shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state, territory, or country, as aforesaid, from which they are taken.' The effect of this provision is not an adoption of the rules of practice as to the preliminaries necessary to the introduction of certified records fixed by state statutes, but to give to such certified copies, when introduced, the like faith and credit that they are accorded in the courts of the state."

## EXTRADITION

Vol. III, p. 283, sec. 5275. [First ed., vol. III, p. 78.]

**Subjecting extradited person to civil liability.**—The process of extradition should not be perverted to serve the purposes of a private litigant in subjecting the extradited person to a civil liability. *Smith v. Government of Canal Zone*, (C. C. A. 5th Cir. 1918) 249 Fed. 273, 161 C. C. A. 281.

Vol. III, p. 285, sec. 5278. [First ed., vol. III, p. 78.]

VI. Fugitive from justice.

XII. Warrant of arrest.

XIV. Review.

2. By state courts.

VI. FUGITIVE FROM JUSTICE (p. 288)

**Meaning of term.**—The term "fugitive from justice" has reference to a person who, having within the state committed that which by its law constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, has left

its jurisdiction and is found in the territory of another state. *Ex p. Thurber*, (Cal. App. 1918) 174 Pac. 112.

XII. WARRANT OF ARREST (p. 301)

**Form and sufficiency.**—*Fugitive from justice.*—A warrant for the arrest of an alleged fugitive from justice, which is issued on information on oath that "the offense of fugitive from justice has been committed" by him, even though treated as including the oath which recites that he entered the state from another state "where he is charged with the crime of murder," is insufficient as failing to show the production of an authenticated "copy of an indictment found or affidavit made before a magistrate" of the state from which he is alleged to have fled, as required by this section. *Reichman v. Harris*, (C. C. A. 6th Cir. 1918) 252 Fed. 371, 164 C. C. A. 205.

XIV. REVIEW

2. By State Courts (p. 305)

The guilt or innocence of the accused cannot be inquired into on habeas corpus. *Ex p. Thurber*, (Cal. App. 1918) 174 Pac. 112.

## FOOD AND DRUGS

Vol. III, p. 358, sec. 1. [First ed., 1909 Supp., p. 137.]

**Costs.**—The Food and Drugs Act is a highly penal statute and the court cannot read into it the imposition of anything which partakes of the nature of punishment and is not to be found in the law. Thus, in the absence of an express provision in the act regarding liability for costs, intervening claimants of goods libeled thereunder, who have not agreed to pay costs of the proceed-

ing, cannot be held liable. *U. S. v. 1,590 Cases of Tomato Pulp*, (E. D. Pa. 1919) 255 Fed. 228.

**State statutes.**—The Food and Drugs Act does not prevent state regulation of domestic retail sales. Indirect effects upon interstate commerce do not invalidate the act. *Hebe Co. v. Shaw*, (1919) 248 U. S. 297, 39 S. Ct. 125, 63 U. S. (L. ed.) —.

A state statute making it unlawful to sell any article of food that contains benzoic acid or benzoates is valid and applies to domestic

retail sales of single bottles or the contents of single bottles notwithstanding that they were shipped into the state from another state and complied with all requirements of the federal Food and Drugs Act. *Weigle v. Curtice Bros. Co.*, (1919) 248 U. S. 286, 39 S. Ct. 124, 63 U. S. (L. ed.) —, wherein the court said: "The argument in support of the decree contends in various forms that the sale of the individual bottles, when removed from the original package after entering the state, still is a part of commerce among the states, since the Act of Congress as to misbranding applies to them. But the Food and Drugs Act does not change or purport to change the moment at which an object ceases to move in interstate commerce. It imposes an obligation to label the bottles severally, although contained in one original package, as of course it may. Seven Cases of *Eckman's Alternative v. United States*, 239 U. S. 510, 515, 516. It provides for seizure and condemnation of misbranded or adulterated articles that have been transported from one state to another, although the transit is at an end, while the articles remain unsold or in original unbroken packages, as again it may. There is no reason why a lien *ex delicto* should be lost by the end of the journey in which the wrong was done. The two things have no relation to each other. *Hipolite Egg Co. v. United States*, 220 U. S. 45, 57, 58. Finally, the duty to retain the label upon the single bottles does not disappear at once. For reasons stated in *McDermott v. Wisconsin*, (1913) 228 U. S. 115, 33 S. Ct. 431, 57 U. S. (L. ed.) 754, 4 L. R. A. (N. S.) 984, Ann. Cas. 1915A 39, if the state should require the label to be removed while the bottles remained in the importer's hands unsold, it could interfere with the means reasonably adopted by Congress to make its regulations obeyed. But all this has nothing to do with the question when interstate commerce is over and the articles carried in it have come under the general power of the state. The law upon that point has undergone no change. The Food and Drugs Act indicates its intent to respect the recognized line of distinction between domestic and interstate commerce too clearly to need argument of an examination of its language. It naturally would, as the distinction is constitutional. The fact that a food or drug might be condemned by Congress if it passed from state to state, does not carry an immunity of foods or drugs, making the same passage, that it does not condemn. Neither the silence of Congress nor the decisions of officers of the United States have any authority beyond the domain established by the Constitution. *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 362. When objects of commerce get within the sphere of state legislation the state may exercise its independent judgment and prohibit what Congress did not see fit to forbid. When they get within that sphere is determined, as we have said, by the old

long-established criteria. The Food and Drugs Act does not interfere with state regulation of selling at retail. *Armour & Co. v. North Dakota*, 240 U. S. 510, 517; *McDermott v. Wisconsin*, 228 U. S. 115, 131. Such regulation is not an attempt to supplement the action of Congress in interstate commerce but the exercise of an authority outside of that commerce that always has remained in the states."

A state statute prescribing a standard of purity for a product to entitle it labeled or branded in a certain manner and sold at retail under such label or brand, does not contravene this Act. *Cleveland Macaroni Co. v. State Board of Health*, (N. D. Cal. 1919) 256 Fed. 376.

The Act of March 2, 1895, ch. 164, which prohibits the bringing of milk into the District of Columbia without first obtaining a permit from the health officer of the District, was intended primarily to regulate the source of supply of such milk and to secure sanitary conditions and surroundings, and is not repealed by this Act, which is operative when such milk reaches the District and subjects it to the tests of misbranding and adulteration. *District of Columbia v. Simpson*, (1917) 47 App. Cas. (D. C.) 6.

### Vol. III, p. 360, sec. 2. [First ed., 1909 Supp., p. 137.]

**Articles not to be immediately used as food.** — In a prosecution for transporting in interstate commerce milk adulterated with water, it is no defense that it was shipped from the defendant's receiving station in one state to itself in another state, there to be treated and impurities removed before being used as an article of food. *Union Dairy Co. v. U. S.*, (C. C. A. 7th Cir. 1918) 250 Fed. 231, 162 C. C. A. 367.

**Number of offenses in single shipment.** — There is authority that the unit of an offense under this section is the article as distinguished from the shipment. Moreover, adulteration and misbranding are different offenses. Consequently, if there are seven different articles in a shipment and each article is both adulterated and misbranded, there are fourteen separate and distinct violations of the Act, for which separate penalties may be imposed. *U. S. v. Direct Sales Co.*, (W. D. N. Y. 1918) 252 Fed. 882.

It has been held, however, contrary to the above authority, that a shipment of two hundred and fifty pails of adulterated candy to one consignee in a single shipment constitutes but one offense under this section. *U. S. v. Watson-Durand-Kasper Grocery Co.*, (D. C. Kan. 1917) 251 Fed. 310, wherein the court said: "Conceding, therefore, the candy complained of in this case was adulterated in violation of the act, yet, as there was but a single sale, purchase, and shipment of the adulterated product, as the entire matter charged grew out of a single transaction and

a single shipment, it must follow the plaintiff can carve out of this single transaction but a single offense. Although there were 250 pails of the candy shipped, yet here, as under the provisions of the Twenty-Eight Hour Law (Act June 29, 1906, c. 3594, 34 Stat. 607), shipment made or offered by defendant must be taken as the unit, although it may consist of many parcels. No greater reason appears for dividing the shipment in question under the Food and Drugs Act, all being comprehended under the general term 'confectionery,' into different lots or parcels than would appear for making the many different head or cars of stock a separate violation of the Twenty-Eight Hour Law."

**Information—Signing and filing.**—An information signed by the district attorney acting on a report filed in court by the Secretary of Agriculture is sufficient, and leave of court is not necessary to its filing. *U. S. v. Simon*, (E. D. Pa. 1916) 248 Fed. 980. The court said: "The practice, adopted, as we are informed, in the western district of this circuit, of requiring actual leave before permitting informations to be filed, presents certain advantages, as does the practice followed in other jurisdictions of permitting leave to be assumed until challenged, but each comes in the end to be the same."

### Vol. III, p. 371, sec. 7. [First ed., 1909 Supp., p. 138.]

**Decaying fruit.**—Oranges frozen before shipment and beginning to decay are adulterated within the meaning of this Act. *U. S. v. 462 Boxes of Oranges*, (D. C. Colo. 1917) 249 Fed. 505.

**Confectionery.**—Confectionery is adulterated when it contains "a vegetable substance" deleterious or detrimental to health. *U. S. v. Watson-Durand-Kasper Grocery Co.*, (D. C. Kan. 1917) 251 Fed. 310, wherein the court said: "Coming, now, to the remaining question, defendant contends, although the adulterated product charged to have been shipped in interstate commerce is pleaded to have been a food product, as the evidence discloses it to have been 'confectionery,' commonly called candy, and as the act by its terms defines in what the adulteration of 'confectionery' consists, namely, 'if it contains terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color, or flavor,' and as 'the adulteration here charged is not by the use of a mineral but of a vegetable substance, therefore, applying the rule of ejusdem generis, the act does not, by the addition of the phrase 'or other ingredient deleterious or detrimental to health,' cover a case in which the substance, deleterious or detrimental to health ingredient, is of a vegetable and not a mineral substance."

"From a careful reading of the act I cannot give my assent to this construction for this reason: Conceding candy to fall under the general classification of 'confectionery,' further conceding Congress has by the terms

of the act specified what constitutes an adulteration of 'confectionery,' all as by defendant contended, yet I am of the opinion the phrase, 'or other ingredient deleterious or detrimental to health,' is not limited by or restricted to the preceding phrase, 'or other mineral substance or poisonous color or flavor.' On the contrary, I am of the opinion it was the intent of the lawmaking power to provide that 'confectionery may be adulterated in violation of the terms of the act in three distinct and separate manners or ways: (1) By causing it to contain 'terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor;' (2) by permitting it to contain or include any 'other ingredient deleterious or detrimental to health;' or (3) by the use of 'any vinous, malt, or spirituous liquor or compound or narcotic drug.'"

**Adulterated milk.**—In a prosecution for transporting in interstate commerce milk adulterated with water, it is unnecessary, in view of the provisions of this section, for the court to receive evidence to establish the fact that the addition of water to milk injuriously affects the quality or strength of milk. *Union Dairy Co. v. U. S.*, (C. C. A. 7th Cir. 1918) 250 Fed. 231, 162 C. C. A. 367.

**Meat and meat-food products prepared for interstate or foreign commerce under the meat-inspection amendment to the Agricultural Appropriation Act of June 30, 1906, ch. 3913 (see vol. I, p. 398), are subject to the provisions of this Act relating to adulteration.** (1913) 30 Op. Atty-Gen. 164.

### Vol. III, p. 379, sec. 8. [First ed., 1909 Supp., p. 139.]

**Scope of last proviso.**—The last proviso that "nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding,"—merely relates to the interpretation of the requirements of the federal Act, and does not enlarge its purview, or establish a rule as to matters which lie outside its prohibitions. *Corn Products Refining Co. v. Eddy*, (1919) 249 U. S. 427, 39 S. Ct. 325, 63 U. S. (L. ed.) —, *affirming* (1916) 99 Kan. 63, 163 Pac. 615.

**Validity of state statutes on subject of misbranding.**—To the same effect as the original annotation, see *E. Fougere v. New York*, (1918) 224 N. Y. 269, 120 N. E. 642.

Congress did not, by the enactment of the Food and Drugs Act for the prevention of adulteration and misbranding of food and drugs when the subject of interstate commerce, preclude a state board of health from prohibiting, under the sanction of the state Food and Drugs Law, sales by importing dealers of a proprietary table syrup in the original packages unless the principal label

shall disclose the ingredients and their proportions, where the state law, though following quite closely the lines of the federal statute, inserts the words not found in the federal statute, "or the rules and regulations of the state board of health," in the proviso to the misbranding section that nothing in the Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary goods which contain no unwholesome ingredients to disclose their trade formulas except in so far as the provisions of the Act may require to secure freedom from adulteration or misbranding. *Corn Products Refining Co. v. Eddy*, (1919) 249 U. S. 427, 39 S. Ct. 325, 63 U. S. (L. ed.) — (*affirming* (1916) 99 Kan. 63, 163 Pac. 615), wherein the court said: "The question of repugnancy to the commerce clause may be treated (a) aside from federal legislation; and (b) in view of the 'Food and Drugs Act' of Congress, June 30, 1906, c. 3915, 34 Stat. 768. Upon this question, in both aspects, the judgment under review is clearly sustained by the decision of this court in *Savage v. Jones*, (1912) 225 U. S. 501, 32 S. Ct. 715, 56 U. S. (L. ed.) 1182, which is precisely in point. . . . *Savage v. Jones* was decided after elaborate argument and upon full consideration. We see no reason to reconsider the conclusion there reached or to deny to the case its proper authority. Its doctrine was followed and applied in *Sligh v. Kirkwood*, (1915) 237 U. S. 52, 61–62 [35 S. Ct. 501, 59 U. S. (L. ed.) 835, 839]; *Hebe Co. v. Shaw*, (1919) 248 U. S. 297, 304 [39 S. Ct. 125, 63 U. S. (L. ed.) —]. It is argued that the present case is controlled rather by *McDermott v. Wisconsin*, (1913) 228 U. S. 115, 130, 33 S. Ct. 431, 57 U. S. (L. ed.) 754, 765, Ann. Cas. 1915A 39, 47 L. R. A. (N. S.) 984, and in effect that this case must be taken as overruling *Savage v. Jones*. The contention is unfounded. The authority of the earlier decision was expressly recognized in the opinion of the court in the later; the distinction being placed (pp. 131–132) upon the question whether the regulations of the state concerning the same subject-matter were in conflict with the acts of Congress. The Wisconsin statute was held to be in conflict because it required that packages of foodstuffs received through the channels of interstate commerce, bearing labels intended to be in compliance with the act of Congress, while the goods were still unsold and were in the possession of the importer for the purpose of sale and being exposed and offered for sale by him, as a condition of their legitimate sale within the state, should bear the label required by the state law and none other — in effect requiring the label that showed compliance with the act of Congress to be removed from the package before the first sale by the importer, and while the goods remained still subject to federal inspection."

**Misleading statements as to curative effects** — "*Remedy*." — The word "remedy" is not synonymous with "cure" but means that

which relieves or cures a disease, and hence a manufacturer who advertises a medicine as a remedy for certain diseases, after being informed that it relieved them, is not guilty of "misbranding" it within the meaning of this section, on the principle that he advertised it as a cure for such diseases. *U. S. v. Natura Co.*, (N. D. Cal. 1917) 250 Fed. 925.

**Statements false and fraudulent.** — In a prosecution under this section for misbranding medicine by making false and fraudulent statements on the labels regarding its curative effects, the government in order to obtain a conviction must show that the statements were both false and fraudulent. *U. S. v. Tuberclecide Co.*, (S. D. Cal. 1916) 252 Fed. 938.

An information charging a violation of this section in misbranding drugs shipped in interstate commerce is sufficient against a motion in arrest of judgment where it alleges that the statements in the labels were applied by the defendant to the drug knowingly and in reckless and wanton disregard to their truth or falsity. *Dr. J. H. McLean Medicine Co. v. U. S.*, (C. C. A. 8th Cir. 1918) 253 Fed. 694, 165 C. C. A. 288.

Evidence by physicians that there is a general agreement of medical opinion that a drug, composed according to the formula used by the defendant in preparing the drug sold by him, would not be effective for the treatment of the diseases for which the defendant's labels and statements claim it is effective, is admissible in a prosecution under this section for misbranding drugs. Likewise, in such a prosecution testimonials regarding the defendant's drug, if relating to the alleged false statements made by him and if relied on by the manager of his business in making the statements, are admissible on the question of intent, without proof of their execution, or the truth of their subject matter. *Dr. J. H. McLean Medicine Co. v. U. S.*, (C. C. A. 8th Cir. 1918) 253 Fed. 694, 165 C. C. A. 288.

In a prosecution under this section for misbranding drugs shipped in interstate commerce, there must be proof of an actual intent to deceive, an intent which may be inferred from facts and circumstances, but which must be proved. Accordingly, an instruction that one who makes a false statement, not knowing whether it is true or false, is as guilty of wrong as the man who makes a false statement knowing it is false, is erroneous. *Dr. J. H. McLean Medicine Co. v. U. S.*, (C. C. A. 8th Cir. 1918) 253 Fed. 694, 165 C. C. A. 288.

**Label as evidence of contents.** — The label upon a bottle required by the Pure Food Laws of the United States, stating the component parts of the contents of said bottle, is presumptive evidence of what the bottle contains, and such bottle, contents, and label thereon may be legally introduced in evidence in a prosecution for a violation of the prohibitory liquor laws of this state, and, if not rebutted, such evidence is *prima facie*

sufficient to establish the character of the contents of such bottle in so far as the statements contained in said labels are required by law. *Gilliland v. State*, (Okla. 1919) 179 Pac. 786.

**Administrative rules defining variations, etc.**—Under this section as amended by the

Act of March 3, 1913, ch. 117, administrative rules are to be promulgated specifically defining (1) reasonable variations, (2) tolerances as to large packages, (3) exemptions as to small, the line between large and small packages to be determined by the three secretaries. (1913) 30 Op. Atty.-Gen. 222.

## FOOD AND FUEL

### 1918 Supp., p. 188, sec. 15.

**Section as part of customs laws.**—"This section is not a part of the customs laws, providing for the importation of 'dutiable' goods." In re Food Conservation Act, (N. D. N. Y. 1918) 254 Fed. 893.

**Forfeiture of vehicles.**—"I am of the opinion, while the authorities are conflicting, that when a defendant has been indicted, convicted, and punished by a court of competent jurisdiction, pursuant to the provisions of section 15, . . . for bringing distilled spirits into the United States, he cannot be proceeded against by proceedings in rem for the forfeiture of his vehicles used in bringing in such spirits, inasmuch as the statute is new, denounces the penalty and punishment for the offense to be imposed, and makes no reference to any forfeiture of such property, or to any other or prior statute. As to the distilled spirits brought in contrary to law, I am of the opinion they are unlawfully in the United States, and may be seized and disposed of by forfeiture or otherwise, and that such seizure and forfeiture is not the imposition of a double or added punishment." In re Food Conservation Act, (N. D. N. Y. 1918) 254 Fed. 893.

### 1918 Supp., p. 191, sec. 25.

**Constitutionality.**—This section which seeks to regulate the prices of coal and coke is clearly a measure necessary for the efficient prosecution of war and is constitutional. *U. S. v. Pennsylvania Cent. Coal Co.*, (W. D. Pa. 1918) 256 Fed. 703.

**Indictment for conspiracy.**—In *U. S. v. Pennsylvania Cent. Coal Co.*, (W. D. Pa. 1918) 256 Fed. 703, which was an indictment for conspiracy against the Pennsylvania Cent. Coal Co., and others, to violate this section, demurrers to the indictment were overruled. The court said: "To constitute an indictment under this section, it is, of course, necessary to charge that the conspiracy was to do an act made a crime by the laws of the United States, the offense under section 37 of the Criminal Code (see vol. VII, p. 534) consisting of the unlawful combination and the doing of some act in furtherance of it. The offense which the defendants are charged with conspiring to commit, to wit, 'to violate the provisions of section 25 of the act of Congress approved

August 10, 1917, entitled "An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," and the regulations issued thereunder by Woodrow Wilson, President of the United States, and Harry A. Garfield, United States Fuel Administrator.' The manner of its violation is set forth to be that the defendants, engaged in the business of jobbers of coal, with full knowledge that the President had fixed a maximum price for the sale of coal, unlawfully combined to demand and receive from certain parties named a higher price per ton than the maximum price fixed by the President. Under the act, it is the President of the United States who is authorized to fix the price, and to establish rules for the regulation of and to regulate the production, sale, shipment, and so forth. 'Said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission during the war or for such part of said time as in his judgment may be necessary.' That portion of the indictment which avers a violation of the regulations issued by the President and the Fuel Administrator may be rejected as surplusage, in view of the specific definition of the offense which follows these words. If the charge was the commission of a substantive offense, namely, the sale of coal above the price fixed, it would be necessary in the indictment to aver both the fixed price and the price of sale. Not so, however, when the offense is a conspiracy to ask, demand, and receive a higher price than that fixed by the President. I think the indictment is sufficiently specific to define and identify the offense charged, so as to enable the defendants to prepare their defense thereto. It is not necessary that the offense which is intended to be committed as a result of the conspiracy should be described with the particularity required in an indictment in which such matter is charged as a substantive crime. Certainty to a common intent is all that is required. Neither is it necessary in alleging overt acts in the indictment, committed by one of the conspirators, to set forth in what manner the several overt acts tended to effect the purpose of the conspiracy. It is sufficient to allege that such acts were done to effect its object. *Houston v. United States*, 217 Fed. 854, 133 C. C. A. 562. It was said in

*United States v. McCord*, (D. C.) 72 Fed. 163: 'Any overt act, however slight, intended to effectuate the object of the conspiracy, and whatever its character may be, whether it is itself criminal or . . . innocent in its nature, is sufficient to fix the offense and to make it indictable.' The indictment sets forth the names of the alleged conspirators, charged

with a conspiracy to commit an offense against the United States, the nature of the offense, the time and place, with the overt acts committed in and for the purpose of executing them. These, in my opinion, are sufficient to sustain the indictment. *Hyde v. United States*, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614."

## GAME ANIMALS AND BIRDS

Vol. III, p. 414, sec. 1. [First ed., 1914 Supp., p. 147.]

**Conflict with state laws.**—Congress will not be deemed to have assumed such exclusive jurisdiction of migratory game and insectivorous birds by the provisions of the Act of March 4, 1913, that such birds "shall hereafter be deemed to be within the custody and protection of the government of the United States, and shall not be destroyed or taken contrary to regulations hereinafter provided therefor," which are to fix closed seasons in the several zones, as to invalidate the provisions of S. D. Laws 1909, ch. 240, § 29, forbidding the shipment by common or private carriers of wild duck of any variety to any person within or without the state,—especially since to construe the federal act as having such effect would raise a doubt as to its constitutionality. *Carey v. South Dakota*, (1919) 250 U. S. 118, 39 S. Ct. 403, 63 U. S. (L. ed.) — (*affirming* (1917) 39 S. D. 524, 165 N. W. 539), wherein the court said: "On behalf of the state, it was contended that this provision of its statute is not inconsistent with the federal law; and that its statute is in any event valid, because the

federal law is unconstitutional. *United States v. McCullagh*, (D. C. Kan. 1915) 221 Fed. Rep. 288. The Supreme Court of South Dakota did not pass upon the constitutional question; but upheld the state statute on the ground that it was not inconsistent with the federal law, since it did not appear that the ducks in question had been killed in violation of any regulation adopted under it. The prohibition of the federal act is limited to the provision that the birds 'shall not be destroyed or taken contrary to regulations.' The regulations merely prescribe the closed seasons. That is, neither the federal law nor the regulations deal with shipping. The prohibition of the state law here in question is limited to forbidding persons to 'ship . . . by common or private carrier.' It applies alike whether the shipment is made in open or closed season; and, it applies although the birds were lawfully killed or taken. This provision of the state law is obviously not inconsistent with the federal law. The fact that other provisions of this state statute may be so (which we do not consider) is immaterial, as the provision here in question may clearly stand alone."

## HABEAS CORPUS

Vol. III, p. 427, sec. 751. [First ed., vol. III, p. 162.]

### II. Courts authorized to issue writ.

1. Generally.
2. Supreme Court.
4. District Court.

### IV. As substitute for writ of error.

1. Rule stated.

### VI. Federal interference with custody of state court.

1. Rule stated.

### VIII. Review of proceedings of special tribunals.

3. Immigration.

### II. COURTS AUTHORIZED TO ISSUE WRIT

#### 1. Generally (p. 428)

It is settled that the jurisdiction of courts of the United States to issue writs of habeas

corpus is limited to cases of persons alleged to be restrained of their liberty in violation of the Constitution or of some law or treaty of the United States, and cases arising under the law of nations. *Matters v. Ryan*, (1919) 249 U. S. 375, 39 S. Ct. 315, 63 U. S. (L. ed.) —.

#### 2. Supreme Court (p. 428)

**Power as appellate in nature.**—A habeas corpus proceeding presenting the question whether a federal District Court may punish a witness for contempt solely because of the opinion of that court that he is committing perjury, without reference to any circumstance or condition giving it an obstructive effect, is so exceptional in character as to require the Supreme Court to determine the question in the exercise of its original jurisdiction. *Ex p. Hudgings*, (1919) 249 U. S. 378, 39 S. Ct. 337, 63 U. S. (L. ed.) —.

**Relief afforded by other competent courts.**

—For the purpose of redressing assumed violations of the Constitution and laws of the United States by means of habeas corpus the jurisdiction of other competent courts to afford relief may not be passed by and the original jurisdiction of the federal Supreme Court be invoked, in the absence of exceptional conditions justifying such course. *In re Tracy*, (1919) 249 U. S. 551, 39 S. Ct. 374, 63 U. S. (L. ed.) —.

**Effect of granting permission to file petition for writ.**—The grant by the Supreme Court of permission to file a petition for a writ of habeas corpus *prima facie* implies that the case is of such a character as to be an exception to the rule of procedure that other available sources of judicial power may not be passed by for the purpose of obtaining relief by resorting to the original jurisdiction of the Supreme Court. *Ex p. Hudgings*, (1919) 249 U. S. 378, 39 S. Ct. 337, 63 U. S. (L. ed.) —.

**4. District Court (p. 430)**

**Maternity and custody of child.**—A habeas corpus proceeding to determine the maternity and consequent right to custody of a minor child was not brought within the jurisdiction of a District Court as involving a substantial federal question by reason of an averment in the petition that the case was governed by the immigration laws of the United States, where the only basis for that assertion rested upon the allegation that the defendant, pretending to be the mother of the infant child, had brought her from Canada into the United States without complying with the administrative requirements of the immigration laws. *Matters v. Ryan*, (1919) 249 U. S. 375, 39 S. Ct. 315, 63 U. S. (L. ed.) —, wherein the court said: "It is obvious that on the face of the petition the sole question at issue was the maternity and custody of the child, and as that question was in its nature local and non-federal there was nothing to sustain the jurisdiction unless the averment that the case was governed by the immigration laws of the United States had that effect. But when it is observed that the only basis for that assertion rested upon the allegation that the defendant, pretending to be the mother of the infant child, had brought her from Canada into the United States without complying with the administrative requirements of the immigration laws, we are of opinion that the case made involved no federal question adequate to sustain the jurisdiction, because of the unsubstantial and frivolous character of the contention made in that respect."

"We are constrained to this conclusion since we are unable to perceive the possible basis upon which it can be assumed that the local question of maternity, and consequent right to custody, which dominated and controlled the whole issue could be transformed and made federal in character by the asser-

tion concerning immigration laws. And this becomes all the more cogent when the absence of power on the part of the petitioner to champion the enforcement of the immigration laws is borne in mind."

"Whether a case might arise where a court of the United States could take jurisdiction of a petition for habeas corpus upon averment of diversity of citizenship and pecuniary interest, without the assertion of a federal right, does not here arise (a) because the suit was brought exclusively under the assumption that it was governed by the law of the United States which requires a federal question to give jurisdiction, and (b) because, in any event, there is here no averment of jurisdictional amount."

**IV. AS SUBSTITUTE FOR WRIT OF ERROR****1. Rule Stated (p. 431)**

**Rule against use as substitute.**—The writ of habeas corpus may not be employed as an anticipatory writ of error. *Rumely v. McCarthy*, (1919) 250 U. S. 283, 39 S. Ct. 483, 63 U. S. (L. ed.) —, *affirming* (S. D. N. Y. 1919) 256 Fed. 565.

**Review of finding of United States commissioner.**—A finding of a United States commissioner in proceedings for the removal to another federal district for trial of a person there charged with an offense against the United States, that the office of the Alien Property Custodian is in the District of Columbia, if supported by competent evidence, is not reviewable by habeas corpus. *Rumely v. McCarthy*, (1919) 250 U. S. 283, 39 S. Ct. 483, 63 U. S. (L. ed.) —, *affirming* (S. D. N. Y. 1919) 256 Fed. 565.

**VI. FEDERAL INTERFERENCE WITH CUSTODY OF STATE COURT****1. Rule Stated (p. 438)**

**Where a person is in custody, under process from a state court.**—To same effect as original annotation, see *Castle v. Lewis*, (C. C. A. 8th Cir. 1918) 254 Fed. 917, 166 C. C. A. 279.

A petition to a federal court for a writ of habeas corpus which does not disclose with sufficient particularity anything which would warrant the court in interfering with the proceedings in the state court, will be denied. *Shapley v. Cahoon*, (C. C. A. 1st Cir. 1919) 255 Fed. 689.

**VIII. REVIEW OF PROCEEDINGS OF SPECIAL TRIBUNALS****3. Immigration (p. 443)**

In *Mayo v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 839, 168 C. C. A. 185, which was an appeal from an order, made on a habeas corpus hearing, directing that the appellee, an alien, be released from custody by the appellant, the Commissioner of Immigration at the port of New Orleans, the opinion read as follows: "The writ was issued pursuant

to the prayer of a petition, which alleged that the petitioner, the appellee, was deprived of a fair hearing by the board which ordered her deportation after she was detained upon her arrival at New Orleans on a vessel from a Mexican port. The return to the writ set up that the petitioner was held under an order of deportation made by a board of special inquiry and affirmed by the Secretary of Labor; that order being based upon a finding that the appellee was 'a person coming to this country for an immoral purpose.' The record discloses that evidence was adduced on the hearing which resulted in the order appealed from. It does not disclose what that evidence was. Some evidence is set out, without being authenticated in any way by the presiding judge. The record does not purport to contain all the evidence adduced on the hearing.

"The following is all that is shown by the bill of exceptions: The appellant objected to the admission of testimony by the appellee 'on the ground that the court had no jurisdiction to receive evidence and inquire into the merits of said cause without ascertaining whether the alien, Laure Sebastine Jobin, was given a fair trial by the immigration authorities; and his honor the judge then and there overruled said objection and admitted said testimony. Whereupon counsel for respondent reserved the bill of exceptions to the said ruling of the court.' It is not made to appear that the stated ground of objection existed in fact. It follows that it cannot properly be said that the ruling excepted to was erroneous. The opinion rendered by the district judge shows that he found that the appellee was denied a fair hearing by the immigration authorities, and that she 'is not of immoral character and is entitled to admission to the United States.' Proper findings to that effect entitled the appellee to be released from custody under the order of deportation. *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369; *Zadonaite v. Wolf*, 226 U. S. 272, 33 Sup. Ct. 31, 57 L. Ed. 218. It is to be presumed that the findings were proper ones, the record not showing the contrary."

**Vol. III, p. 462, sec. 754.** [First ed., vol. III, p. 172.]

**Petition—Allegations of arbitrary action.**—"Where the unlawfulness claimed is the order of an inferior tribunal, legally constituted and clothed with jurisdiction over the subject-matter and the person detained, the petition must charge facts constituting arbitrary or capricious action by such inferior tribunal." *Ex p. Tinkoff*, (N. D. Ill. 1918) 254 Fed. 222, affirmed (C. C. A. 7th Cir. 1918) 254 Fed. 225, 165 C. C. A. 513.

**Vol. III, p. 464, sec. 755.** [First ed., vol. III, p. 173.]

**Proceedings before draft boards.**—The refusal of a district board to grant a rehearing to a registrant is not arbitrary action that will justify the issuance of a writ of habeas corpus, nor may the writ be issued to relieve a registrant from an alleged erroneous decision of the board. *Ex p. Tinkoff*, (N. D. Ill. 1918) 254 Fed. 222, affirmed (C. C. A. 7th Cir. 1918) 254 Fed. 225, 165 C. C. A. 513.

**Vol. III, p. 480, sec. 766.** [First ed., vol. III, p. 179.]

**Stay of proceedings.**—Where the district judge who remanded the relator and allowed the appeal, refused a stay pending appeal to the Circuit Court of Appeals in a habeas corpus proceeding, it was held that a single judge of the Circuit Court of Appeals had no power to grant a stay. *U. S. v. Johnson*, (C. C. A. 2d Cir. 1918) 251 Fed. 889, 164 C. C. A. 105.

**Resentence.**—A resentence by a state court pending a writ of habeas corpus in a federal court, the first sentence being treated as void, does not constitute "acting in any matter pending and in process of being heard" in the federal court. *Ex p. McCready*, (Cal. 1918) 177 Pac. 459.

**Decisions of a federal court are controlling on state courts as to the interpretation of the Act.** *Ex p. McCready*, (Cal. 1918) 177 Pac. 459.

## HOSPITALS AND ASYLUMS

**Vol. III, p. 605, sec. 1.** [First ed., vol. III, p. 279.]

**Direction of transfer after end of term of imprisonment.**—A convict sentenced to imprisonment in a federal prison is entitled to be discharged at the end of his term of imprisonment, and hence an order made there-

after by the Secretary of the Interior under authority of this section, directing his transfer from the prison to the Government Hospital for the Insane at Washington, D. C., is not sufficient authority for his detention in the latter institution. (1916) 30 Op. Atty.-Gen. 569.



## IMMIGRATION

**Vol. III, p. 630, sec. 22.** [First ed., 1909 Supp., p. 171.]

**Validity of regulations.**—Since such rules and regulations as the Commissioner-General of Immigration is authorized to establish under this section must be consistent with the Act itself, they can only have the force and effect of law when not in contravention of law. *Holland-America Line v. U. S.*, (1918) 53 Ct. Cl. 522.

**Vol. III, p. 640, sec. 2.** [First ed., 1909 Supp., p. 162.]

V. Persons likely to become a public charge.

VIII. Persons solicited to migrate.

IX. Children.

**V. PERSONS LIKELY TO BECOME A PUBLIC CHARGE** (p. 641)

**Person liable to arrest.**—An alien who is charged with the commission of a minor offense before immigration is not subject to deportation. *Howe v. U. S.*, (C. C. A. 2d Cir. 1917) 247 Fed. 292, 159 C. C. A. 386, wherein the court said: "Section 2 of the act expressly covers exclusion because of the commission of a felony or other crime involving moral turpitude, and conditions the exclusion upon either a conviction of the alien or on an admission by him, neither of which exists in this case. If an immigrant may be excluded on the theory that because of charges of dishonesty neither proved nor admitted, this special provision of the act would appear to be useless. Certainly it can be circumvented in any case. It seems to us evidently intended, by defining the proof required, to prevent just such conjectures as were indulged in by the immigration inspector in this case. Indeed, with such latitudinarian construction of the provision 'likely to become a public charge,' most of the other specific grounds of exclusion could have been dispensed with. Idiots, imbeciles, feeble-minded persons, insane persons, persons affected with tuberculosis, and prostitutes might all be regarded as likely to become a public charge. The excluded classes with which this provision is associated are significant. It appears between 'paupers' and 'professional beggars.' We are convinced that Congress meant the act to exclude persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future. If the words covered jails, hospitals, and insane asylums, several of the other categories of exclusion would seem to be unnecessary. We are referred to a decision of the District Court for the Southern District of New York

in *United States ex rel. Freeman v. Williams*, (D. C.) 175 Fed. 274, in which the deportation of an alien whose career before entering the United States had been one of habitual delinquency was sustained on the ground that he was likely to become a public charge. We are not persuaded by this decision, and think *Savitsky* did not fall within the class under which the order of deportation was made. *Geglow v. Uhl*, 239 U. S. 9, 36 Sup. Ct. 2, 60 L. Ed. 114."

**VIII. PERSONS SOLICITED TO MIGRATE**  
(p. 646)

**"Offers or promises of employment"** in order to come within the scope of this section, must be made by, or with the authority of, the person proposing to furnish the employment. A mere assurance or promise, in general terms, of employment after reaching this country, made to an alien contract laborer by a foreign steamship or transportation agent, is not ground for exclusion. *Ex p. Prout*, (D. C. Mass. 1916) 253 Fed. 97.

**IX. CHILDREN** (p. 648)

**Children of citizens born abroad.**—The Department of Labor has no authority to promulgate a rule excluding from admission to this country children of Chinese citizens born abroad, unless they are dependent members of their father's family. *Quan Hing Sun v. White*, (C. C. A. 9th Cir. 1918) 254 Fed. 402, 165 C. C. A. 622.

**Vol. III, p. 656, sec. 5.** [First ed., 1909 Supp., p. 164.]

**Construction.**—This section should be strictly construed. *U. S. v. River Spinning Co.*, (C. C. A. 1st Cir. 1918) 250 Fed. 586, 162 C. C. A. 602.

**Separate penalties for each alien.**—Where two contract laborers are caused to come to this country by virtue of a single letter promising employment to both only one penalty can be recovered. *U. S. v. International Silver Co.*, (D. C. Conn. 1919) 255 Fed. 694, wherein the court said: "The demurrer to the relief prayed for in the second count must be sustained upon the authority of *United States v. N. Y. Central R. R. Co.*, (D. C.) 232 Fed. 179. There the defendant arranged for the importation of five alien laborers with whom it had made contracts of employment, and had arranged to assist their importation by furnishing them a joint free railroad pass, which the court held to be equivalent to the prepayment of their fares in cash, and decided that this was but a single act applicable to all five, and hence one penalty could be imposed. On page 184

Judge Ray said: 'As there was but one solicitation, all one act, the defendant incurred one penalty.' This ruling was affirmed by the Circuit Court of Appeals for the Second Circuit on appeal. 239 Fed. 130, 152 C. C. A. 172. So here there was but one transaction, all one act, and, even if the allegations of the second count be sufficient to state a cause of action, there could be only one recovery."

**Necessity of actual entry.**—Where contract laborers are rejected at the port of entry, the penalty provided by this section may not be recovered, for an actual entry into the United States must be shown. *U. S. v. River Spinning Co.*, (C. C. A. 1st Cir. 1918) 250 Fed. 586, 162 C. C. A. 602.

**Vol. III, p. 661, sec. 9.** [First ed., 1909 Supp., p. 165.]

**British sailor removed from British ship because of illness.**—This section is not violated where a British seaman signing as a member of a crew of a British steamship in an English port for a round trip is suffering from tuberculosis and is removed from the ship at an American port by immigration authorities for appearance before a board of inquiry where the facts show that at the time of the signing he appeared to be healthy, and neither the master nor any of the officers of the ship had any reason to suspect he was diseased, although a medical examination would have disclosed the fact that he was suffering from tuberculosis. *W. & C. T. Jones Steamship Corp. v. Hamilton*, (E. D. Va. 1918) 255 Fed. 799.

**Vol. III, p. 666, sec. 16.** [First ed., 1909 Supp., p. 168.]

**Liability of steamship company for maintenance of aliens.**—Section 16 does not obligate steamship lines transporting alien immigrants to defray the expense of the treatment, care, and maintenance of aliens in hospitals where they are treated prior to their examination by immigration officials and subsequent landing and admission to the United States, but contemplates that the United States shall pay the charges incurred for maintenance and treatment preceding examination and admission to the country. *Holland-America Line v. U. S.*, (1918) 53 Ct. Cl. 522.

**Vol. III, p. 673, sec. 20.** [First ed., 1909 Supp., p. 170.]

**I. ENTERING IN VIOLATION OF LAW (p. 673)**

**Entry on temporary pass.**—An alien in sound physical health who enters from Canada under a pass granted him by the board of special inquiry at Montreal established under section 32 of the Act of Feb. 20, 1907 (see vol. III, p. 694), for the purpose of visiting a brother in New York will not be deported on the ground of illegal entry

though he remains in New York and enters into business there. *Howe v. U. S.*, (C. C. A. 2d Cir. 1917) 247 Fed. 292, 159 C. C. A. 386.

**Vol. III, p. 685, sec. 25.** [First ed., 1909 Supp., p. 172.]

**III. FINALITY OF DECISIONS OF IMMIGRATION OFFICERS (p. 687)**

**Determination of identity of applicant.**—Where a Chinese person applies for admission on the ground that he is a native-born citizen of the United States and, on examination under the Chinese Exclusion Acts, produces a certified copy of a court discharge in a habeas corpus proceeding, a decision of the commissioner of immigration denying him admission solely on the ground that he is not the person mentioned in such discharge, is not conclusive and may be reviewed by the District Court. *White v. Tam Sen*, (C. C. A. 9th Cir. 1918) 252 Fed. 131, 164 C. C. A. 243.

**Vol. III, p. 691, sec. 26.** [First ed., 1909 Supp., p. 173.]

**Bond valid.**—A bond conditioned that an alien contemporaneously admitted into the United States shall not become a public charge and that the sureties will within six months and again within a year make written reports to the immigration officer of the residence and occupation of the alien is valid. *U. S. v. Feldman*, (C. C. A. 2d Cir. 1917) 247 Fed. 482, 159 C. C. A. 536.

**Action on bond—presumption.**—In an action on a bond conditioned that the sureties will report on the residence and occupation of an alien, testimony of the immigration officer that no notice was received raises a presumption that it was not sent, for the officers and employees of the postal service are presumed to have done their duty and made delivery of all properly addressed mail matter intrusted to their care; equally, also, are the officials of the immigration service presumed to have kept what they received. *U. S. v. Feldman*, (C. C. A. 2d Cir. 1917) 247 Fed. 482, 159 C. C. A. 536.

**Vol. III, p. 694, sec. 32.** [First ed., 1909 Supp., p. 174.]

**Effect of pass permitting entry.**—A pass properly issued by a board established under section 32 protects the immigrant from deportation on the ground of illegal entry. *Howe v. U. S.*, (C. C. A. 2d Cir. 1917) 247 Fed. 292, 159 C. C. A. 386.

**1918 Supp., p. 214, sec. 3.**

**"Persons likely to become a public charge."**—A "person likely to become a public charge" is one who for some cause or reason appears to be about to become a charge on the public, one who is to be supported at public expense, by reason of poverty, insanity

and poverty, disease and poverty, idiocy and poverty, or, it might be, by reason of having committed a crime which on conviction would be followed by imprisonment. It would seem there should be something indicating the person is liable to become or shows probability of her becoming a public charge. *Ex p. Mitchell*, (N. D. N. Y. 1919) 256 Fed. 229.

**Employee of foreign steamship company temporarily in country as contract laborer.**

—A clerk employed by a Dutch steamship company in its office at Amsterdam, who is transferred to its branch office in New York temporarily and is later to be sent by the company to its branch office in Dutch Guiana, is not a contract laborer within the meaning of this section. *U. S. r. Royal Dutch West India Mail*, (S. D. N. Y. 1918) 250 Fed. 913.

**Findings by immigration authorities as conclusive.**—A finding by the Secretary of Labor that an alien is "likely to become a public charge" is not conclusive, but may be reviewed on habeas corpus. *Ex p. Mitchell*, (N. D. N. Y. 1919) 256 Fed. 229, wherein the court said:

"But it is said the Secretary of Labor at Washington has passed on the question of fact, and has decided as matter of fact that this alien is a person likely to become a public charge, and that this finding is conclusive on the court. But there are no facts and not a single fact, and the record is before the court, indicating that she is such a person. The facts being before the court, it becomes a question of law whether or not this alien is within the description of persons subject to deportation. *Geglow v. Uhl*, 239 U. S. 31, 36 Sup. Ct. 2, 60 L. Ed. 114; *Gonzales v. Williams*, 192 U. S. 1, 15, 24 Sup. Ct. 177, 48 L. Ed. 317; *Howe v. United States*, 247 Fed. 292, 159 C. C. A. 386, refusing to follow *U. S. ex rel. Freeman v. Williams* (D. C.) 175 Fed. 274."

## 1918 Supp., p. 230, sec. 19.

**"Advocating and teaching the unlawful destruction of property."**—A writ of habeas corpus will be denied to aliens who have been ordered to be deported under this section for "advocating and teaching the unlawful destruction of property," where the evidence of the defendants shows that they believed in the teachings of the I. W. W. and distributed its literature which urged readers to commit sabotage by disabling or destroying machinery and other property of their employers. *Ex p. Bernat*, (W. D. Wash. 1918) 255 Fed. 429, wherein the court said: "The matter is not before the court for review, but merely to determine whether there is any evidence upon which to base the finding. Under the law, the conclusion of the department of labor, if there is any evidence, is final."

The third proviso of this section is applicable to all aliens, including Chinese, without reference to the time of their entry, who do, after the date of the act, something denounced by the act. *Mayo v. U. S.*, (C. C. A. 5th Cir. 1918) 251 Fed. 275, 163 C. C. A. 431.

**Burden of proof.**—Under this section the burden of proof rests upon the alien to show his right to remain in the United States. *Jung Kwok Hin v. Burnett*, (C. C. A. 9th Cir. 1919) 255 Fed. 685.

## 1918 Supp., p. 240, sec. 38.

The last proviso of this section preserves the status existing at the time of the passage of the act as to aliens who commit no new offense thereafter, and therefore the status of an alien Chinese person as an alien in this country in violation of the Chinese Exclusion Law will be dealt with by the law as it was before the passage of this Act. *Mayo v. U. S.*, (C. C. A. 5th Cir. 1918) 251 Fed. 275, 163 C. C. A. 431.

# IMPORTS AND EXPORTS

Vol. III, p. 723, sec. 1. [First ed., 1916 Supp., p. 62.]

**Constitutionality.**—This Act is not unconstitutional because it provides that possession of imported opium shall be deemed sufficient evidence to warrant conviction, unless the defendant explains the possession to the satisfaction of the jury, and that after July 1, 1913, all smoking opium within the United States shall be presumed to have been imported after April 1, 1909, and the burden shall be on the accused to rebut the presumption, for it is within the power of Congress to create rebuttable and explainable presumptions of this nature. *Gee Woe v. U. S.*, (C. C. A. 5th Cir. 1918) 250 Fed. 428, 162 C. C. A. 498.

Vol. III, p. 726, sec. 5. [First ed., 1916 Supp., p. 64.]

**Canal Zone.**—The provisions of this section and of section 6 of this Act are applicable to the Canal Zone. (1914) 30 Op. Atty.-Gen. 271.

Vol. III, p. 727, sec. 7. [First ed., 1916 Supp., p. 64.]

**Imposition of penalties by courts of Canal Zone.**—The courts of the Canal Zone have jurisdiction under the Panama Canal Act of Aug. 24, 1912, ch. 390 (see vol. IX, p. 110), to impose the penalties prescribed in this section. (1914) 308 Op. Atty.-Gen. 271.

**Vol. III, p. 728, sec. 1.** [First ed., 1914 Supp., p. 156.]

**Air rifles as "arms or munitions of war."**—The question whether air rifles are "arms or munitions of war" within the meaning of this section, is one of fact which the Attorney-General will not decide. (1913) 30 Op. Atty.-Gen. 9.

**Clothes and provisions are not munitions of war within the meaning of this section.** (1913) 30 Op. Atty.-Gen. 213.

**Horses, riding saddles, etc.**—Ordinary, as distinguished from military, riding saddles, stirrups, girths, hay and other food stuffs, and horses are not "munitions of war" within the meaning of this section. (1913) 30 Op. Atty.-Gen. 227.

**Sufficiency of evidence.**—In *Sotello v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 721, 168 C. C. A. 67, the evidence therein which showed that the defendant was arrested on American soil a few hundred feet from the Mexican border, traveling on a mule which carried considerable ammunition, was held sufficient to justify the court's overruling a motion for a directed verdict of not guilty.

**1918 Supp., p. 243, sec. 1.** [*Seizure, when authorized.*]

The words "or other articles" as used in this section, while literally all-inclusive, should be construed with reference to "arms and munitions of war," used in connection with them, and should be limited to articles

the exportation of which is at all times unlawful, or to be made so by proclamation of the President. *U. S. v. Fernandez*, (C. C. A. 5th Cir. 1918) 254 Fed. 302, 166 C. C. A. 42.

**1918 Supp., p. 244, sec. 2.**

**Time for obtaining warrant.**—The provisions of this section are mandatory; hence, where a warrant for the detention of property seized is not obtained within the required ten days, the property must be returned to its owner. *U. S. v. 267 Twenty-Dollar Gold Pieces*, (W. D. Wash. 1919) 255 Fed. 217.

**1918 Supp., p. 245, sec. 1.**

**Effect of prohibition of exports on charter party.**—Where a voyage is frustrated by an order of the exports administrative board, the ship owner is bound either to refund the freight money or to forward the cargo in some manner permitted by the order. *The Allanwilde*, (D. C. N. J. 1917) 247 Fed. 236.

**Release of property on claimant's bond.**—Where gold coin, delivered for export in violation of this section, is libeled by the government for forfeiture it may not be released to a claimant upon his giving a bond that it will not be exported, as this title makes no provision for the giving of a bond and the release of property. *U. S. v. Fernandez*, (C. C. A. 5th Cir. 1918) 254 Fed. 302, 166 C. C. A. 42.

## INDIANS

**Vol. III, p. 795, sec. 2117.** [First ed., vol. III, p. 374.]

**Sheep.**—To same effect as original annotation, see *U. S. v. Ash Sheep Co.*, (C. C. A. 9th Cir. 1918) 250 Fed. 592, 162 C. C. A. 608; 254 Fed. 59, 165 C. C. A. 469.

**Conclusiveness of decree denying penalty.**—A decree, in a suit to enjoin trespass on lands ceded by Indians to the United States, which denies the recovery of the penalty prescribed by this section on the ground of want of power to adjudicate the question is not conclusive on the right of the United States to recover such penalty in a later suit. *U. S. v. Ash Sheep Co.*, (C. C. A. 9th Cir. 1918) 250 Fed. 592, 162 C. C. A. 608.

**Vol. III, p. 800, sec. 38.** [First ed., vol. III, p. 414.]

**Tribal marriage valid.**—Marriages between citizens of the Choctaw Nation residing therein, contracted according to the usages and customs of the tribe of which they were members, and while the tribal relations

existed and were recognized by the federal government, will be sustained and held valid in the courts of this state, "and the issue of such marriages shall be deemed legitimate and entitled to all inheritances of property, or other rights, the same as in the case of the issue of other forms of lawful marriage." *Johnson v. Dunlap*, (Okla. 1918) 173 Pac. 359.

**Vol. III, p. 825, sec. 5.** [First ed., vol. III, p. 494.]

**Right conferred by trust patent.**—The trust patent provided for in this section gives only a possessory right. *Dougherty v. McFarland*, (S. D. 1918) 166 N. W. 143.

**Beginning of trust period.**—The date of the issuance of the trust patent in favor of an Indian allottee, and not the date of the approval of the allotment, marks the beginning of the trust period prescribed by the provisions of this section, that, upon the approval of the allotments provided for in that act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of

the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, and that, at the expiration of such period, the United States will convey the same by patent to said Indian or his heirs in fee, discharged of said trust and free of all charge or encumbrance. *U. S. v. Reynolds*, (1919) 250 U. S. 104, 39 S. Ct. 409, 63 U. S. (L. ed.) —, *reversing* (C. C. A. 8th Cir. 1918) 252 Fed. 65, wherein the court said: "While the matter is not free from doubt, we have reached the conclusion that by the better construction the trust period begins and dates from the issuance of the trust patent and not from the approval of the allotment. The department distinctly so ruled in Klamath Allotments, 38 L. D. 559, 561, where it was said, after quoting the pertinent language of § 5 of the Act of 1887: 'Clearly no trust is declared until actual issuance of patent, and the use of a word of the present tense, 'does,' shows that the trust period begins to run only upon such issuance.' This ruling was made in the year 1910, and may be inconsistent with some previous rulings of the department, as counsel for respondent insists that it is. Nevertheless it is entitled to weight as an administrative interpretation of the act; it comports with our impression of the natural meaning of the language employed by Congress; and it very probably was relied upon by the President when promulgating the order of November 24, 1916, extending the trust period. This order might as well have been made a few months earlier, had it been supposed that the 25-year period was to expire in September. This construction of the Act of 1887 puts it in agreement with other acts for the allotment of Indian lands, which, while subsequently passed and perhaps not strictly to be regarded as a legislative interpretation, nevertheless seem to us to indicate the effect that Congress attributed to the Act of 1887."

**Award of land as alimony.**—Where an Indian of the Wyandotte tribe of Indians had been allotted 40 acres of land, and a trust patent for the same had been issued under Act of Congress approved February 8, 1887, § 5, which contained a restriction against alienation of the land for a period of 25 years, it was held in a suit brought against him by his wife for a divorce, for the care and custody of their four minor children, for permanent alimony, and for the settlement of their property rights, where upon the trial the undisputed evidence showed that the period of restriction had expired but the allottee had not received his final patent for the land from the government, that he held the equitable title thereto in fee, and that the decree of the trial court awarding the land to the wife as permanent alimony and in settlement of the property rights of the parties, and for her use in supporting her-

self and minor children, was valid, and authorized under section 4969, Rev. Laws 1910. *Johnson v. Johnson*, (Okla. 1919) 179 Pac. 595

**Sale of growing corn.**—The sale by an Indian allottee of that part of the total crop to be grown by his tenant upon the allotted land which the lease fixes as due for rent cannot be said to have been forbidden by the prohibition of this section against conveyances of allotted land or contracts touching the same, where such allottee, by virtue of the Act of June 25, 1910 (see vol. 3, p. 853), and resulting regulations, had the power to make the lease and to stipulate for the rental for which it provided. *Miller v. McClain*, (1919) 249 U. S. 308, 39 S. Ct. 297, 63 U. S. (L. ed.) —, *affirming* (1915) 95 Kan. 794, 149 Pac. 399.

**Vol. III, p. 830, sec. 6.** [First ed., vol. III, p. 496.]

**Mandamus to compel issuance of patent to Indian lands** will not issue on the ground that the names of the petitioners were irregularly stricken from the roll of Creek freedmen, where it appears that the enrollment was in fact procured by fraud. *U. S. v. Lane*, (1917) 47 App. Cas. (D. C.) 134.

**Suits by United States as trustee.**—Since this section grants citizenship rights to allottees on the issuance of a fee simple title, the United States is not entitled to sue as trustee for an injury to personal property of such an allottee which has been purchased and maintained with funds obtained by him from the sale of a portion of his allotted lands. *U. S. v. Seufert Bros. Co.*, (C. C. A. 9th Cir. 1918) 252 Fed. 51, 164 C. C. A. 163.

**Jurisdiction of state courts.**—The state courts have jurisdiction to try an Indian who has not severed his tribal relation and is an allottee under the Act on a charge of larceny committed in the state but outside the limits of an Indian allotment or other Indian country. *State v. Superior Ct.*, (Wash. 1919) 181 Pac. 688.

**Vol. III, p. 841.** [*Jurisdiction of action, etc.*] [First ed., vol. III, p. 492.]

**Jurisdiction of Secretary of Interior.**—This paragraph did no more than vest authority in the then federal Circuit Court concurrent with the Secretary of the Interior. It did not deprive the Secretary of the Interior of authority to settle disputes concerning allotments. *Daugherty v. McFarland*, (S. D. 1918) 166 N. W. 143.

**Vol. III, p. 846, sec. 7.** [First ed., vol. III, p. 505.]

"Proper court."—"The proper court referred to . . . was presumably the appropriate federal Circuit Court authorized under Act

Aug. 15, 1894, as amended by Act Feb. 6, 1901" (see vol. 3, p. 841). It does not include a state county court. *Daugherty v. McFarland*, (S. D. 1918) 166 N. W. 143.

**Vol. III, p. 853, sec. 1.** [*Act of June 25, 1910.*] [First ed., 1912 Supp., vol. 1, p. 96.]

**Sale of growing corn by Indian allottee.**—For a construction of this section along with section 5 of the Act of 1887 see *supra*, p. 541.

**Vol. III, p. 861, sec. 1.** [First ed., 1909 Supp., p. 190.]

**Effect of subsequent legislation.**—The Act of May 27, 1908 (see vol. 3, p. 881) repeals the provisions of this Act which are in conflict with it. *Chupco v. Chapman*, (Okla. 1918) 170 Pac. 257.

**Osage Act.**—"Act Cong. June 28, 1906, c. 3572, 34 Stat. 539, placed no restrictions upon the alienation by heirs of inherited lands allotted and deeded in the right of a member of the Osage Tribe of Indians after his death, save only the mineral interests therein reserved to the tribe, individual disposition of which is expressly inhibited." *Mongrain v. Aeron*, (Okla. 1918) 174 Pac. 755.

**Vol. III, p. 872, sec. 19.** [First ed., 1909 Supp., p. 199.]

**As to restrictions in alienation by heirs** see *infra*, this page, the notes under section 22 of this Act.

**Vol. III, p. 874, sec. 22.** [First ed., 1909 Supp., p. 200.]

**Approval of alienation.**—Under section 22, Act Cong. April 26, 1906, c. 1876, 34 Stat. L. 137, the authority was vested exclusively in the Secretary of the Interior to approve a conveyance of any interest of a full-blood heir to a deceased allottee. The approval by the county court on April 3, 1914, of a deed executed after Act April 26, 1906, c. 1876, 34 Stat. 137, and prior to Act May 27, 1908, c. 199, 35 Stat. 312, by a full-blood heir of an interest in inherited land, is unauthorized and void. *Groom v. Dyer*, (Okla. 1919) 179 Pac. 12.

**Approval by Secretary of Interior no longer necessary.**—To the same effect as the original annotation see *Chupco v. Chapman*, (Okla. 1918) 170 Pac. 259.

**Alienation by heirs of a Creek freedman** is governed by this section rather than by section 19. *Harris v. Bell*, (C. C. A. 8th Cir. 1918) 250 Fed. 209, 162 C. C. A. 345.

**Allotment to representative of deceased Indian—restrictions.**—The restrictions made by the provisions of this section apply as well in a case where selection has been made

by a duly appointed executor or administrator for the benefit of the heirs of an Indian, who has died before receiving his allotment, as to a case where the land was selected by the ancestor in his lifetime. *David v. Youngken*, (C. C. A. 8th Cir. 1918) 250 Fed. 208, 162 C. C. A. 344; *Harris v. Bell*, (C. C. A. 8th Cir. 1918) 250 Fed. 209, 163 C. C. A. 345; both following *Brader v. James*, (1917) 246 U. S. 88, 38 S. Ct. 285, 62 U. S. (L. ed.) 591, and *Talley v. Burgess*, (1918) 246 U. S. 104, 38 S. Ct. 287, 62 U. S. (L. ed.) 600.

**Vol. III, p. 881, sec. 1.** [First ed., 1909 Supp., p. 232.]

**Nature of Act and effect on previous legislation.**—This Act is a revising Act, and was intended as a substitute for all former acts relating to the subject of such restrictions, and operated to repeal the provisions of the Act of April 26, 1906 (see vol. 3, p. 861), and previous congressional enactments in conflict therewith on the same subject. *Chupco v. Chapman*, (Okla. 1918) 170 Pac. 259; *King v. Mitchell*, (Okla. 1918) 171 Pac. 725.

**Relation to earlier acts.**—Act Cong. May 27, 1908, c. 199, 35 Stat. 312, entitled "An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes," is a revising Act, and was intended as a substitute for all former acts relating to the subject of such restrictions, and operated to repeal the provisions of Act Cong. April 26, 1906, c. 1876, 34 Stat. 137, and previous congressional enactments in conflict therewith on the same subject. *Coleman v. Davis*, (Okla. 1919) 180 Pac. 381. See to same effect, *King v. Shulta*, (Okla. 1919) 180 Pac. 550.

**Conditional removal of restrictions.**—In *U. S. v. Law*, (C. C. A. 8th Cir. 1918) 250 Fed. 218, 162 C. C. A. 354, it appeared that Amanda Perry was a full-blood Cherokee Indian and duly enrolled; that in the course of administration of the affairs of the tribe she was duly allotted certain lands in the Cherokee Nation; that thereafter, in compliance with law, she duly made application for the removal of restrictions upon the alienation of the lands so allotted, and that the Secretary of the Interior conditionally removed the restrictions therefrom, reserving the right to dispose of the proceeds arising from the sale of the lands upon which restrictions were removed; that the Secretary of the Interior disposed of the proceeds arising from the sale by investing them for and on behalf of Amanda Perry in real estate in the city of Tulsa, Okla., which is the land now in controversy; that the warrant deed conveying the new lands to Amanda Perry, taken with approval of United States by the United States Indian superintendent contained a condition against alienation prior to 1931. Amanda Perry and her husband mortgaged the land so received and the mortgage

was foreclosed. It was held that the condition imposed as the removal of the restriction was valid and that the mortgage foreclosure was subject to cancellation.

**Termination of supervising authority of Secretary of Interior.**—The supervising authority of the Secretary of the Interior over the collection, care, and disbursement of royalties under an oil and gas lease of a Creek allotment, made conformably to this section, did not terminate with the death of the allottee and the inheritance of the land by a full-blood Indian heir, where the event which the regulations of the Secretary of the Interior and the lease declare shall terminate such supervision, viz., the removal of the restrictions on alienation, has not occurred, although, under section 9 of that Act, it is possible for the heir, if the court approves, to sell and convey his interest in the land. *Parker v. Richards*, (1919) 250 U. S. 235, 39 S. Ct. 442, 63 U. S. (L. ed.) —, reversing (C. C. A. 8th Cir. 1917) 245 Fed. 330, 157 C. C. A. 522.

**Removal of restrictions as to minors.**—All restrictions upon the alienation of the allotments of minor allottees of the Five Civilized Tribes having less than one-half Indian blood, and the restrictions upon the alienation of all lands except homesteads of said allottees enrolled as mixed blood Indians of one-half or more than one-half and less than three-fourths Indian blood, are removed by this Act. *Langley v. Ford*, (Okla. 1918) 171 Pac. 471.

**Conveyance during minority.**—Where after passage of Act of Congress of May 27, 1908, ch. 19, 35 Stat. 312, a member of the Choctaw Nation, of one-fourth Indian blood, during his minority executes and delivers a contract for the sale of a portion of his allotment, and at the same time delivers a warranty deed to the same person, such deed and contract is absolutely void. The said allottee, however, on attaining his majority may make a valid conveyance to the same party for a lawful and independent consideration, notwithstanding the first attempted conveyances. *Jones v. Smyth*, (Okla. 1918) 172 Pac. 785.

A deed executed subsequent to the time the Act of Congress approved May 27, 1908 (35 Stat. 312) became effective, by an enrolled citizen of the Five Civilized Tribes, purporting to convey any part of the lands allotted to such citizen, who if a male was at the time under the age of 21 years, and, if a female, under the age of 18 years, according to the enrollment records of the Commission to the Five Civilized Tribes, is for that reason void, and no title passes thereby. *Perryman v. Sharp*, (Okla. 1918) 176 Pac. 526.

Where a Cherokee freedman during his minority attempts to convey by deed his allotted cession thereof for more than one year, and subsequently after attaining his majority he, by warranty deed, conveys to another, the validity of the second conveyance is not affected by section 2260, Rev. Laws 1910, as the alienation of such land

is controlled by Congressional enactment. *Sanders v. Melson*, (Okla. 1918) 174 Pac. 755.

The provision of section 6 of an Act of the Congress of May 27, 1908 (35 Stat. 312), "that the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the state of Oklahoma" embraces allotted lands inherited by such minor. *Crow v. Hardridge*, (Okla. 1918) 175 Pac. 115.

**Curative conveyance.**—While a minor, D., freedman citizen of the Cherokee Nation, prior to Act of Congress of May 27, 1908, ch. 199, 35 Stat. 312, made certain deeds to his allotted lands. After attaining his majority and subsequent to the time at which the mentioned Act became effective, D. executed new deeds to the grantee named in the original void deeds. It was held in an action by the allottee to recover the lands, that, there being no restriction on his power to alienate, in force at the time of the second set of conveyances, the deeds being regularly executed, and no equitable ground being urged for setting them aside, the grantee acquired the title thereto. *Campbell v. Daniels*, (Okla. 1918) 173 Pac. 517.

G., a citizen by blood of the Choctaw Nation, possessed of one-eighth Indian blood, while a minor executed a deed for part of his allotment, the consideration being \$1,500. After reaching the age of 21 years he employed counsel to bring action to recover the lands so conveyed. After propositions had been made pro and con looking toward a settlement, G. agreed that upon the payment of \$500 cash, he would execute a new deed. The \$500 was paid, a new deed was executed, reciting a consideration of \$2,000, arrived at by adding the \$500 then paid to the \$1,500 consideration for the former deed. It was held that the last deed was neither illegal, void, nor violative of the provisions of section 5, Act of Congress of May 27, 1908, and the same conveyed title to the grantee. *Grubbs v. Thompson*, (Okla. 1919) 178 Pac. 684.

**Right of alienation prior to Act.**—The surplus allotment of a duly enrolled member of the Choctaw Nation of one-fourth full blood was, prior to the congressional Act of May 27, 1908, inalienable by said allottee or his heirs except and upon the condition that the purchaser thereof paid said allottee the appraised value of said surplus allotment as the purchase price therefor. *Going v. Shelton*, (Okla. 1918) 176 Pac. 982.

A deed conveying, or a contract for the sale of, a portion of a surplus allotment, made by a Choctaw Indian by blood before the removal of restrictions upon his power to alienate same, in violation of Act of Congress of June 28, 1898 (ch. 517, § 29, 30 Stat. L. 507), and of Act of Congress of July 1, 1902 (ch. 1362, §§ 15, 16, 32 Stat. 642, 643), is void. *Folsom v. Jones*, (Okla. 1918) 173 Pac. 649.

A will by a minor allottee is an alienation within the Act. *Letts v. Letts*, (Okla. 1918) 176 Pac. 234.

State laws are not applicable to the right of an Indian allottee to alienate. *Letts v. Letts*, (Okla. 1918) 176 Pac. 234.

Effect of state champerty law.—Section 2260, Oklahoma Rev. Laws 1910, relating to conveyance of land adversely held, has no application to restricted Indian lands. Act of Congress of May 27, 1908, ch. 199, 35 Stat. 312, controls; and where a purchaser comes into possession of land by virtue of a conveyance made by a restricted Indian, such possession in no manner affects the right of the Indian to convey to another after restrictions are removed. *Groom v. Dyer*, (Okla. 1919) 179 Pac. 12.

**Vol. III, p. 883, sec. 2.** [First ed., 1909 Supp., p. 233.]

Lease for time in excess of that allowed.—Section 2 of the Act of Congress of May 27, 1908, ch. 199, 35 Stat. 312, provides: "That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: Provided, that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise." It was held that under this section, where a full-blood Choctaw Indian had valid existing leases on his surplus and homestead allotments, which did not expire until the 31st day of December, 1911, additional leases made and dated on the 5th day of September, 1911, leasing his surplus lands for a period of five years, commencing on the 1st day of January, 1912, and his homestead allotment for a period of one year, commencing on the same day, without the approval of the Secretary of the Interior, are in contravention of this Act, and therefore void. *Mullen v. Carter*, (Okla. 1918) 173 Pac. 512.

Restrictions removed by section 1.—Section 2, Act of Congress of May 27, 1908, ch. 199, 35 Stat. 312, regulating the leasing of allotted lands of members of the Five Civilized Tribes from which restrictions have not been removed, has no application to the leasing of allotted lands of an enrolled minor member of the Chickasaw Tribe of Indians of less than one-half Indian blood, from which the restrictions have been removed by section 1 of said Act. *Coleman v. Davis*, (Okla. 1919) 180 Pac. 381.

**Vol. III, p. 884, sec. 3.** [First ed., 1909 Supp., p. 233.]

Enrollment records as evidence.—Section 3 of the Act of May 27, 1908 (35 Stat. 313, ch. 199), making the enrollment records "of any enrolled citizen or freedman of said tribes," "and of no other persons," "conclusive evidence" "as to the quantum of Indian blood" and "as to the age" to determine questions arising under this Act, is applicable only in controversies between the allottee and another, in regard to the allotment and to transactions taking place subsequent to the taking effect of that Act, namely, July 27, 1908. *Hughes v. Watkins*, (Okla. 1918) 173 Pac. 369.

Act of Congress of May 27, 1908, ch. 199, § 3, 35 Stat. 313, providing that the enrollment records of the Commissioner of the Five Civilized Tribes should be conclusive evidence as to quantum of Indian blood, and age of enrolled citizen or freedman, the enrollment record giving the age of an enrolled female citizen of the Creek Tribe of Indians as eight years on the 27th day of November, 1899, is conclusive evidence that she had arrived at that age at some period of time within a year preceding that date, but is not conclusive as to date of birth. *Tyrell v. Shaffer*, (Okla. 1918) 174 Pac. 1074.

Under Act April 26, 1906, ch. 1876 (see vol. 3, p. 861), providing that for all purposes the quantum of Indian blood possessed by any member of the Five Civilized Tribes shall be determined by the rolls of citizens thereof approved by the Secretary of the Interior, Act June 21, 1906, ch. 3504, 34 Stat. 325, requiring the Secretary of the Interior, on completion of the approved rolls, to prepare and print the same in a permanent record book, and this section declaring that the rolls of citizenship of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen, the Creek Roll of Indians by Blood, as prepared by law, is conclusive, and not subject to collateral attack. *Cowokochee v. Chapman*, (Okla. 1918) 171 Pac. 50.

A Creek enrollment card giving the age of a minor as nine years and stating the day of enrollment is made conclusive only as to the reaching or passing of his ninth birth anniversary and as to being then less than ten years old, by the provision of this section that the enrollment records of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the age of citizens or freedmen, and such record does not preclude an oil and gas lessee from such Indian from supplementing the record by showing the exact date of the Indian's birth, when the issue is whether he had attained his majority when the lease was executed. *Gilcrease v. McCullough*, (1919) 249 U. S. 178, 39 S. Ct. 198, 63 U. S. (L. ed.) —, affirming (1917) (Okla.) 162 Pac. 178.



"The enrollment record of the Commission to the Five Civilized Tribes," which section 3, Act of Congress of May 27, 1908 (35 Stat. 312), declares "shall hereafter be conclusive evidence as to age" of any enrolled citizen of said tribes, embraces and includes all of the testimony and exhibits tending to establish age that were in evidence before the commission, and the conclusion of the commission based thereon, from the date of application for enrollment of any particular individual up to the time of the ascertainment by the commission as to whether the name of such person was entitled to be placed upon the rolls of the nation in which he claimed citizenship. *Perryman v. Sharp*, (Okla. 1918) 176 Pac. 526, holding that a birth affidavit, executed and filed in May, 1901, subsequent to an application for enrollment as a Creek freedman and issuance of citizenship certificate, but prior to the transmission by the Commission to the Five Civilized Tribes of the schedule or partial roll containing the name of such citizen to the Secretary of the Interior for his approval, is part of the enrollment record.

Entire record to be considered.—The entire enrollment record, and not any particular part thereof, is, by the Act of Congress of May 27, 1908 (35 Stat. 312, ch. 199), made conclusive as to age in determining questions arising under the Act. *Davis v. Thompson*, (Okla. 1919) 177 Pac. 67.

**Vol. III, p. 887, sec. 4.** [First ed., 1909 Supp., p. 233.]

**Validity and scope—taxation.**—To the same effect as original annotation, see *Fink v. Muskogee County*, (1919) 248 U. S. 399, 39 S. Ct. 128, 63 U. S. (L. ed.) —, *affirming* (1916) 60 Okla. 67, 159 Pac. 470.

**"Contracts hitherto expressly permitted by law."**—The words "contracts heretofore expressly permitted by law," as used in the proviso to section 4 of said Act, mean contracts relating to said allotted lands theretofore expressly permitted by Acts of Congress. Therefore, the homestead allotment of a Creek freedman, the restrictions from which were removed by the Act of Congress of May 27, 1908, cannot be subjected or held liable to levy and sale under execution for a deficiency judgment against the allottee of said lands rendered in an action against him on a note executed by him on March 21, 1908, and foreclosing a mortgage on his surplus allotment given as security for the indebtedness represented by said note. *Mike v. Bank of Commerce*, (Okla. 1918) 176 Pac. 398.

**Effect on lands allotted under prior Act.**—Lands allotted to an enrolled Choctaw freedman under the Atoka Agreement embodied in Act of Congress of June 28, 1898, in pursuance of provisions of the Treaty of July 10, 1866, and Act of Choctaw Council of May 21, 1883, and which lands were to be nontaxable for a period of 21 years, or while the title

remained in the original allottee, are exempt from state taxation. The allottee acquired vested rights of exemptions from taxation, which were not abrogated by Act of Congress of May 27, 1908, removing restrictions upon alienation and providing that the lands from which restrictions were removed should be subject to taxation. *Farris v. Union Cent. Life Ins. Co.*, (Okla. 1919) 170 Pac. 919.

**Vol. III, p. 887, sec. 6.** [First ed., 1909 Supp., p. 234.]

**"Restricted lands."**—Lands inherited by full-blood Creek Indian minors from a full-blood Creek allottee are not "restricted lands" within the purview of the proviso in this section prohibiting the sale or incumbrance of restricted lands of living minors, except by leases authorized by law, by order of the court, or otherwise. *Chupco v. Chapman*, (Okla. 1918) 170 Pac. 259; *King v. Mitchell*, (Okla. 1918) 171 Pac. 725.

"Lands inherited by full-blood Creek Indian minors from a full-blood Creek allottee are not 'restricted lands' within the purview of the proviso in section 6 of the Act of May 27, 1908 (35 Stat. L. 312), prohibiting the sale or incumbrance of restricted lands of living minors, except by leases authorized by law, by order of the court, or otherwise." *King v. Shults*, (Okla. 1919) 180 Pac. 550.

As used in the proviso to section 6, Act of Congress of May 27, 1908, ch. 199, 35 Stat. 312, the phrase "restricted lands of living minors" has reference to the allotted lands of such minors that are restricted by section 1 of said Act. *Coleman v. Davis*, (Okla. 1919) 180 Pac. 381.

**Who is "minor."**—A "minor" within the meaning of section 6 of Act of Congress of May 27, 1908, ch. 199, 35 Stat. 312, includes males under the age of twenty-one years, and females under the age of eighteen years, and an order of the district court granting such minor the rights of majority does not confer upon him or her the authority to do any act affecting at the time, or thereafter, his or her allotted lands independent of the jurisdiction and supervision of the county courts of the state. *Mortgage, etc., Co. v. Burrows*, (Okla. 1919) 182 Pac. 238.

**"Except as otherwise provided by law,"** means federal law and not state law. *Mortgage, etc., Co. v. Burrows*, (Okla. 1919) 182 Pac. 238.

**Jurisdiction of probate court over leases.**—By the provisions of section 6, Act of Congress of May 27, 1908, ch. 199, 35 Stat. 312, the persons and property of minor allottees of the Five Civilized Tribes, except as otherwise specifically provided by law, are made subject to the jurisdiction of the probate courts of the state of Oklahoma. *Coleman v. Davis*, (Okla. 1919) 180 Pac. 381.

**Liability to execution sale after allottee reaches majority.**—Lands allotted to a Choctaw Indian of one-fourth blood are not sub-

ject to sale on execution after she becomes of age, to satisfy a judgment rendered against her after reaching her majority upon an indebtedness incurred before reaching the age of eighteen years. *Mortgage, etc., Co. v. Burrows*, (Okla. 1919), 182 Pac. 238.

**Judgment rendered during minority.**—Lands allotted to a Choctaw Indian of one-eighth blood are not subject to sale on execution after he becomes of age, to satisfy a judgment rendered against him during his minority. *Hewitt First State Bank v. Lowery*, (Okla. 1919) 178 Pac. 983.

### Vol. III, p. 890, sec. 9. [First ed., 1909 Supp., p. 235.]

**Construction of statute.**—This section removed restrictions against alienation of inherited lands, and authorized adult full-blood Indian heirs to convey such land, but provided, as an essential to the validity of such conveyance, that the same should be approved by the court having jurisdiction of the settlement of the estate of said deceased allottee. *Chupco v. Chapman*, (Okla. 1918) 170 Pac. 259.

**Prospective only.**—This section is prospective and applies only to conveyances made after its passage, conveyances executed by a full-blood Indian heir before the passage of this section being governed by the Act of April 26, 1906, ch. 1876, § 22 (see vol. 3, p. 874). *Harris v. Bell*, (C. C. A. 8th Cir. 1918) 250 Fed. 209, 162 C. C. A. 345.

**Effect of first proviso.**—Under the provisions of this section the death of an allottee of the Five Civilized Tribes operated to remove all restrictions upon the alienation of said allottee's land. The first proviso in said section, "That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee," imposed a merely personal restriction on the full-blood Indian heirs. The restriction thus imposed was simply an incapacity to convey without the approval of the proper county court, similar to the disability of a minor to sell his lands. *Chupco v. Chapman*, (Okla. 1918) 170 Pac. 259.

"Under the provisions of section 9 of the Act of Congress of May 27, 1908 (35 Stat. L. 312), the death of an allottee of the Five Civilized Tribes operated to remove all restrictions upon the alienation of said allottee's land. The first proviso in said section, 'That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee,' imposed a merely personal restriction on the full-blood Indian heirs. The restriction thus imposed was simply an incapacity to convey without the approval of the proper county court, similar to the disability of a minor to sell his lands." *King v. Shultz*, (Okla. 1919) 180 Pac. 550.

**Effect of second proviso.**—A child born to an enrolled full-blood Creek allottee after March 4, 1906, must be deemed to be entitled, upon the latter's decease, to the exclusive use, as against the other heirs, of the entire homestead while she lives (but not beyond April 26, 1931), including the interest or income which may be obtained during that period by properly investing all the royalties collected and accruing under an oil and gas lease, leaving the principal, like the homestead, to go to the heirs in general on determination of her special right, in view of the second proviso that if any such allottee shall die leaving issue born since March 4, 1906, the homestead of the allottee shall be inalienable for the use and support of such issue during life until April 26, 1931, unless restrictions against alienation are removed by the Secretary of the Interior. *Parker v. Riley*, (1919) 250 U. S. 66, 39 S. Ct. 405, 63 U. S. (L. ed.) —, reversing (C. C. A. 8th Cir. 1917) 243 Fed. 42, 155 C. C. A. 572.

**Approval by the court.**—Amos Chupco and Katie Chupco, full-blood Creek Indian allottees, died in Hughes county, Okla., leaving surviving both adult and minor full-blood Indian heirs. By virtue of the probate jurisdiction conferred by section 6, the probate court of Hughes county, Okla., was authorized to sell the inherited interest of the full-blood Indian minors in the allotments of the deceased allottees in conformity to the procedure for the sale of the lands of minors under the probate laws of the state, said court being the same court that had jurisdiction of the settlement of the estate of the deceased allottees, and the approval by the court of the guardianship sale, with direction to the guardian to execute a deed to the purchaser, was a substantial compliance with that part of section 9 providing: "That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee." *Chupco v. Chapman*, (Okla. 1918) 170 Pac. 259.

Under section 9 of Act of Congress of May 27, 1908, ch. 199, 35 Stat. L. 312, the only court having authority to approve a conveyance of any interest of a full-blood heir of a deceased allottee is the court having jurisdiction of the settlement of the estate of said allottee. The approval by a county court of a conveyance by a full-blood heir not having jurisdiction of the settlement of the estate of a deceased allottee is unauthorized and void, and may be collaterally attacked. *Groom v. Dyer*, (Okla. 1919) 179 Pac. 12.

An oil and gas mining lease executed February 11, 1915, by a full-blood heir of a deceased Creek Indian allottee, is a "conveyance of an interest" in said lands, and is void unless approved as required by section 9 of Act of Congress of May 27, 1908, ch. 199, 35 Stat. 315. *Hoyt v. Fixico*, (Okla. 1918) 175 Pac. 517.

An allottee resided and died in that part of Indian Territory which upon the creation

of the state of Oklahoma became Wagoner county. The land in litigation was situated and the minor heirs to whom it descended resided in that part of Indian Territory which became Okmulgee county, and the county court of that county had jurisdiction of their guardianship. It was held that a guardian's sale of the minors' interests under order of the county court of Okmulgee county without the concurrence of the court of Wagoner county, was valid. *Harris v. Bell*, (C. C. A. 8th Cir. 1918) 250 Fed. 209, 162 C. C. A. 345.

**Necessity for approval by Secretary of Interior.**—In the year 1907 adult full-blood Creek Indian heirs executed conveyances to inherited lands that were not approved by the Secretary of the Interior, as provided by section 22 of the Act of Congress of April 26, 1906 (see vol. 3, p. 874). In the year 1910 the same heirs executed other deeds to the land to the same grantee for a recited consideration. The petition for the cancellation of said last-named deeds alleged that the same were taken in confirmation and ratification of the prior void deeds. It was held that the conveyances, having been approved by the proper court, as provided by the Act of Congress of May 27, 1908, were valid, and conveyed title to the land. *Chupco v. Chapman*, (Okla. 1918) 170 Pac. 259.

**Death of allottee as removing restrictions.**—“Under the provisions of this section the death of an allottee of the Five Civilized Tribes operates to remove all restrictions upon the alienation of said allottee's land. The first proviso in said section, ‘That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee,’ imposes a merely personal restriction on the full-blood Indian heirs. The restriction thus imposed is simply an incapacity to convey without the approval of the proper county court, similar to the disability of a minor to sell his lands.” *King v. Mitchell*, (Okla. 1918) 171 Pac. 725.

**Full-blooded Indian heir.**—Lands inherited from a Creek allottee by a full-blood Indian heir were not freed from the restrictions on alienation, by the provision that the death of any allottee shall operate to remove all restrictions upon the alienation of the allottee's land, “provided that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee,” since, as to this class of heirs, restrictions are not removed, but are merely relaxed or qualified to the extent of sanctioning such conveyances as receive the court's approval. *Parker v. Richard*, (1919) 250 U. S. 235, 39 S. Ct. 442, 63 U. S. (L. ed.) —, reversing (C. C. A. 8th Cir. 1917) 245 Fed. 330, 157 C. C. A. 522.

**Payment of consideration.**—Proof of the present payment of a consideration for a conveyance of inherited lands by a full-

blooded Indian heir is not essential to the validity of such conveyance. *Chupco v. Chapman*, (Okla. 1918) 170 Pac. 259.

**Partition of inherited lands.**—The district courts of Oklahoma are without jurisdiction to entertain an action for the partition of real estate inherited by full-blood Indians of the Five Civilized Tribes from a deceased allottee, who was also a full-blood Indian of one of said tribes. *Hoodenpyl v. Champion*, (Okla. 1918) 177 Pac. 369.

**Taxation under state laws.**—Lands of full-blood Indian heirs of the Seminole Nation are not subject to taxation under state laws. *U. S. v. Bean*, (C. C. A. 8th Cir. 1918) 253 Fed. 1, 165 C. C. A. 21.

**Taxation of lands inherited from allottees.**—Lands of a half-blood allottee become taxable on his death and the descent of the title to his heirs of less than half Indian blood prior to their sale through the probate courts of the state. *McNee v. Whitehead*, (C. C. A. 8th Cir. 1918) 253 Fed. 546, 165 C. C. A. 216.

**Vol. III, p. 897, sec. 13.** [First ed., vol. III, p. 479.]

**The effect of the admission of Oklahoma to statehood** was to remove from the congressional domain all matters relating to Indian lands which remained subject to restrictions against alienation. As to other lands the state regulations as to the taking of property for railway purposes control. *Oklahoma, etc., R. Co. v. Bowling*, (C. C. A. 8th Cir. 1918) 249 Fed. 592, 161 C. C. A. 518.

**Vol. III, p. 915, sec. 2140.** [First ed., vol. III, p. 385.]

**Forfeiture of automobile.**—This section by enumerating the vehicles subject to forfeiture hereunder, thereby excludes automobiles. *Shawnee Nat. Bank v. U. S.*, (C. C. A. 8th Cir. 1918) 249 Fed. 583, 161 C. C. A. 509.

**Forfeiture of interest of innocent mortgagee.**—This section does not authorize the forfeiture of the interest of an innocent chattel mortgagee in an automobile used by the mortgagor for the introduction of intoxicating liquor into Indian country, as it was intended to authorize the forfeiture of those articles only that are owned by the guilty party. *Shawnee Nat. Bank v. U. S.*, (C. C. A. 8th Cir. 1918) 249 Fed. 583, 161 C. C. A. 509.

**Who may urge objection to forfeiture.**—A person claiming as a mortgagee an automobile sought to be forfeited may urge not only the immunity of his interest but also the contention that the automobile is not such a vehicle as the statute contemplates. *Shawnee Nat. Bank v. U. S.*, 249 U. S. 583.

**Destruction of liquor outside Indian Territory** without an order of court is unauthorized though there is reason to believe that it is intended to transport the liquor into the

Indian country. *Daneiger v. Atchison, etc., R. Co.*, (Mo. 1919) 212 S. W. 5.

**Nature of forfeiture proceedings—jury trial.**—A proceeding under this section is an action at law, in which the parties are entitled to such rights and remedies as are incident to such an action in the federal courts, including the right to trial by jury. *Shawnee Nat. Bank v. U. S.*, (C. C. A. 8th Cir. 1918) 249 Fed. 583, 161 C. C. A. 509.

**Vol. III, p. 917, sec. 8.** [First ed., vol. III, p. 424.]

**Constitutionality.**—This section, "as limited to interstate commerce by the Oklahoma Enabling Act," is not unconstitutional on the ground that it discriminates between the states in respect of trade and commerce in intoxicating liquors. *De Moss v. U. S.*, (C. C. A. 8th Cir. 1918) 250 Fed. 87, 162 C. C. A. 259, following *Joplin Mercantile Co. v. U. S.*, (1915) 236 U. S. 531, 35 S. Ct. 291, 59 U. S. (L. ed.) 705. To same effect, see *Warren v. U. S.*, (C. C. A. 8th Cir. 1918) 250 Fed. 89, 162 C. C. A. 261.

**Indictment.**—In *Dosset v. U. S.*, (C. C. A. 8th Cir. 1918) 248 Fed. 902, 161 C. C. A. 20, the following indictment was held sufficient under Rev. Stat. sec. 1025, though it did not, except by recital, allege that the place into which the liquor was introduced had formerly been a part of the Indian Territory: "That one Bill Dosset, on the 13th day of August, A. D. 1916, in the county of Jefferson, state of Oklahoma, in the said district and within the jurisdiction of said court, did at the time and place aforesaid, unlawfully, knowingly, willfully, and feloniously introduce and carry into the county and district aforesaid, from without the said state of Oklahoma, one quart of vinous, malt, fermented, and intoxicating liquor, to wit, whisky and beer; the portion of said county and district into which the said liquor was so introduced having been within the limits of the Indian Territory, and a part thereof, prior to the admission of the said state of Oklahoma into the Union as one of the United States of America."

**Admission of evidence as harmless.**—The admission of parol evidence of the amount of a check given in payment for the liquor illegally brought into Indian country is harmless where the facts as to the giving of the check and the connection of the defendant therewith are proved without objection or contradiction. *De Moss v. U. S.*, (C. C. A. 8th Cir. 1918) 250 Fed. 87, 162 C. C. A. 259.

**Advice of federal district attorney.**—In *Hardy v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 284, the court, in holding evidence of advice of the prosecuting attorney to be inadmissible in defense of an indictment for conspiracy to make illegal shipments, stated the facts and its conclusions as follows: "On the objection of the prosecution the court refused to permit the introduction of testimony of Edgar Scurry, a

witness for the defendants, to the following effect: That the witness as a lawyer represented the defendant Hardy when the latter, in the spring of 1916, was charged with some offense of importing liquor into the Indian Territory; that he was present when the evidence on which that charge was based was stated to the then United States district attorney; that that evidence, as so stated, was to the effect that Hardy directed one or more of his employes to deliver to an automobile liquor bought from Hardy by two men in reference to whom Hardy stated to the district attorney, 'I knew that these men lived in Oklahoma, and I had probably heard that they had had trouble in Oklahoma, for introducing liquor into Oklahoma;' that Hardy stated to the district attorney that he did not participate in the hauling of the liquor to Oklahoma, and was not going to do so, and had no financial interest in the transaction other than the sale of the liquor to the two men; and that the district attorney said in the presence of Hardy that the transaction, as reflected in the above-indicated statement of the facts to him, was not a violation of the law, and for that reason he had the charge dismissed.

"It may be assumed, without being conceded, that it is permissible for one charged with having conspired with others to commit a stated criminal offense to prove that, before taking part in the transaction upon which that charge is based, he had been informed by the prosecuting officer that such a transaction is not a violation of law. The excluded evidence in question was not to that effect. The transaction which the proposed testimony showed was passed on by the district attorney was not shown to have had the features which give criminality to the transactions now in question. In material respects it differed from the transactions shown by the evidence introduced by the prosecution in this case. That transaction occurred before the enactment of the Reed Amendment, which made it a crime to cause intoxicating liquor to be transported in interstate commerce into a state or territory the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes."

**1918 Supp., p. 251, sec. 1.** [*Intoxicating liquors, etc.*]

**Question for jury.**—Whether the presumption is rebutted by the testimony of a witness who is not contradicted but is impeached is for the jury. *Harris v. U. S.*, (C. C. A. 8th Cir. 1918) 249 Fed. 41, 161 C. C. A. 101.

**1918 Supp., p. 260, sec. 1.**

**"Introduction prohibited by treaty or Federal statute."**—The phrase "prohibited by treaty or Federal statute," applies only to treaties or statutes relative to Indian affairs

and cannot be extended in its application to the Reed amendment. (1918 Supp. Fed. Stat. Ann., p. 394.) *U. S. v. One Buick Automobile*, (D. C. Colo. 1919) 255 Fed. 793.

### 1918 Supp., p. 267, sec. 1.

Prior to the Act the District Courts of Oklahoma were without jurisdiction to entertain an action for the partition of real estate inherited by full-blood Indians of the Five Civilized Tribes from a deceased allottee, who was also a full-blood Indian of one of said tribes. *Hoodenpyl v. Champion*, (Okla. 1918) 177 Pac. 369.

On April 27, 1915, the District Courts of this state were without jurisdiction of a suit by the full-blood Indian heirs of a deceased Pawnee Indian involving lands allotted to the decedent under General Allotment Act of February 8, 1887, ch. 119, 24 Stat. L. 388, as amended by Act of February 28, 1891, ch. 383, 26 Stat. L. 794, where such suit necessarily included the determination of the title, and, incidentally, the right to the possession of the Indian allotment while the same was held in trust by the United States. *Cesar v. Krow*, (Okla. 1918) 176 Pac. 927.

**Jurisdiction of courts.**—The power and authority conferred on the county courts by Act of Congress of June 14, 1918, ch. 101, 40 Stat. L. 606, though it involves the exercise by said courts of judicial or quasi judicial power, is not strictly judicial, but is administrative and ministerial, and in determining, pursuant to said Act, as a question of fact who are the heirs of any deceased citizen allottee of the Five Civilized Tribes, the court merely finds the facts, and fixes the status, which finding, when material to the question at issue, is conclusive and binding upon the state courts and upon the administrative officers of the national government in determining questions arising under Acts of Congress to which it is applicable. The Act, however, does not deprive the superior courts of this state of jurisdiction of suits involving lands allotted to an Indian of the Five Civilized Tribes who may die or may have heretofore died leaving restricted Indian heirs, where such suit necessarily includes the determination of the title, and, incidentally, the question of fact as to who are the heirs of said deceased allottee. *State v. Wilcox*, (Okla. 1919) 182 Pac. 673.

## INTERNAL REVENUE

### Vol. III, p. 982, sec. 3149. [First ed., vol. III, p. 563.]

**Term of deputies.**—The term of office of deputy collectors of internal revenue expires automatically upon the appointment of a successor to their own collector, and this limitation of tenure is not affected by section 6 of the Act of August 24, 1912 (see vol. 8, p. 956). In order to continue in office after the appointment of a successor to their own collector, deputy collectors must be affirmatively reappointed and recommissioned. (1913) 30 Op. Atty.-Gen. 1.

### Vol. III, p. 1010, sec. 3182. [First ed., vol. III, p. 582.]

**Recovery of additional tax paid — Burden of proof.**—To recover the amount of an additional tax levied because of excessive "outage" in liquor withdrawn from bond plaintiffs must sustain the allegation that the assessment was without warrant of law. To do this, they must prove that all legal taxes have been paid, even though it involve proof of the negative allegation that no spirits had been removed untaxpaid. This burden rests upon them throughout the trial, whatever shifting there may be in the duty of going forward with proof to meet a prima facie case. The burden is not met by proof that payment was made in accordance with the governmental regauge; for, whatever pre-

sumption of regularity might otherwise attach to such regauges as official acts, none can be given them in the light of the later assessment concededly based upon the alleged inaccuracy of the regauge returns, an assessment which is expressly declared by statute to be prima facie evidence of the amount due. Revised Statutes, §§ 3182, 3309, 3437; *Western Express Co. v. United States*, 141 Fed. 28, 72 C. C. A. 516. Nor does the added fact of long delay in making the assessment overcome its prima facie evidentiary effect. In other words, an assessment made contrary to the regauge returns must stand as valid, until some other evidence of its incorrectness or of the correctness of the regauge returns is introduced. *Mayes v. Casey*, (C. C. A. 6th Cir. 1918) 252 Fed. 754, 164 C. C. A. 594.

**Parol evidence of assessment.**—Where the surety on a distiller's bond pays the assessment and sues him for reimbursement, he cannot prove the assessment by parol evidence, unless it appears that neither the record nor an exemplified copy can be obtained. *National Surety Co. v. Brock*, (N. C. 1913) 97 S. E. 417.

### Vol. III, p. 1032, sec. 3224. [First ed., vol. III, p. 600.]

The word "restraining" is used in this section in the broad popular sense of hindering or impeding as well as of prohibiting or staying, rather than in its narrowest techni-

cal sense as applicable only to suits praying for restraining orders and injunctions. *Gouge v. Hart*, (W. D. Va. 1917) 250 Fed. 802.

**Annulment of tax sale.**—The section forbids an action to annul a sale by the collector for the nonpayment of a revenue tax. *Gouge v. Hart*, (W. D. Va. 1917) 250 Fed. 802. The court said: "Counsel for plaintiffs contend that granting the relief sought by the bill would not hamper or retard the collection of the tax. I am unable to concede this. Some of the property was bid in by the collector for the government. Copenhagen, the purchaser of the remainder of the property, has declined to complete his purchase. If this court nullifies these sales, the government is at least put back in the situation it occupied before the sales were made. If such action by the court would not hinder and impede the collection of a tax, I do not understand the meaning of the words. The fact that the government may, if it sees fit, collect taxes by suit, and that in such event the defendant may contest the validity of the demand, seems to me to be too remotely connected, if connected at all, with the subject under discussion to throw any light on it."

**Waiver of prohibition.**—Neither the collector of internal revenue, the commissioner of internal revenue nor the district attorney has power to waive the prohibition of this section. *Gouge v. Hart*, (W. D. Va. 1917) 250 Fed. 802.

**Vol. III, p. 1033, sec. 3225.** [First ed., vol. III, p. 601.]

**Provision valid.**—The provision as applied to the corporation tax law is not invalid as warranting a confiscation of property. It is well settled that this corporation tax act imposed an excise tax, and the only limitation on the power of Congress in the imposition of excise taxes is that they shall be uniform throughout the United States. *United States v. Singer*, 15 Wall. 111, 121, 21 L. ed. 49; *Pacific Insurance Co. v. Soule*, 7 Wall. 433, 446, 19 L. ed. 95. By this a geographical uniformity is meant. *Flint v. Stone Tracy Co.*, 220 U. S. 107, 31 Sup. Ct. 342, 55 L. ed. 389, Ann. Cas. 1912B 1312. The provisions laying an additional tax proportionate to the property omitted from the list, on all who make any understatement or undervaluation, operates uniformly on all of that class of persons wherever found, and hence was within the power of Congress. The refusal of a right of action to recover such taxes, unless proof is made that there was no understatement or undervaluation, is likewise within the scope of the legislative power. *Camp Bird v. Howbert*, (C. C. A. 8th Cir. 1918) 249 Fed. 27, 161 C. C. A. 87.

**Application to corporation tax.**—The section applies to the corporation tax act (see vol. 4, p. 255) being a section applying to revenue laws generally. *Camp Bird v. Howbert* (C. C. A. 8th Cir. 1918) 249 Fed. 27, 161 C. C. A. 87.

**Innocent omission.**—An omission in good faith from the return is not within the provision that a false or fraudulent return bars an action to recover back taxes paid. *Northwestern Mut. Life Ins. Co. v. Fink*, (E. D. Wis. 1917) 248 Fed. 568.

**Vol. III, p. 1034, sec. 3226.** [First ed., vol. III, p. 601.]

**Recovery back of inheritance taxes.**—This section does not apply to the recovery back of inheritance taxes by reason of the Act of June 27, 1902, sec. 3 (see vol. 4, p. 232) and the Act of July 27, 1912, sec. 2 (see vol. 4, p. 236) though under the Act of June 3, 1898, sec. 31 it did apply. *Rand v. U. S.*, (1919) 249 U. S. 503, 39 S. Ct. 359, 63 U. S. (L. ed.) —, *affirming* (1917) 52 Ct. Cl. 72, 285.

**Vol. III, p. 1037, sec. 3227.** [First ed., vol. III, p. 802.]

**Recovery back of inheritance taxes.**—See note *supra* under section 3226.

**Vol. III, p. 1038, sec. 3229.** [First ed., vol. III, p. 604.]

**Authority to compromise.**—The commissioner of internal revenue, with the approval of the Secretary of the Treasury, has authority under this section to compromise a case involving a tax liability before proceeding to distraint and sale. (1915) 30 Op. Atty.-Gen. 329.

**Vol. III, p. 1042, sec. 3236.** [First ed., vol. III, p. 606.]

**Registration under Harrison Act.**—This section is expressly made applicable to the special tax imposed under section 1 of the Harrison Act (4 Fed. Stat. Ann. 177) and requires the separate registration under such Act of a physician who both dispenses narcotic drugs and sells the same as a dealer. *Blunt v. U. S.*, (C. C. A. 7th Cir. 1918) 255 Fed. 332, 166 C. C. A. 502.

**Vol. III, p. 1053, sec. 16.** [First ed., vol. III, p. 609.]

**Purpose and application of law.**—The primary purpose of this section is to raise revenue. It does not grant a right to engage in the liquor business but fixes a penalty for engaging in such business without having paid the required tax, and this applies uniformly to all the states and territories, regardless of whether the state law prohibits the sale of liquor. *U. S. v. Lazzaro*, (W. D. Wash. 1918) 255 Fed. 237.

**Conspiracy to carry on business, evidence sufficient.**—In *Villers v. U. S.*, (C. C. A. 4th Cir. 1918) 255 Fed. 75, 166 C. C. A. 403, the court, in sustaining a conviction of con-

spiracy to carry on the business of a retail liquor dealer without having paid the special tax required by law, stated the facts and its conclusion as follows: "At the time of his arrest, in March, 1918, Villers was the assistant postmaster of Clarksburg, W. Va., and Klacko the clerk or manager of a store in that city. They had become acquainted not long before, and Klacko had learned in some way that whisky could be procured from Villers. Called as a witness for the government, Klacko testified to buying whisky from Villers for himself, and also for one Lazovich, a fellow countryman, whose acquaintance he made about that time. Lazovich was an agent of the Department of Justice, and happened to be in Clarksburg on other business. Learning from Klacko, with whom he became friendly, that whisky could be bought from Villers, he set about getting evidence that would convict him of the offense. Accordingly, he arranged with Klacko, who appears to have been unaware of his purpose, to buy whisky for him from Villers, and four such purchases were made during the next eight or ten days. Lazovich furnished the money, Klacko took the order to Villers, and the latter delivered the liquor at Klacko's store. On the last occasion, and while in the act of handing over a couple of quarts of whisky, Villers was arrested.

"These facts, wholly undenied by Villers, were quite sufficient to show that he was engaged in the illegal sale of liquor, and to warrant the inference of that understanding and relationship with Klacko which the law regards as a conspiracy. Villers had a quantity of whisky for sale, where or how procured does not appear, and Klacko was not unwilling to help him dispose of it. Each aided the other, and their mutual co-operation effected the criminal result; and what they repeatedly united in doing, both knowing it to be unlawful, the jury might well believe they had in effect conspired to do, and nothing more needs be said in defense of the refusal to direct a verdict. The question was clearly one of fact, and the finding of the jury is conclusive."

**Vol. III, p. 1058, sec. 18.** [First ed., vol. III, p. 615.]

"Sale."—In *Scoggins v. U. S.*, (C. C. A. 8th Cir. 1919) 255 Fed. 825, 3 A. L. R. 1093, it was said with respect to a "sale" within the meaning of this section and R. S. sec. 3244 (vol. 3, p. 1045): "But one party cannot make a contract of sale. No such contract can be made without assent of the minds of two parties at the same time to the sale and to the terms of the sale, to the subject-matter and the consideration of the sale."

**Presumption as to sale.**—As a contract for the sale of liquor without paying the tax prescribed by this section and R. S. section 3244, is illegal, and its making criminal, the legal presumption is that the defendant did not make it and this presumption prevails

until he is proved to have done so beyond a reasonable doubt. *Scoggins v. U. S.*, (C. C. A. 8th Cir. 1919) 255 Fed. 825, 3 A. L. R. 1093.

**Vol. III, p. 1068, sec. 3, par. 8.** [First ed., 1916 Supp., p. 87.]

**Lecture lyceums.**—A mere independent show unit employed for the occasion is not exempt under the proviso of this paragraph merely because it is hired and produced by a so-called lyceum bureau. *Redpath Lyceum Bureau v. Pickering*, (C. C. A. 7th Cir. 1918) 251 Fed. 49, 163 C. C. A. 299.

**Vol. IV, p. 173, sec. 1.** [First ed., 1916 Supp., p. 71.]

**Indictment.**—If the accused is not a citizen, the indictment need not allege that the defendant has not given the required bond. *Lee Mow Lin v. U. S.*, (C. C. A. 8th Cir. 1918) 250 Fed. 694, 162 C. C. A. 656. The court said: "It is further claimed that, because section 1 provides that 'no person shall engage in such manufacture who is not a citizen of the United States and who has not given the bond required by the Commissioner of Internal Revenue,' the use of the conjunction 'and' requires the pleader to allege, and therefore prove, that plaintiffs in error were not only noncitizens, but also had not given a bond. While the word 'and' is used, we do not think the bond provision should be applied to persons who are not entitled to give a bond under any circumstances, but should be held to apply to citizens who are required to give a bond, if they shall engage in the manufacture of opium for smoking purposes."

**Vol. IV, p. 177, sec. 1.** [First ed., 1916 Supp., p. 101.]

**Constitutionality.**—This act is constitutional. *U. S. v. Hoyt*, (S. D. N. Y. 1917) 255 Fed. 927.

In *U. S. v. Denker*, (E. D. N. Y. 1918) 255 Fed. 339, the court, in declaring this Act constitutional, said: "The defendants all claim that the entire Harrison Law is unconstitutional, under the authority of *United States v. Doremus* (W. D. Tex. 1918) 246 Fed. 958, a decision of the District Court for the Western District of Texas. Subsequently the law has been declared constitutional by the District Court for the Southern District of New York. *United States v. Jacob Rosenberg* (decided July 17, 1918) 251 Fed. 963. A decision has also been rendered by the United States Circuit Court of Appeals for the Seventh Circuit in *Blunt v. United States*, 255 Fed. 332, 166 C. C. A. 502, by which the last paragraph of section 2 has been held unconstitutional, but the first part of that section has been held constitutional. To the same effect are *U. S. v. Hoyt*,

255 Fed. 927, United States District Court, Southern District of New York, December 9, 1917, and United States v. Jin Fuey Moy, 253 Fed. 213, United States District Court, Western District of Pennsylvania, November term, 1917. A statute constitutional in part only will be upheld as to what is constitutional, if it can be separated from the unconstitutional provisions. *Presser v. Illinois*, 116 U. S. 252, 6 Sup. Ct. 580, 20 L. Ed. 615. I am of the opinion that the weight of authority is substantially in favor of upholding the constitutionality of the law, except so far as section 8 is concerned."

In *U. S. v. Jin Fuey Moy*, (W. D. Pa. 1918) 253 Fed. 213, the court in passing upon the constitutionality of the Act said: "First, as to the constitutionality of the Harrison Act. It seems to me that this act should be read in the light of the previous legislation of Congress in restraint of the traffic in opium. . . . It is plain that Congress had the power to prohibit altogether the importation from foreign shores of this deadly narcotic, or they had the right to admit it under such restrictions as to its use, in protection of the public, as they might see fit to impose. And having done so, they may prescribe such regulations, penal or otherwise, as will effect the purpose intended; that is, to restrict its use to that for which alone it was admitted. Every provision of the Harrison Act which deals with the use of the drugs in question shows that its use is restricted and intended to be confined to medicinal purposes only. This is in harmony with the law prohibiting its importation or use for any other purpose. It is a matter of common knowledge that no opium is produced in the United States; but this can perhaps not be assumed, when the act undertakes to deal with those who produce it. In the case of the United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854, the Supreme Court said: 'A statute must be construed, if fairly possible, so as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score.'

"In the same opinion the court said: 'It may be assumed that the statute [the Harrison Act] has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right.' I am not convinced that the Congress in enacting the Harrison law exceeded its constitutional powers, and the motion in arrest of judgment on this ground cannot be sustained."

In holding the act to be a revenue measure within the federal legislative power the court said in *Hughes v. U. S.*, (C. C. A. 8th Cir. 1918) 253 Fed. 543, 165 C. C. A. 213: "It is urged that the purpose of the statute was the suppression of the drug habit, and that it is therefore not a revenue measure, but one of police, within the exclusive province of

the states. But we think it cannot be said that the provisions referred to have no real or substantial relation to the raising of revenue. If they have such relation, we have nothing to do with any other purpose of Congress. The traffic in such drugs is of a peculiar character. Considerable of it is carried on covertly by peddlers, and the small bulk of the articles facilitates clandestine distribution. The difficulties of subjecting the traffic to excise and preventing frauds on the revenue are obvious, and it was competent for Congress to bring the traffic into the open. That there may be consumers of the drugs, who cannot or will not obtain them in the ways provided, is not enough to condemn the statute. Substantially the same result might have followed a heavy tax on such transactions, as to which there would be no color for claim of unconstitutionality."

See also notes under section 2, *infra*, as to constitutionality of that section.

**Incorporation of earlier act.**—Rev. Stat. § 3226 (3 Fed. St. Ann. 1042) is applicable to the special tax imposed by this Act and accordingly a physician who both dispenses drugs and sells the same as a dealer must register separately as physician and as dealer. *Blunt v. U. S.*, (C. C. A. 7th Cir. 1918) 255 Fed. 332, 166 C. C. A. 502.

## Vol. IV, p. 178, sec. 2. [First ed., 1916 Supp., p. 102.]

**Constitutionality.**—This section is constitutional. *U. S. v. Rosenberg*, (S. D. N. Y. 1918) 251 Fed. 963.

The section is not unconstitutional on the ground that its provisions are not those of a revenue measure, but are purely police regulations. *Fyke v. U. S.*, (C. C. A. 5th Cir. 1918) 254 Fed. 225, 165 C. C. A. 513, approving and following *Baldwin v. U. S.*, (C. C. A. 5th Cir. 1917) 238 Fed. 793, 151 C. C. A. 643.

The first sentence of this section prohibits retail sales of morphine by druggists to persons who have no physician's prescription, who have no order blank therefor, and who cannot obtain an order blank because not of the class to which blanks are allowed to be issued. As so construed it is constitutional. *Webb v. U. S.*, (1919) 249 U. S. 98, 39 S. Ct. 217, 63 U. S. (L. ed.)—.

The section was declared constitutional in *U. S. v. Doremus*, (1919) 249 U. S. 86, 39 S. Ct. 214, 63 U. S. (L. ed.)—, (reversing *W. D. Tex.* 1918) 246 Fed. 958) wherein the court said: "The legislation under consideration was before us in a case concerning § 8 of the act, and in the course of the decision we said: 'It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right.' *U. S. v. Jin*



Fuey Moy, 241 U. S. 394, 402. Considering the full power of Congress over excise taxation the decisive question here is: Have the provisions in question any relation to the raising of revenue? That Congress might levy an excise tax upon such dealers, and others who are named in § 1 of the act, cannot be successfully disputed. The provisions of § 2, to which we have referred, aim to confine sales to registered dealers and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians. Congress, with full power over the subject, short of arbitrary and unreasonable action which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law. This case well illustrates the possibility which may have induced Congress to insert the provisions limiting sales to registered dealers and requiring patients to obtain these drugs as a medicine from physicians or upon regular prescriptions. Ameris, being as the indictment charges an addict, may not have used this great number of doses for himself. He might sell some to others without paying the tax, at least Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue. We cannot agree with the contention that the provisions of § 2, controlling the disposition of these drugs in the ways described, can have nothing to do with facilitating the collection of the revenue, as we should be obliged to do if we were to declare this act beyond the power of Congress acting under its constitutional authority to impose excise taxes. It follows that the judgment of the District Court must be reversed."

In *Foreman v. U. S.*, (C. C. A. 4th Cir. 1918) 255 Fed. 621, 166 C. C. A. 655, in holding this section constitutional as a revenue measure, the court said: "The indictment is attacked on the additional ground that it charges no offense which the Congress had the power to create. The act was sustained as a revenue measure in *United States v. Moy*, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D 854. It is argued that, when the dealer complies with the first section of the act by registry and payment of the tax, all that affects the revenue is done, and that the further restraints on his business provided by the second section of the act do not affect the revenue, and are therefore invalid as an attempted invasion of the police power of the states. The Supreme Court has answered such objections by holding that in a revenue statute the Congress may make any rule or regulation which is not in itself unreasonable, although its effect

on the revenue be only remote or incidental, and its effect on the public health or morals direct and obvious. *In re Kollock*, 165 U. S. 526-536, 17 Sup. Ct. 444, 41 L. Ed. 813; *Felsenheld v. United States*, 186 U. S. 126, 22 Sup. Ct. 740, 46 L. Ed. 1085. All the regulations of section 2 tend to promote public health and morals and doubtless that consideration influenced its enactment. But these regulations also bear directly on the revenue in that the procurement of the drugs only on orders and prescriptions to be filed and kept enable the officers of the government to ascertain whether unregistered persons are using the orders and prescriptions authorized by the statute. These requirements are also valuable in connection with section 1 providing for the collection of the current revenue in that the information as to the extent of the business to be derived from the orders and prescriptions filed may be of value in fixing the tax upon dealers."

The provision of paragraph (d) of this section that "it shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession," is unconstitutional. *Blunt v. U. S.*, (C. C. A. 7th Cir. 1918) 255 Fed. 332, 166 C. C. A. 502.

As to constitutionality of Harrison Act generally, see note *supra*, under section 1.

**Scope of section.—Title to drugs.**—In *U. S. v. Jin Fuey Moy*, (W. D. Pa. 1918) 253 Fed. 213, it was contended that the words "sell, barter, exchange, or give away" should be construed so as to include only those cases where title to the prescribed drug was in him who undertook to dispense or distribute it. Answering this contention the court said: "The lawmakers were not concerned with the ownership of the drug, but with its unlawful distribution. It could matter nothing to the poor victim in the fatal clutches of the drug habit, where title was to the narcotic which was thus dispensed to him, every grain of which brought him nearer to the grave. Whether the victim procured the drug from the hand of the physician, or through the druggist on an order or prescription of the physician, can matter nothing, unless we look blindly at the letter of the act, wholly forgetting its spirit and purpose."

**Sale by unregistered dealer.**—The provisions of this section include not only dealers who have registered, but all persons, whether registered or not, who sell the prohibited drugs. *Fyke v. U. S.*, (C. C. A. 5th Cir. 1918) 254 Fed. 225, 165 C. C. A. 513.

**Amount of sale.**—"It appears Congress undertook to regulate the amount of such sales by putting the limitations on the physician who prescribes the drug, and not on the druggist who fills it. The former is supposed to know the needs of his patient and to pre-

scribe accordingly. And if he distributes the drugs to others than his patients, or in amounts not warranted in the legitimate practice of his profession, for the purpose of alleviating suffering or effecting a cure, he is not protected by the exception, and becomes criminally liable for the violations of the general provisions of section 2. Wisely or unwisely, Congress appears to have placed no other limitation whatever on the amount of the sale. It made the prescription of the registered physician the sole and sufficient warrant for the sale by the druggist of the drugs therein prescribed. Evidently it was intended that, if the druggist keeps within the limitations of the prescription, he is protected thereby. . . . A careful scrutiny of the act makes it reasonably apparent that the meaning of the words 'in the legitimate practice of his profession' and 'in the conduct of a lawful business in said drugs' are defined and fixed by the limitations on the action of physicians and druggists prescribed in exceptions (a) and (b). In other words, if the physician prescribes the drugs to patients in the course of his professional practice only, this constitutes the use, sale, or distribution of such drugs in the legitimate practice of his profession; and if the dealer sells or dispenses the drugs only in pursuance of a written prescription, issued by a registered physician and dated as of the day it is signed, then such drugs are distributed by him in the conduct of a lawful business in such drugs. These provisions, embraced in the same section, one relating to the acquisition of the drugs and the other to their sale and distribution, when thus read, are in complete harmony. . . . If I am right in my construction of the law, Congress has defined what is a lawful business in the sale of narcotics by a dealer; and it is not a question of good faith on his part, but of strict compliance with the conditions, which Congress has imposed upon him." *U. S. v. Joseph Fleming, etc., Co.*, (W. D. Pa. 1918) 251 Fed. 932.

**Sales by physician outside of profession** are within the section. *U. S. v. Hoyt*, (S. D. N. Y. 1917) 255 Fed. 927. The court said: "It is insisted for the defendant that the indictment also charges that he was a 'physician registered with the collector of internal revenue as the law requires, and therefore paragraph 1 of section 2 of the act, on which the indictment is based, does not apply to him, since subsection (a) of section 2 provides that nothing contained in section 2 shall apply to physicians registered under the act, who dispense and distribute narcotics in the course of their professional practice only, provided the physician does certain other things not material here. This is true, and is important, in that it might be fatal to the indictment, if the pleader has not worded it so as to render the exception inapplicable. As we understand paragraph 1, § 2, it does not apply to registered physicians who dispense or distribute narcotics in the course of their professional practice

only. But that is the precise thing the defendant is charged with not having done. The legal presumption in favor of the defendant, as a registered physician, that he complied with the law, in that he dispensed and distributed narcotics in the course of his professional practice only, is expressly negated by the charge that he did not limit his operations to the course of his professional practice only."

**Physician's prescription.**—If a practicing and registered physician issues an order for morphine to a habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, it is not a physician's prescription under exception (b) of § 2. *Webb v. U. S.*, (1919) 249 U. S. 96, 39 S. Ct. 217, 63 U. S. (L. ed.) —.

**Issuance of prescription as sale.**—The mere issuance of a prescription to be filled by a druggist, without participation by the physician in the sale made under it, is not a "sale" or such distribution or dispensing as amounts to a sale within the meaning of this section. "What the statute forbids is sale, barter, exchange or gift, including such distribution or dispensing by a physician not in the course of his practice as would amount to a participation in a sale, barter, exchange or gift." *Foreman v. U. S.*, (C. C. A. 4th Cir. 1918) 255 Fed. 621, 166 C. C. A. 655.

**Completion of sale.**—In *Hammer v. U. S.*, (C. C. A. 2d Cir. 1918) 249 Fed. 336, 161 C. C. A. 344, the facts were as follows: One Peak became an informer, and arranged with Fowle, a revenue agent, the following transaction: He (Peak) communicated with Hammer (the accused), asserting that he had a customer in New York for a quantity of drugs, and would act as agent for a commission. Hammer agreed, stating in substance that he could supply what was wanted up to almost any limit. Thereupon Rogers and Hammer, in Tampa, put drugs, of which the sale price was to be \$1,750, in a package and sent it by express to Peak in New York C. O. D., and Hammer himself at once started for that city to oversee the matter. Peak met him at the station, together they went to a hotel, and there Fowle was introduced as the buyer, and with him Hammer discussed drug sales and stated definitely the amount then in the express company's care. Fowle said he wanted that and more, and the three men arranged to meet the next morning, go to the express office, get the drugs, and pay the money. They met accordingly, Hammer and Peak identified themselves as shipper and consignee respectively, Hammer gave Peak a check for the latter's commission, the express clerk was in substance directed to deliver the drug package to Fowle on receiving the money, and Fowle began to count out money, when the other agents in waiting

stepped up, arrested Hammer, and seized the drugs. It was held that a completed sale of the drugs was shown.

**Indictment—Sufficiency.**—An indictment under this section which charges that the defendant, a registered physician, unlawfully and willfully sold, bartered, exchanged and gave away a certain narcotic drug not in pursuance of a written order from such person on a form issued in blank for that purpose by the Commissioner of Internal Revenue is sufficient though it unnecessarily negatives the exception as to physicians and in so doing also charges that the drug was prescribed and dispensed. *U. S. v. Jin Fuey Moy*, (W. D. Pa. 1918) 253 Fed. 213.

In *Fyke v. U. S.*, (C. C. A. 5th Cir. 1918) 254 Fed. 225, 165 C. C. A. 513, regarding the allegations necessary in an indictment under the Act, the court said: "Taking the law in its entirety, no person, whether registered, or unregistered, can lawfully sell the prohibited drugs, 'except in pursuance of a written order of the person to whom such article is sold,' and an indictment which charged even an unregistered person with selling, not in pursuance of such a written order, would charge him with all the elements of a sale prohibited by the Act. It would, we think, be unnecessary, in this view, for the indictment to allege that the defendant was actually registered and had paid the tax, and, as the law itself imposes a duty of registry and payment of the tax on all persons who sell, it would be unnecessary for the indictment to allege that the defendant, being charged with making a sale, was in the class required to register and pay the tax. The plaintiff in error contends that section 1 and section 2 create distinct offenses, the former directed alone against unregistered persons who have failed to pay the tax, and the latter directed alone against registered persons who have paid the tax but have failed to conduct the business in other respects in accordance with the Act. The Act in different sections defines what sales are unlawful. It does not, however, affix separate penalties to each class of prohibited sales. Section 9 (section 6287o) provides a penalty to be imposed upon any person who violates or fails to comply with any of the requirements of the Act. Sales of the prohibited drugs may be unlawful (a) when made by an unregistered person who has not paid the tax, or (b) when made by any person, except in pursuance of an order blank. The offense punished is the making of a sale in violation of the Act. If the sale is prohibited by the Act, it is not important that the indictment should be framed under any particular section of the Act, provided its averments sufficiently show a sale made unlawful by the Act in its entirety. An indictment which charges a sale to have been made in a way that no person, registered or unregistered, could law-

fully make it by the terms of the Act, sufficiently shows that the defendant, in making it, violated the Act in a way that subjects him to the penalties prescribed for its violation by section 9."

**Averment as to character of drug.**—"The first count is criticised because it contains no direct averment that cocaine is a derivative of coca leaves, and that morphine and heroin are salts or derivatives of opium. It is averred in the first count of each indictment, that the respective defendants, at the time of the commission of the offense, knew that cocaine was a derivative of coca leaves, and that morphine and heroin were salts and derivatives of opium. It is difficult to see how they could know this to be a fact, unless it was a fact, and the averment that it was known by them to be a fact implies the averment that it was a fact. It certainly informs the defendants sufficiently of the charge against them, and, if an imperfect averment, is a harmless imperfection, carrying no consequence, in view of R. S. § 1025." *Melanson v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 783, 168 C. C. A. 129.

**Duplicity.**—An indictment which avers that the defendant was, at the time of the commission of the alleged offense, a "registered physician," and also alleging that he sold narcotics without an order not made on a blank issued for that purpose by the Commissioner of Internal Revenue, is not double or uncertain. *U. S. v. Hoyt*, (S. D. N. Y. 1917) 255 Fed. 927. The court said:

"In the fourth ground of demurrer it is said that the indictment is uncertain, ambiguous, and duplicitous. True, it is averred that the defendant was, at the time of the commission of the alleged offense, a 'registered physician,' and it is insisted, from the language used, that it is not certain whether he is being prosecuted for violating the law as it relates to him as a physician dispensing and distributing narcotics, as contradistinguished from him as an individual engaged in selling, bartering, exchanging, and giving away the drug.

"We think if the language used by the pleader is confusing in the slightest degree it may and should be treated as surplusage. To us it is clear that, although a physician may be properly registered, that fact would not necessarily prevent him from violating paragraph 1, § 2, of the Act, for he might and could use the fact that he was registered as a cloak to do the very things charged against him in this case; that is, notwithstanding he was a registered physician, he sold, bartered, dispensed, and distributed the drug while not acting in the course of his professional practice only."

**Negating exceptions in indictment** see notes under section 8, *infra*.

**Expert testimony.**—In such a prosecution the testimony of qualified medical experts that the prescription of morphine under stated quantities and circumstances would

not be in the course of a physician's regular practice, is admissible. *Melanson v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 783, 168 C. C. A. 129.

**Evidence of total quantity used by physician.**—Where the issue was whether a physician acted in the regular course of practice in prescribing morphine, order forms showing the amount of morphine procured by him from other druggists are admissible. *Melanson v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 783, 168 C. C. A. 129.

**Evidence of nature of drugs.**—In a prosecution for a violation of this section it is unnecessary to introduce evidence to show that morphine, heroin, and cocaine are derivatives of opium and coca leaves. *Hughes v. U. S.*, (C. C. A. 8th Cir. 1918) 253 Fed. 543, 165 C. C. A. 213. To same effect, see *Hughes v. U. S.*, (C. C. A. 8th Cir. 1918) 253 Fed. 545, 165 C. C. A. 215.

So in *Melanson v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 783, it was said: "It is objected that there should have been evidence introduced by the government that cocaine was a derivative of coca leaves, and that heroin and morphine were salts of opium. In the Ellsworth case, the plaintiff's witness, Will S. Wood, testified as follows: 'Morphine is an alkaloid of opium, and heroin is a derivative of opium, and cocaine is an alkaloid of coca leaves. Alkaloid means the principal agent of opium. Cocaine is a principal agent of coca leaves; it comes from coca leaves. Morphine and heroin both come from opium.' No transaction in heroin was relied upon by the plaintiff as a ground for conviction. The first count of the indictment alleged that 'morphine was a salt and derivative of opium, and that heroin was a salt and derivative of opium, and that cocaine was a salt and derivative of coca leaves.' The second count contained this averment: 'Said morphine (referring to that charged to have been unlawfully sold) being a salt and derivative of opium.' We think the proof in the Ellsworth case was sufficient to show that the drugs were salts, and certainly derivatives, respectively, of coca leaves or opium. The proof as to this fact is not as specific in the Melanson case, but was sufficient to authorize submission of the issue to the jury, if, indeed, proof of such a scientific fact was required. The courts take judicial knowledge of the facts of chemistry contained in the United States Pharmacopoeia."

**Evidence of other offenses.**—On a prosecution for illegally dispensing morphine sulphate one of the errors assigned was that evidence was introduced on defendant's cross-examination to show that several years after the alleged offense the defendant attempted to bribe an officer not to arrest him for another offense. *Paquin v. U. S.*, (C. C. A. 8th Cir. 1918) 251 Fed. 579, 163 C. C. A. 573.

**Sufficiency of evidence—Conspiracy by two physicians with a druggist to dispense**

drugs in the guise of prescriptions to patients was held in *Melanson v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 783, 168 C. C. A. 129, to be shown, the facts bearing against the defendants being stated as follows: "In the Ellsworth case the evidence showed that the defendant Ellsworth had issued in the period three months before the prosecution was instituted 700 prescriptions for the drugs, all of which had been filled by his codefendant Dolan, or his employees, and in quantities varying from 15 grains to 60 grains. The evidence also showed that prescriptions of the kind and quantity shown to have been issued by Ellsworth, and in the aggregate amount for the period, could not have been issued in the course of his professional practice legitimately. In the Melanson case, the evidence showed that the defendant Melanson had an office in the rear of his codefendant's drug store; that during a like period he had issued 900 prescriptions for the prohibited drugs, which had been filled by Dolan or his employees; and that no prescription for any other kind of drugs had been issued by Melanson to be filled by Dolan or his employees during that time. The evidence also showed that the prescriptions were of a character, and for an amount, that would not be issued by a physician in the course of his professional practice. This was sufficient evidence in each case for submission to the jury, upon the issue as to whether or not each of the defendants had conspired with Dolan to dispense the drug, in the guise of prescriptions to patients, but in fact to them as addicts, for the gratification of their appetite, and not for their cure."

**Instructions.**—On the trial of a physician for violating this section, the trial judge in his general charge to the jury may properly submit the issue of the good faith of the defendant in issuing prescriptions to supposed patients. *Melanson v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 783, 168 C. C. A. 129.

**Inconsistent verdict.**—A verdict of conviction on one count of an indictment which charges the defendants with obtaining narcotic drugs by means of order forms for purposes other than the use, sale, and distribution in the conduct of a lawful business in such drugs, has no foundation on which to rest where there is an acquittal on other counts of the indictment charging an unlawful sale. *U. S. v. Joseph Fleming, etc., Co.* (W. D. Pa. 1918) 251 Fed. 932.

But an acquittal on a count charging a sale is not inconsistent with a conviction in a count charging failure to pay the tax required of a dealer. *Gee Woe v. U. S.*, (C. C. A. 5th Cir. 1918) 250 Fed. 428.

**Vol. IV, p. 187, sec. 8.** [First ed., 1916 Supp., p. 106.]

The possession of opium by an unregistered dealer is a violation of this section. *Gee Woe v. U. S.*, (C. C. A. 5th Cir. 1918) 250 Fed. 428, 162 C. C. A. 498.

**Burden of proof.**—If in a prosecution under this section the defendant is a dealer in opium, the burden is upon him to show registry and payment of the special tax. *Gee Woe v. U. S.*, (C. C. A. 5th Cir. 1918) 250 Fed. 428, 162 C. C. A. 498.

**Indictment.**—*Averments negatively exceptions.*—An indictment for a violation of this Act need not aver facts showing that the defendants do not come within any of the exceptions of the Act. *Melanson v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 783, 168 C. C. A. 129.

An indictment of a physician for violation of this section is not bad as stating a conclusion of the pleader where it alleges that the sale was "not in the course of his professional practice only." *U. S. v. Rosenberg*, (S. D. N. Y. 1918) 251 Fed. 963.

### Vol. IV, p. 187, sec. 12. [First ed., 1916 Supp., p. 108.]

**Repeal of earlier Acts.**—This Act, as is apparent from the disclaimer in this section, does not repeal or in any manner affect the Act of Feb. 9, 1909, ch. 100, nor the Act of Jan. 17, 1914, ch. 9 (see vol. 3, p. 723), which amends it. *Gee Woe v. U. S.*, (C. C. A. 5th Cir. 1918) 250 Fed. 428, 162 C. C. A. 498.

### Vol. IV, p. 195, sec. 14. [First ed., vol. III, p. 125.]

**Decision of commissioner as conclusive.**—Whatever review may be had by direct suit or action, or by any other method, in those cases where the constitutionality of such a statute is attacked, or where it is claimed that no hearing was accorded, or where the conduct of the administrative officer was such that it can be characterized as arbitrary as matter of law, it is at least certain that where there has been a hearing on contested facts, and arbitrary conduct in the legal sense is not complained of, the decision of the commissioner is final that a substance taxed under the Act of May 9, 1902 (3 Fed. Stat. Ann. 1066) is adulterated butter. *Cohen v. Edwards*, (S. D. N. Y. 1919) 256 Fed. 964.

### Vol. IV, p. 232, sec. 3. [First ed., vol. III, p. 787.]

**Judgment as bar to suit in court of claims.**—A judgment against a collector of internal revenue for a partial refund of a succession tax collected contrary to the terms of this section under the War Revenue Act of June 13, 1898 (30 Stat. at L. 448, chap. 448), § 29, is not a bar to a subsequent suit against the United States in the court of claims for the unrepaid residue of such tax. *Sage v. U. S.*, (1919) 250 U. S. 33, 39 S. Ct. 415, 63 U. S. (L. ed.) reversing (1918) 53 Ct. Cl. 628.

### Vol. IV, p. 236, sec. 2.

**Refund of succession tax.**—A claim for the refund of a succession tax imposed on contingent beneficial interests under the War Revenue Act of June 13, 1898, § 29 (see vol. 4, p. 230 note) and wrongfully collected after the passage of the Act of June 27, 1902 § 3, (see vol. 4, p. 232) which forbade such a tax and directed its refund, is governed by the provision of this act. *Coleman v. U. S.*, (1919) 250 U. S. 30, 39 S. Ct. 390 mem., 63 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 628.

**Payment under protest** is not essential to the maintenance of a suit to recover back inheritance taxes. *Rand v. U. S.*, (1919) 249 U. S. 503, 39 S. Ct. 359, 63 U. S. (L. ed.) —, *affirming* (1917) 52 Ct. Cl. 72, 285.

**Demand for repayment; by whom made.**—The conditions of this section and of § 3 of the Act of June 27, 1902, are not satisfied, so as to permit the life beneficiary in a testamentary trust to sue for the recovery of the inheritance tax assessed and collected against her life estate, by a demand made by the attorney for the testamentary trustee for a refund of such tax, or by a similar demand made by the personal representative of the defendant successor to the executrix, who had actually made the payment at the cost of the beneficiary, and her failure to make a demand in her own name is not excused on the assumption that a third demand would be a useless ceremony. *Rand v. U. S.*, (1919) 249 U. S. 503, 39 S. Ct. 359, 63 U. S. (L. ed.) —, *affirming* (1917) 52 Ct. Cl. 72, 285.

**Suit in court of claims for unrepaid residue of succession tax.**—Any bar to a suit against the United States in the court of claims for the unrepaid residue of a succession tax collected contrary to the terms of the Act of June 27, 1902, § 3 (see vol. 4, p. 232) under the War Revenue Act of June 13, 1898 (30 Stat. at L. 448, chap. 448), § 29, which might result from the prior recovery of a judgment against a collector of internal revenue for the partial refund of such tax, was removed by the subsequent enactment of this act, which, after providing in § 1 for the presentation of claims for taxes erroneously collected under said § 29, directs repayment in § 2 to such claimants as have presented, or shall hereafter so present, their claims and establish them,—since the claimants, having presented their claims prior to beginning the suit against the collector, had complied with the letter of the act, and the effect of such claim was not extinguished by the judgment. *Sage v. U. S.*, (1919) 250 U. S. 33, 39 S. Ct. 415, 63 U. S. (L. ed.) —, *reversing* (1918) 53 Ct. Cl. 628.

### Vol. IV, p. 236, par. A, subd. 1. [First ed., 1914 Supp., p. 185.]

**Retroactive effect of act.**—This act, although passed in October, 1913, can tax

incomes from March 1st of that year. *Woods v. Tewell*, (C. C. A. 3d Cir. 1918) 252 Fed. 106, 164 C. C. A. 218.

**When legacy deemed received.**—The duty levied by the federal act of September 8, 1916, resembles very closely the old English probate duty established in 1694 and the probate duty of 1862 and 1864 levied by the acts of Congress of the United States. The old probate duty was treated in England as an expense of administration to be deducted out of the residue of the estate. *Knowlton v. Moore*, (1900) 178 U. S. 41, 20 S. Ct. 747, 44 U. S. (L. ed.) 969. The federal act of September 8, 1916, levies a duty against the value of the entire mass of the decedent's property, real or personal, tangible or intangible, wherever situated, after deducting for funeral expenses, administration expenses, claims against the estate, and the other deductions mentioned in said act, and makes the same a lien against the property in whosoever hands the same may pass by transfer or otherwise. As the duty is made payable by the executor or administrator to the collector or deputy collector by the express provisions of the statute, the duty is an expense or a charge against the estate of the decedent, and not an express charge against the shares of the legatees or distributees of the decedent. The legatees and distributees cannot in any sense be held to have "received" any part of the duty that is paid to the government by the executor or trustee or administrator as such estate tax, and there is no language in the act that will permit a construction that the duty is levied upon each share of the legatees or distributees of the decedent, as was given the federal act of 1898. *People v. Pasfield*, (1918) 284 Ill. 450, 120 N. E. 286.

**Tax in respect of rent.**—In *Kimball v. Cotting*, (1918) 229 Mass. 541, 118 N. E. 866, L. R. A. 1918 C 1189, it was held that a clause in a lease made the lessee and not the lessor liable for the income tax arising out of the rents.

**Property owned in United States.**—The income from stocks and bonds of corporations organized under laws of the United States, and from bonds and mortgages secured upon property in the United States,—all owned by a nonresident alien,—which income is collected and remitted to her by an agent domiciled in the United States, who has physical possession of such securities under a power of attorney which gives him authority to sell, assign, or transfer any of them, and to invest and reinvest the proceeds of such sales as he may deem best in the management of the business and the affairs of the principal, is income derived from property owned in the United States. *De Ganay v. Lederer*, (1919) 250 U. S. 376, 39 S. Ct. 524, 63 U. S. (L. ed.) —, wherein the court said: "The question submitted comes to this: Is the income from the stock, bonds and mortgages, held by the Pennsylvania Company, derived from property owned in the United States? A learned

argument is made to the effect that the stock certificates, bonds and mortgages are not property, that they are but evidences of the ownership of interests which are property; that the property, in a legal sense, represented by the securities, would exist if the physical evidences thereof were destroyed. But we are of opinion that these refinements are not decisive of the congressional intent in using the term 'property' in this statute. Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them. To the general understanding and with the common meaning usually attached to such descriptive terms, bonds, mortgages, and certificates of stock are regarded as property. By state and federal statutes they are often treated as property, not as mere evidences of the interest which they represent. In *Blackstone v. Miller*, (1903) 188 U. S. 189, 206, [23 S. Ct. 277, 47 U. S. (L. ed.) 439, 445], this court held that a deposit by a citizen of Illinois in a trust company in the city of New York was subject to the transfer tax of the state of New York and said: "There is no conflict between our views and the point decided in the case reported under the name of *State Tax on Foreign-Held Bonds*, (1872) 15 Wall. 300, [21 U. S. (L. ed.) 179]. The taxation in that case was on the interest on bonds held out of the state. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon v. Hooker*, (1901) 177 Mass. 335, 337, [58 N. E. 1078, 83 A. S. R. 279]. . . . We have no doubt that the securities, herein involved, are property. Are they property within the United States? It is insisted that the maxim *mobilia sequuntur personam* applies in this instance, and that the situs of the property was at the domicile of the owner in France. But this court has frequently declared that the maxim, a fiction at most, must yield to the facts and circumstances of cases which require it; and that notes, bonds and mortgages may acquire a situs at a place other than the domicile of the owner, and be there reached by the taxing authority."

**Income of nonresident aliens.**—Nonresident aliens, corporate or individual, not carrying on any business, trade or profession in the United States are not subject to tax under this section on income derived from stocks or bonds of domestic corporations doing a domestic business, or (b) from obligations secured by mortgages on tangible property within the United States, whether such obligations be held by the owners or by their collecting agents here. (1915) 30 Op. Atty.-Gen. 435.

This subdivision does not lay a tax upon the interest accruing on bonds executed by a resident or citizen of the United States when

held and owned by a nonresident alien, and this is true irrespective of whether they are unsecured or secured by a mortgage upon real estate in this country, and also irrespective of where the written bonds are in fact kept or interest payments thereon are made. (1913) 30 Op. Atty.-Gen. 230.

Shares of stock of domestic corporations owned by nonresident aliens are not "property . . . in the United States" within the meaning of this subdivision and dividends accruing therefrom to such nonresident aliens are not subject to any tax under this Act. (1914) 30 Op. Atty.-Gen. 273.

**Vol. IV, p. 239, par. B.** [First ed., 1914 Supp., p. 186.]

**Insurance agent's commissions.**—Under this paragraph commissions of a life insurance agent derived from renewal premiums paid on policies that were obtained by him and accepted by the company in some earlier year, are taxable. *Woods v. Lewellyn*, (C. C. A. 3d Cir. 1918) 252 Fed. 106, 164 C. C. A. 218.

**Special assessment districts**, when lawfully created under the authority of the states for the purpose of improvement of streets and public highways, the provision of sewerage, gas and light, and the reclamation, drainage, or irrigation of considerable bodies of land within the states, are "political subdivisions" thereof within the meaning of the proviso to this paragraph. (1914) 30 Op. Atty.-Gen. 252.

**Vol. IV, p. 241, par. D.** [First ed., 1914 Supp., p. 187.]

**Income from partnership.**—A member of a partnership need not include, as a part of his net income subject to the normal tax, such part of his income derived from or through a partnership which has been received by that partnership as dividends on stocks owned by it in corporations taxable upon their net income under section G. *U. S. v. Coulby*, (N. D. Ohio, 1918) 251 Fed. 982.

**Vol. IV, p. 242, par. E.** [First ed., 1914 Supp., p. 189.]

**Reassessment after false return.**—A tax for 1913 may properly be assessed in May, 1915, under this paragraph if the taxpayer's return was "false," such term not meaning "fraudulent" but rather incorrect or untrue. *Woods v. Lewellyn*, (C. C. A. 3d Cir. 1918) 252 Fed. 106, 164 C. C. A. 218.

**Vol. IV, p. 245, par. G.** [First ed., 1914 Supp., p. 191.]

**Dividend on stock of another corporation.**—A corporation which receives an annual dividend on the stock of another corporation, is subject to be taxed thereon in the

year when it was received. *Skinner v. Union Pac. Coal Co.*, (C. C. A. 8th Cir. 1918) 249 Fed. 152, 161 C. C. A. 204, where it was said: "The case must be determined by deciding whether the dividend constituted income of the Union Pacific Coal Company 'arising or accruing' within the calendar year ending December 31, 1913. The argument of plaintiff really comes to this: That the dividend did not accrue to it in 1913, because the profits of the Superior Coal Company, out of which it was paid, did not all accrue to that company from its business during the calendar year 1913, but half of it accrued in 1912. This statement of the question indicates its decision. The Income Tax Law does not deal with the period during which a corporation which pays a dividend accumulates the profits out of which the dividend is paid. It is concerned with the income of the corporation receiving the dividend. Viewed in that light, the dividend accrued to the Union Pacific Coal Company in the year 1913, and all of it was taxable."

**Joint stock association.**—The collector of internal revenue, who unlawfully, but with probable cause, assessed for income-tax purposes the trustees in a common-law trust as an association, may retain out of the sum received by him the amount of the tax that they should have paid as trustees, since any recovery for the excess will, under R. S. sec. 989 (see vol. 3, p. 232) be from the United States, and if the United States retains from the amount received by it the amount that it should have received, it cannot recover that sum in a subsequent suit. *Crocker v. Malley*, (1919) 249 U. S. 223, 39 S. Ct. 270, 63 U. S. (L. ed.) —, reversing (C. C. A. 1st Cir. 1918) 250 Fed. 817, 163 C. C. A. 131), which was an action to recover taxes paid under protest to the collector by the trustees. The court, commenting on the question decided, said: "The District Court while it found for the plaintiffs, ruled that the defendant was entitled to retain out of the sum received by him the amount of the tax that they should have paid as trustees. To this the plaintiffs took a cross writ of error to the Circuit Court of Appeals. There can be no question that although the plaintiffs escape the larger liability, there was probable cause for the defendant's act. The Commissioner of Internal Revenue rejected the plaintiffs' claim, and the statute does not leave the matter clear. The recovery therefore will be from the United States. Rev. Stats., § 989. The plaintiffs, as they themselves alleged in their claim, were the persons taxed, whether they were called an association or trustees. They were taxed too much. If the United States retains from the amount received by it the amount that it should have received, it cannot recover that sum in a subsequent suit."

The income from a common-law trust under which the trustees are to collect rents and income of such property as may be in their hands, and pay over to the holders of trustees' receipt certificates what they

shall determine to be fairly distributable net income, with the right to apply any funds in their hands for the repair or development of the property held by them, or the acquisition of other property pending conversion and distribution, the receipt holders having no joint action or interest and no control over the fund—is not taxable to the trustees as an association without any deductions in respect to dividends received from a corporation that itself pays an income tax by reason of the provisions of § II. G. (a), imposing a tax upon the income of every corporation, joint stock company, or association, “no matter how created or organized;” and it is immaterial whether the individual receipt holders are entitled (as seems to be the practical construction) to the income of the fund subject to an unexercised power in the trustees, in their reasonable discretion, to divert it to the improvement of the capital, or whether they are not entitled to the income as such until they receive it. *Crocker v. Malley*, (1919) 249 U. S. 223, 39 S. Ct. 270, 63 U. S. (L. ed.) —, *reversing* (C. C. A. 1st Cir. 1918) 250 Fed. 817, 163 C. C. A. 131, wherein the court said: “The requirement of G. (a) is that the normal tax thereinbefore imposed upon individuals shall be paid upon the entire net income accruing from all sources during the preceding year ‘to every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships.’ The trust that has been described would not fall under any familiar conception of a joint-stock association, whether formed under a statute or not. *Smith v. Anderson*, (1880) 15 Ch. Div. (Eng.) 247, 273, 274, 277, 282; *Elliot v. Freeman*, (1911) 220 U. S. 178, 186, [31 S. Ct. 360, 55 U. S. (L. ed.) 424, 428. If we assume that the words ‘no matter how created or organized’ apply to ‘association’ and not only to ‘insurance company,’ still it would be a wide departure from normal usage to call the beneficiaries here a joint-stock association when they are admitted not to be partners in any sense, and when they have no joint action or interest and no control over the fund. On the other hand, the trustees by themselves cannot be a joint-stock association within the meaning of the act unless all trustees with discretionary powers are such, and the special provision for trustees in D. is to be made meaningless. We perceive no ground for grouping the two—beneficiaries and trustees—together, in order to turn them into an association, by uniting their contrasted functions and powers, although they are in no proper sense associated. It seems to be an unnatural perversion of a well-known institution of the law. . . . We presume that the taxation of corporations and joint-stock companies upon dividends of corporations that themselves pay the income tax was for the purpose of discouraging combinations of the kind now in

disfavor, by which a corporation holds controlling interests in other corporations which in their turn may control others, and so on, and in this way concentrates a power that is disapproved. There is nothing of that sort here. Upon the whole case we are of opinion that the statute fails to show a clear intent to subject the dividends on the Massachusetts corporation's stock to the extra tax imposed by G. (a).”

A partnership composed of several corporations, and organized under the laws of Hawaii, has been held not to be a joint-stock company, and a tax illegally collected was recovered by the various partners. *Haiku Sugar Co. v. Johnstone*, (C. C. A. 9th Cir. 1918) 249 Fed. 103, 161 C. C. A. 155.

Income prior to March 1, 1913.—Where a holding company took over accumulated earnings of the subsidiary companies, which earnings had been used as capital before the taxing year, it was held that the transactions should not be regarded as “dividends declared and paid in the ordinary course by a corporation,” and therefore “income.” *Gulf Oil Corp. v. Lewellyn*, (1918) 248 U. S. 7, 39 S. Ct. 35, 63 U. S. (L. ed.) —, *reversing* (C. C. A. 3d Cir. 1917) 245 Fed. 1. 156 C. C. A. 1, which *affirmed* (W. D. Pa. 1916) 242 Fed. 709, wherein the court said: “This is a suit to recover a tax levied upon certain dividends as income, under the Act of October 3, 1913, ch. 16, § 11, 38 Stat. 114, 166. The District Court gave judgment for the plaintiff, 242 Fed. Rep. 709, but this judgment was reversed by the Circuit Court of Appeals. 245 Fed. Rep. 1, 156 C. C. A. 1. The facts may be abridged from the findings below as follows: The petitioner was a holding company owning all the stock in the other corporations concerned except the qualify shares held by directors. These companies with others constituted a single enterprise, carried on by the petitioner, of producing, buying, transporting, refining and selling oil. The subsidiary companies had retained their earnings, although making some loans inter se, and all their funds were invested in properties or actually required to carry on the business, so that the debtor companies had no money available to pay their debts. In January, 1913, the petitioner decided to take over the previously accumulated earnings and surplus and did so in that year by votes of the companies that it controlled. But, disregarding the forms gone through, the result was merely that the petitioner became the holder of the debts previously due from one of its companies to another. It was no richer than before, but its property now was represented by stock in and debts due from its subsidiaries, whereas formerly it was represented by the stock alone, the change being effected by entries upon the respective companies' books. The earnings thus transferred had been accumulated and had been used as capital before the taxing year. *Lynch v. Turrish*, 247 U. S.



221, 228. We are of opinion that the decision of the District Court was right. It is true that the petitioner and its subsidiaries were distinct beings in contemplation of law, but the facts that they were related as parts of one enterprise, all owned by the petitioner, that the debts were all enterprise debts due to members, and that the dividends represented earnings that had been made in former years and that practically had been converted into capital, unite to convince us that the transaction should be regarded as bookkeeping rather than as 'dividends declared and paid in the ordinary course by a corporation.' *Lynch v. Hornby*, 247 U. S. 339, 346. The petitioner did not itself do the business of its subsidiaries and have possession of their property as in *Southern Pacific Co. v. Lowe*, 247 U. S. 330, but the principle of that case must be taken to cover this. By § 11, G, (c), 38 Stat. 174, and S. *id.* 202, the tax from January 1 to February 28, 1913, is levied as a special excise tax, but in view of our decision that the dividends here concerned were not income it is unnecessary to discuss the further question that has been raised under the latter clause as to the effect of the fact that excise taxes upon the subsidiary corporations had been paid."

**Rental of entire corporate property as "income."**—May 1, 1871, the plaintiff leased its railroad, equipment, and franchises for the term of its charter of 500 years and of any extension thereof to the Delaware & Hudson Canal Company, in consideration whereof the lessee agreed to pay an annual rent as follows: The interest on \$1,625,000 of mortgage bonds made, guaranteed or assumed by the lessor; the interest and \$5,000 annually on account of the principal of the lessor's bond to the city of Troy on account of the Troy Union Railroad Company; the interest on \$375,000 of 7 per cent. bonds to be issued by the lessor, payment of interest guaranteed by the lessee; a dividend of 4 per cent., payable semi-annually, on the lessor's capital stock; and the rents accruing and to become due on certain leases to which the lessor was a party. The lessee further agreed to stamp upon the lessor's bonds and stock on presentation a guaranty of payment of the interest and dividends aforesaid to the owners and holders. Every share of the plaintiff's stock is so stamped. It was, however, expressly provided that the lessee was not to pay the then income tax or any income tax that might thereafter be imposed on the said dividends and interest, and that, if required by law to pay the same, it might deduct the amount of tax so paid from the said interest and dividends. The lessor covenanted to continue its corporate organization at the expense of the lessee, not exceeding \$1,000 annually, and to co-operate with the lessee as far as legal and practicable to make the lease perpetual. The lessee from 1871 down to the present time has continued to be in possession of the lessor's properties and

franchises, has operated and maintained the road, and has kept transfer books of the lessor's bonds and stocks. The plaintiff contended that it had no other income than the \$1,000 paid it annually by the lessee as expense of keeping up its corporate organization and an income from other sources amounting to \$3,600 annually, and that the moneys paid as rent to the holders of its bonds and stock were their income. Answering this contention the court said: "It is true that the rent of its road does not go into the plaintiff's treasury and that it has no means of withholding the tax from it. It is also true that the rent reserved by the lease is paid by the lessee in fixed sums to third parties. All the same, the rent is the property of the plaintiff, and remains such, though by the terms of the lease paid out to others, whose rights are derived through it. While the rent is a debt of the lessee to the lessor, it is, as between the lessor and its stockholders, the lessor's income, out of which the dividends, if any, are to be paid. The application of the rent under the lease is a mere labor-saving device, the effect being exactly the same as if it be paid to the lessor and by it paid out as far as necessary to bondholders for interest, and the surplus in dividends to its stockholders." *Rensselaer & S. R. Co. v. Irwin*, (C. C. A. 2d Cir. 1918) 161 C. C. A. 636, 249 Fed. 726.

**Provision in lease as requiring lessee to pay tax on account of rents received by lessor.**—In *Codman v. American Piano Co.*, (1918) 229 Mass. 285, 118 N. E. 344, it appeared that the defendant in 1912 entered into a written indenture of lease with Paul M. Hamlen and Miriam P. Loring as lessors whereby they demised certain premises to the defendant for a long term at a rental therein recited. The plaintiffs were trustees of a voluntary association which succeeded to the rights of the original lessors under the lease. The lease contained the following covenant:

"And the lessee further covenants and agrees with the lessors to pay punctually within fourteen (14) days from the times when they become due and payable all taxes and assessments whatsoever which may be payable for or in respect of the leased premises during the term thereof, except assessments for betterments hereinafter arranged for."

Under the terms of this paragraph the association was subject in each of the years 1914, 1915, and 1916 to a tax of one per cent. upon its entire income arising or accruing from all sources during the preceding calendar year. In each of the years above referred to a tax at the rate of one per cent. was duly assessed upon the association's entire net income, which assessments were paid by the association in accordance with the terms of the Act. The plaintiffs sought in the action to recover the amount of the taxes so paid upon the amount of the rent reserved in the lease and paid by the defendant to the association. It was held that the action would

not lie. The court said: "It is agreed that the plaintiffs are an 'association' as that word is used in section 2, paragraph G (a), and that the defendant paid to the association the full rent in the amounts and at the times specified by the lease, and did not withhold the federal income tax of one per cent. The question then is whether the defendant is liable to indemnify and pay to the plaintiffs the amount of the taxes upon the rents so paid by the plaintiffs to the federal government. . . . What is meant by taxes for or in respect of the leased premises? The legal signification clearly is that the taxes are those which relate directly to the premises themselves and not to the rent reserved which, when due, is a separate and independent estate. The fundamental fact on which the rights of the parties depend is that the defendant never agreed to pay the taxes on the rent. In *Catawissa R. Co. v. Philadelphia, etc., R. Co.*, (1916) 255 Pa. St. 269, 99 Atl. 807, it was said: 'The income tax was not imposed by the government upon "the demised premises or any part thereof." . . . It was imposed upon rental received by the lessor from the lessee.' The words chosen by the parties cannot fairly be extended by us beyond their natural or ordinary meaning, and therefore the defendant cannot be held liable for taxes which the covenant neither by express words nor reasonable implication obliged him to pay."

**Deduction of rebate on fixed premium.**—The provision that amounts repaid to policyholders by way of rebate on premiums may be deducted for the year in which the repayment was made is not limited to payments made during the year in which they were repaid and includes payments made before the passage of the Act. *Penn Mut. Life Ins. Co. v. Lederer*, (E. D. Pa. 1918) 247 Fed. 559.

#### Vol. IV, p. 255, sec. 38. [First ed., 1909 Supp., p. 829.]

- I. Subdivision first.
  - 6. Corporations subject to tax.
  - 6. Income.
- II. Subdivision second.
- V. Subdivision fifth.
- VII. Subdivision eighth (new).

##### I. SUBDIVISION FIRST (p. 260)

##### 4. Corporations subject to tax (p. 261).

A terminal railway company organized and incorporated to perform services for four railroad companies, its stockholders, known as the "tenant companies," is taxable on its income. "It may be that the tenant companies organized the terminal company to provide a convenient joint agency for the performance of certain of their duties as carriers, and with no view to profit to be derived from its organization. It was, however, legally organized as a corporation, capable of earning and paying dividends to its stockholders, and the fact that it has not done so does not make it

the less a corporation engaged in business and organized for profit, within the meaning of the corporation tax law. Profit from its organization and operation could result to its stockholders in other ways than in dividends. If the tenant companies chose to avail themselves of an agency, owned by them, which did business in a corporate capacity, then under the Act of August 5, 1909, they became liable through it for the payment of an excise tax for this privilege." *Houston Belt, etc., R. Co. v. U. S.*, (C. C. A. 5th Cir. 1918) 250 Fed. 1, 162 C. C. A. 173.

##### 6. Income (p. 267)

**"Gain or profit."**—"Where property is sold by a corporation at a price exceeding its cost, the gain is to be treated as income. *Scott v. Schwab*, (C. C. A. 9th Cir. 1919) 255 Fed. 57, 166 C. C. A. 385.

**Release of debt by sole stockholder.**—Where a corporation which owned the entire capital stock of another corporation released a debt of that corporation the amount of the release constitutes an addition to the capital and not income of the corporation whose debt was released. *U. S. v. Oregon-Washington R., etc., Co.*, (C. C. A. 2d Cir 1918) 251 Fed. 211, 163 C. C. A. 367.

**Payments made for corporation by constituent corporations as income.**—A terminal railway corporation was organized for the purpose of performing terminal services for four railroad companies, which were its stockholders, and which are referred to as "tenant lines." In order to finance its organization, it was necessary to borrow a large sum of money, and the credit of the terminal company was not sufficient to accomplish the needed loan. An arrangement was reached by which the tenant lines agreed with the Central Trust Company of New York, and with the terminal company, that they would pay in equal parts the annual interest and sinking fund requirements of a loan from the Central Trust Company to the terminal company, to be evidenced by bonds in the amount of \$5,000,000, secured by a mortgage on the property of the terminal company. The capital stock of the terminal company was subscribed for and paid for by the four tenant lines in equal parts, and was in the amount of \$25,000. The current operating expenses of the terminal company were to be paid by the tenant lines ratably according to the extent of the user by them respectively, to be determined according to a wheelage basis. The stock of the tenant lines was agreed to be and in fact was pledged to the Central Trust Company, to secure the loan, with the privilege of sale, in case of default on the part of any tenant company in its payments of interest and for the sinking fund. In case of such default, provision was made for the elimination of the defaulting tenant line from the privilege of being served by the terminal company and from the use of its property. It was also provided that any of the tenant companies could withdraw, under certain conditions, from the agreement,

and it was thereby and thereafter relieved from further obligation for interest and sinking fund payments. The tenant lines became liable to pay the principal of the loan, only through their agreement to pay the sinking fund installments, while they continued tenant lines. The terminal company executed the bonds and mortgage which secured them and was directly liable to the Central Trust Company for the loan. However, the installments of interest and sinking fund were not paid by the tenant lines to the terminal company and by it, in turn, paid to the Central Trust Company, but were paid in quarterly parts by the respective tenant lines to the Central Trust Company. The title to the terminal properties and the ownership of them was in the terminal company, subject to the mortgage. It was held that the sums paid in the loan by the railroad companies were taxable as income of the terminal company. *Houston Belt, etc., Co. v. U. S.*, (C. C. A. 5th Cir. 1918) 250 Fed. 1, 162 C. C. A. 173.

**Excess premiums.**—Excess premiums collected by a mutual company and subject to refund are not income. *Northwestern Mut. Life Ins. Co. v. Fink*, (E. D. Wis. 1917) 248 Fed. 568.

**Premiums not received during year.**—"I regard the plaintiff's claim that only premiums actually received in cash during the year can properly be regarded as income for the purposes of said second clause as well founded. As to premiums accrued or becoming due, but not paid, within the year, and as to money previously received in payment of a premium, but applied within the year to pay a different premium, I rule that their inclusion as 'income received within the year' is not required by said second clause." *Lumber Mut. F. Ins. Co. v. Malley*, (D. C. Mass. 1916) 256 Fed. 380, wherein the court said further: "A 'cash' and not a 'revenue' basis, for estimation of the income whereby the tax imposed is to be admeasured, seems to me the basis contemplated by the statute."

Premiums accrued but not collected are not included. *Northwestern Mut. Life Ins. Co. v. Fink*, (E. D. Wis. 1917) 248 Fed. 568.

**Interest on policy loans** need not be returned as part of the income. *Northwestern Mut. Life Ins. Co. v. Fink*, (E. D. Wis. 1917) 248 Fed. 568.

**Increases or decreases in book value of bonds.**—In computing the amount of income received within a year by a corporation, increases in the book value of bonds held by it as investments of its funds cannot be considered as income nor the decreases as expenses paid or losses sustained. *Lumber Mut. Fire Ins. Co. v. Malley*, (D. C. Mass. 1916) 256 Fed. 383.

**Interest.**—A stock brokerage corporation must list as part of its gross income interest paid by its customers on unpaid balances of margin. *Alzheimer, etc., Invest. Co. v. Allen*, (C. C. A. 8th Cir. 1918) 248 Fed. 688, 160 C. C. A. 588. In that case it appeared that plaintiff's business consisted in part of the purchase for customers of bonds and other

securities, which it carried for them on margin or part payment. It charged and received from them interest on the unpaid balances. In buying the securities for its customers, plaintiff itself paid but part of the price "on said purchases," and paid interest on the balances it owed. In these transactions the interest received by plaintiff from its customers exceeded the interest it paid. In making its tax returns, plaintiff deducted from the interest it received the entire amount of the interest it paid and listed the balance as gross income. The Commissioner of Internal Revenue, in reforming the returns, listed all interest received as gross income, and limited the amount of deduction for interest paid according to the statutory restriction in respect of the amount of plaintiff's capital stock. It was held that the ruling of the commissioner was correct.

## II. SUBDIVISION SECOND (p. 270)

**Deductions.**—"Tax imposed under authority of state."—A state tax on corporate stock, imposed on the corporation and not on its stockholders, may be deducted from its gross income by the corporation. *U. S. v. Guaranty Trust, etc., Bank*, (S. D. Fla. 1918) 253 Fed. 291.

**Past losses.**—A corporation which has for several years made return and paid the tax without reference to a transaction prior to the passage of the act whereby certain bonds and notes were sold at a discount and the loss charged off, is not entitled to assert the right to a deduction and obtain a refund of the proportional amount of the tax paid. *Chicago, etc., R. Co. v. U. S.*, (1917) 53 Ct. Cl. 41.

**Cost of necessary repairs.**—In computing the tax under this section, a corporation operating a steamship line may deduct the cost of necessary repairs to its steamers, docks, etc. *San Francisco, etc., Steamship Co. v. Scott*, (N. D. Cal. 1918) 253 Fed. 854. The court said: "The question thus raised does not seem to have been directly decided in any reported case to which my attention has been called, or which I have been able to find, although the cost of repairs and upkeep was assumed in *Grand Rapids & I. Ry. v. Doyle* (D. C.) 245 Fed. 792, to be an item properly included in operating and maintenance expense. Under the law the tax is to be laid on net income and such net income is to be ascertained by deducting from the gross income (1) all the ordinary and necessary expenses actually paid within the year out of income in the 'maintenance and operation' of the business and property; (2) losses actually suffered, not covered by insurance, including a reasonable allowance for depreciation, if any. (3), (4), and (5) are items not material here. It will thus be seen that the deductions allowed are to include, not only ordinary and necessary amounts actually paid out in the operation of the property, but also the amounts paid out in the maintenance thereof, and in addition a reasonable sum for depreciation,

if any. Now, the operation of a business or property includes payment for labor and materials which go into the actual operation thereof, while maintenance means the upkeep or preserving the condition of the property to be operated, and therefore, in my judgment, includes the cost of ordinary repairs necessary and proper from time to time for that purpose. 'Depreciation' as used in the statute is not to be confused with ordinary repairs. It is intended to cover the estimated lessening in value of the original property, if any, due to wear and tear, decay, or gradual decline from natural causes, inadequacy, obsolescence, etc., which at some time in the future will require the abandonment or replacement of the property, in spite of ordinary current repairs."

**Reserve funds.**—"Congress did not attempt to define the term 'reserve funds,' as used in the Excise Tax Law of 1909. The rule is familiar that when a word which has a known legal meaning is used in a statute, it must be assumed that it is used in its legal sense, in the absence of an indication of a contrary intent. 26 Am. & Eng. Encyc. Law, 607; *Apple v. Apple*, 1 Head (Tenn.) 348; *State v. Smith*, 5 Humph. (Tenn.) 394; *Grogan v. Garrison*, 27 Ohio St. 50, 63. It is clear, from Mr. Justice Pitney's opinion in the *McCoach Case*, 244 U. S., p. 586, 37 Sup. Ct. 709, 61 L. Ed. 1333, that the term 'reserve funds,' within the meaning of the act of Congress, bears the signification known to the general law of insurance." *National Life, etc., Ins. Co. v. Craig*, (C. C. A. 6th Cir. 1918) 251 Fed. 524, 163 C. C. A. 518.

Money appropriated to the reserve fund may be deducted from income. *Northwestern Mut. Life Ins. Co. v. Fink*, (E. D. Wis. 1917) 248 Fed. 568.

Dividends voluntarily paid, as a matter of business policy, by an insurance company may be deducted, as should sums which the company is required by state law to put into a reserve fund. *Prudential Ins. Co. v. Herold*, (D. C. N. J. 1918) 247 Fed. 681.

#### V. SUBDIVISION FIFTH

The word "false" as used in this subdivision means "untrue" or "incorrect," and does not necessarily mean intentionally or fraudulently false. *U. S. v. Nashville, etc., Ry.*, (C. C. A. 6th Cir. 1918) 249 Fed. 678, 161 C. C. A. 588.

#### VII. SUBDIVISION EIGHTH (New)

**Action to collect omitted items.**—In view of the provision of this section making all laws relating to the collection, remission and refund of internal revenue taxes applicable to the tax imposed by this section, an action may be maintained by the government under R. S. section 3213 (see vol. 3, p. 1025) to collect the tax imposed by this section on items of income omitted from a corporation's return, despite the fact that the action is brought after the expiration of the period, during which the Commissioner of Internal

Revenue is entitled to amend the return. *U. S. v. Nashville, etc., Ry.*, (C. C. A. 6th Cir. 1918) 249 Fed. 678, 161 C. C. A. 588. The court said:

"We think it clear that one who, through erroneous return, has made it impossible for the commissioner to exercise his judgment upon the items affected thereby cannot be heard to object that the only remedy open to the government is invoked. Indeed, the declaration avers that the commissioner has 'disallowed' the deduction of the items in question, and the natural inference therefrom is that, so far as he can, he has held the defendant liable for the excise tax thereon. It results from these views that the learned district judge was in error in holding that this suit was barred by the commissioner's failure to reassess. The conclusion we have arrived at has been reached in two cases in district courts: *United States v. Threshing Co.*, (D. C.) 229 Fed. 1019; *United States v. Grand Rapids & Indiana Ry. Co.* (D. C.) 239 Fed. 153."

#### Vol. IV, p. 277, sec. 1. [First ed., 1916 Supp., p. 73.]

**Nature of Act.**—While the Act had for its purpose objects other than or in addition to raising revenue, it must be construed as a revenue Act. *Hutton v. Terrill*, (S. D. N. Y. 1918) 255 Fed. 860.

#### Vol. IV, p. 278, sec. 3. [First ed., 1916 Supp., p. 74.]

**Pleading compliance with statute.**—In an action on a cotton futures contract payment of the tax need not be alleged in the complaint, failure to pay being matter of defense. *Hutton v. Terrill*, (S. D. N. Y. 1918) 255 Fed. 860.

#### Vol. IV, p. 278, sec. 4. [First ed., 1916 Supp., p. 74.]

**Pleading that contract was in writing is not necessary in an action thereon, want of the required written memorandum being matter of defense.** *Hutton v. Terrill*, (S. D. N. Y. 1918) 255 Fed. 860.

**Contract signed by broker.**—Where a sale of cotton futures is made on the Cotton Exchange the broker is the "person to be charged" and his signature without disclosing his principal is sufficient. *Hutton v. Terrill*, (S. D. N. Y. 1918) 255 Fed. 860. The court said:

"Being a revenue measure, the purpose of sections 3 and 4 must be assumed to be the safeguarding of the government in the observance and collection of the tax. When plaintiffs made purchases on the Cotton Exchange, they were obviously the persons to be charged under the statute, so far either as the government or the seller was concerned. It must be assumed that the statute was enacted, in

this regard, to prevent tax evasions, and not to affect contractual relations. Any other construction, if permissible, could only be justified (if at all) by a clear requirement that brokers on the Exchange could not, in effect, do business on their own credit and responsibility. Of course, the only way in which business on exchanges can be done is to deal with a member of the Exchange. Such member is subject to rules and supervision. No one would think ordinarily, in the quick and important transactions on exchanges, of taking the time to investigate the responsibility of the broker's customer or principal; and yet, if the Exchange member is not the 'party to be charged,' for the purposes of section 4, that result is what the statute would ultimately require."

**Vol. IV, p. 296.** [*Bonds, debentures, etc.*] [First ed., 1916 Supp., p. 95.]

**Stock certificates of federal reserve banks.**—Certificates of stock to be issued to member banks by federal reserve banks should not be revenue stamped under this schedule. (1916) 30 Op. Atty-Gen. 511.

**Vol. IV, p. 301.** [*Insurance policies, etc.*] [First ed., 1916 Supp., p. 98.]

**Mutual fire insurance company.**—A mutual company insuring only its members is none the less within the exemption because it requires payment of premiums in advance and maintains a reserve fund. *Niles v. Central Mfg. Mut. Ins. Co.*, (C. C. A. 6th Cir. 1918) 252 Fed. 564, 165 C. C. A. 14, wherein it was said:

"The distinction drawn in the Act is between those mixed mutuals, which, though commonly called mutuals, are in fact also doing a nonmutual business for profit, and the strictly mutual companies; not between the mutuals which carry a reserve and surplus, and those which levy assessments only after each loss. A mere incidental profit earned by way of interest on its invested safety funds, or on its bank balances, does not change the purely mutual character of the company, or indicate that its business, though thus earning a profit, is 'carried on for profit.' And if the text or context of these words could be deemed to create an ambiguity, as in our judgment they cannot, the doubt would be resolved in favor of the taxpayer; the question is not, as in *Perry v. Norfolk*, 220 U. S. 480, 31 Sup. Ct. 465, 55 L. ed. 548, that of an alleged contractual exemption from general taxation laws, but, as in *Eidman v. Martinez*, 184 U. S. 578, 583, 22 Sup. Ct. 515, 46 L. ed. 697, that of the class of corporations intended by the Act to be included in or exempted from its special tax provisions."

**Vol. IV, p. 311, sec. 3450.** [First ed., vol. III, p. 795.]

**Innocence of automobile owner.**—The fact that the owner of an automobile who has put an employee in charge of the machine for a lawful purpose is innocent of its use by the employee in removing distilled liquor, on which the tax had not been paid, for the purpose of defrauding the government, does not prevent its forfeiture under this section. *U. S. v. Mincey*, (C. C. A. 5th Cir. 1918) 254 Fed. 287, 165 C. C. A. 575.

**Vol. IV, p. 321, sec. 3460.** [First ed., vol. III, p. 803.]

**Failure to file a claim under the third subdivision** will not estop the true owner from asserting his title by an action of trover brought against the purchaser of the property at a sale held by the collector of internal revenue, provided he has done nothing to mislead the purchaser as to his relation to the property and the title. *Campbell v. Hutcheson*, (1918) 23 Ga. App. 111, 97 S. E. 555.

**1918 Supp., p. 279, sec. 14.**

**Amendment not retroactive.**—The amendment made by this section is not retroactive and does not affect a proceeding on second assessment completed before its enactment. *Camp Bird v. Howbert*, (C. C. A. 8th Cir. 1918) 249 Fed. 27, 161 C. C. A. 87.

**1918 Supp., p. 305, sec. 201.**

**Tax as payable out of estate before distribution.**—"The federal act of 1916 imposes a tax payable out of the estate before distribution, thus differing from the federal inheritance tax of 1908, payable by the individual beneficiaries. It is not a tax upon specific legacies, nor upon residuary legatees. It is taken from the net estate 'before the distributive shares are determined rather than off the distributive shares.' Its payment diminishes pro tanto the share of each beneficiary. The executor or administrator must pay the tax out of the estate before the shares of the legatees are ascertained. It is an obligation against the estate and payable like any expense which falls under the head of administration expenses. The tax paid is no part of the estate at the time of distribution; it has passed from the estate, and the share of the beneficiaries is diminished by just so much. *Corbin v. Townshend*, (1918) 92 Conn. 501, 103 Atl. 647.

The estate tax resembles the probate duty imposed by the Act of July 1, 1862, ch. 119, 12 Stat. L. 483, which was payable by the executor out of the estate, while the legacy duty therein provided for (page 485) was payable by the beneficiaries. The tax occupies the same field of death duty as does the

"estate tax" in England. *In re Roebling*, (1918) 89 N. J. Eq. 163, 104 Atl. 295.

This tax is in terms a tax imposed upon the transfer of the net estate of a decedent passing to others under the provisions of his will or the intestate laws of the several states. It is denominated an estate tax, not a tax upon the succession or inheritance, and it is charged upon and payable out of the net estate of the decedent. It is imposed without regard to the provisions of the will or the law of the several states; the paramount taxing power of the federal government takes effect at the moment of the owner's death upon his entire estate, subject only to the specific deductions mentioned in section 203, and an exemption of \$50,000, and it requires payment therefrom of a tax according to a graduated scale, regulated by the net amount of the taxable estate. *In re Knight*, (Pa. 1918) 104 Atl. 765.

If not otherwise directed by will, the tax is to be paid out of the estate and charged pro rata to each beneficiary. *Fuller v. Gale*, (1918) 78 N. H. 544, 103 Atl. 308, wherein the court said: "The estate tax imposed by act of Congress is to be paid pro rata by all who share in the estate. It is not a property tax, but one 'imposed upon the transfer of the net estate.'"

### 1918 Supp., p. 351, sec. 311.

**Purpose and computation of tax.**—"The tax is laid, not as a tax upon the shell, or any part of the shell, but is laid as an excise tax upon the business or occupation of manufacturing shells, or any parts of shells, the amount of the tax to be measured by the entire net profits received from the sale of such articles manufactured in the conduct of that business or occupation." *Worth Bros. Co. v. Lederer*, (E. D. Pa. 1919) 256 Fed. 116.

**Manufacture of shell forgings.**—In *Worth Bros. Co. v. Lederer*, (E. D. Pa. 1919) 256 Fed. 116, in holding that a manufacturer of rough shell forgings, which were subjected by another to a number of processes to make them into completed shell casings, was subject to tax the court said: "As the tax is laid upon the business or occupation of manufacturing, the inquiry therefore is whether 'any person manufacturing' includes only such persons manufacturing as bring the article manufactured to the finished condition, where it is adapted for use as a part of a shell, or whether the term includes any person manufacturing the article in any one or more of the successive steps substantially necessary to bring it to that condition.

"If the former construction is to prevail, at which of the steps does the manufacture begin? If it is held that it does not begin until the manufacturer who brings it to its finished state commences his work, it would

follow that, if the process of manufacture were distributed among a number of manufacturers, each doing a part of the manufacturing, the payment of the tax would be confined to that manufacturer who contributed such final steps as would bring the article to its completed state of adaptability to the purpose intended. I do not think the language of the section justifies an interpretation which would lead to nullifying its purpose, or would lead to a different measure of liability for the tax assessed against different manufacturers, or against the same manufacturer of different lots of shells, dependent upon what part of the prior stages of manufacture might be done under contract or otherwise by others.

"I think the language of the act is broad enough to clearly show that Congress intended to impose an excise tax upon the occupation or business of manufacturing in all or any of its stages, from the first step to the last of the manufacture which produces the shell, or any part of it, from the raw material composing it to its completed state, but that manufacturing must be held to have begun only when the material as such had been so changed by manufacture as to exhibit its intended use in, and application exclusively to, the manufacture of the final product."

**Shells manufactured through subcontractors.**—A corporation taking a contract to furnish shells and having the work done principally by subcontractors to whom it furnishes mere round bars in mill lengths is taxable on the profits of the sale of the completed shells. *Carbon Steel Co. v. Lewellyn*, (W. D. Pa. 1919) 255 Fed. 364. The court said:

"If the excise tax provided for in the foregoing sections be a tax imposed upon manufacturers of munitions, can it be said that the plaintiff escaped liability under the facts found in this case? The plaintiff, by its engagement with the British government, undertook to manufacture, or have others manufacture, the shells. It began the manufacture of the shells to the extent of making the round bars in mill lengths. The steel in said round bars was the plaintiff's property, and remained the plaintiff's property during all succeeding processes, and until the plaintiff delivered the finished product to the British government. If this court would hold that the plaintiff ceased to be a manufacturer when it had finished the manufacture of the round bars in mill lengths out of which the shells were made, although it retained title thereto during the processes performed by others, the construction of the law would be too illiberal, and would tend to defeat what plainly appears to be the purposes of Congress. The tax, however, is not upon the manufacturer; it is upon the entire net profits actually received or accrued from the sale or disposition of such articles."

# INTERSTATE COMMERCE

Vol. IV, p. 337, sec. 1 (A). [First ed., vol. III, p. 809.]

## V. Construction of Act.

2. Federal rules of construction as controlling.

## VI. Validity of state statutes.

5. Furnishing cars.
6. Rates.

## VIII. Persons, etc., subject to Act.

2. Telegraph companies.
3. Carriers by water.
5. Pipe lines.

## IX. Commerce as interstate or intrastate.

## XI. Common control, etc.

### V. CONSTRUCTION OF ACT

#### 2. Federal Rules of Construction as Controlling (p. 339)

A decision of the federal Supreme Court construing the Act is binding in a state court. *St. Louis, etc., R. Co. v. Wood*, (1918) 136 Ark. 585, 207 S. W. 32.

### VI. VALIDITY OF STATE STATUTES

#### 5. Furnishing Cars (p. 341)

A state statute requiring an interstate carrier to furnish cars at points within the state within a reasonable time is in entire harmony with the Hepburn Amendment of the Interstate Commerce Act, and the state and federal courts have concurrent jurisdiction of actions for a failure to perform the duty; but if an interstate carrier has established a rule for the distribution of cars, and administers it fairly and equally between applicants, the authority to determine whether the rule is reasonable rests with the Interstate Commerce Commission, and no court has jurisdiction until the commission has determined that question. *State Public Utilities Com. v. Baltimore, etc., R. Co.* (1917) 281 Ill. 405, 118 N. E. 81.

**Order of state commission.**—By reason of the provisions of the congressional Act regulating interstate commerce, the corporation commission is without jurisdiction to require a railway company to designate a point on its right of way for the location of a portable grain elevator and to spot cars thereto for interstate shipments, when the effect of such order is to obstruct interstate commerce by materially interfering with the movement of cars to and from elevators permanently located near the right of way, and with the loading of cars on the right of way by track shippers. *Chicago, etc., R. Co. v. State*, (Okla. 1919) 180 Pac. 246.

#### 6. Rates (p. 342)

Intrastate rates may be regulated by the state notwithstanding the Interstate Com-

merce Act. *Atchison, etc., R. Co. v. State*, (Okla. 1918) 171 Pac. 43.

**Gas.**—The rates to be charged for gas brought from one state to another may be regulated by state statutes. *Pennsylvania Gas Co. v. Public Service Commission, etc.*, (1919) 225 N. Y. 397, 122 N. E. 260, wherein the court said: "Congress has never occupied the field of regulation, as it has done with railroads, the telegraph and telephone lines, and even in the oil companies. . . . Gas and water companies are expressly excepted. In such circumstances, there is no implied exclusion of the police power of the states. The exercise of that power is, indeed, subject to conditions. It must not impose upon interstate commerce burdens new and direct rather than remote and incidental. . . . It must not discriminate against foreign products. . . . It must not introduce diversity and conflict where there is need of uniformity and harmony. . . . But, subject to those conditions, the police power of the states survives, though the transactions brought within its grip are those of interstate commerce."

### VIII. PERSONS, ETC., SUBJECT TO ACT

#### 2. Telegraph Companies (p. 343)

**Relayed message.**—In *Berg v. Western Union Tel. Co.*, (1918) 110 S. C. 169, 96 S. E. 248, it was held that a telegram addressed to a point in the state, but sent to a point outside the state and from there relayed to its destination, was an interstate message. The court said: "The words in the proviso to section 1 of the Interstate Commerce Act, 'that the provisions of this Act shall not apply to the transportation of passengers or property . . . wholly within one state,' etc., and the words, 'nor shall they apply to the transmission of messages by telegraph, telephone or cable, wholly within one state,' etc., were intended to declare that the transportation or transmission which was only partly within a state should be subject to the provisions of the Interstate Commerce Act, for the reason that only such portion of the instrumentalities, used in the transportation or transmission, located in a particular state, can be subjected to the legislation of that state, but not of any other state. No other reasonable construction can be placed on that section." See to the same effect *Western Union R. Co. v. Bowles*, (Va. 1919) 98 S. W. 645, wherein the rule was laid down despite a state statute providing as follows: "Any message accepted by any telegraph company doing business in this state to be sent to another point in this state, shall be deemed to be an intrastate message. Any telegraph company that would give such message as aforesaid the character, or fix

upon such message an interstate character by virtue of the fact that in the course of transit of said message it is relayed or carried out of the state in sending it, shall introduce evidence . . . that the route used in sending said message was the only practicable or feasible and the most expeditious manner of sending said message, and shall introduce as a part of said evidence charts and maps showing lines of wires and relay stations to prove such route as the most desirable and proper route to have been used, upon request of any complaint."

**Railway telegraph.**—An interstate railway company doing a telegraph business comes as clearly within the purview of the Interstate Commerce Act and the Rulings and Regulations of the Interstate Commerce Commission, as if it were a telegraph or telephone company. *La Cost v. Chicago, etc., R. Co.,* (1918) 134 Ark. 92, 203 S. W. 586.

**Mental anguish** is not an element of damage for failure to deliver an interstate message. *Berg v. Western Union Tel. Co.,* (1918) 110 S. C. 169, 96 S. W. 248.

**State penal statutes** are superseded in respect to interstate messages. *Davis v. Western Union Tel. Co.,* (1918) 198 Mo. App. 692, 202 S. W. 292.

**Limitation of liability.**—The statute does not abrogate a state doctrine that a limitation of liability not brought to the notice of the sender is not binding. *Western Union Tel. Co. v. Morrow, (Tex. 1919),* 208 S. W. 689; *Des Arc Oil Mill v. Western Union Tel. Co.,* (1918) 132 Ark. 335, 201 S. W. 273. Compare *Merriweather v. Western Union Tel. Co.,* (1919) 183 Ky. 710, 210 S. W. 190; *Hartness v. Western Union Tel. Co.,* (S. C. 1919) 99 S. E. 759.

In *William v. Postal Tel. Cable Co.,* (1918) 122 Va. 675, 95 S. E. 436, the court said: "The telegram was an interstate message and was unrepeatable; and the blank upon which it was written contained the usual stipulation that it was sent 'subject to the terms on the back hereof, which are hereby agreed to.' These 'terms' are familiar to the profession, and need not be here repeated at large. Suffice it to say that they contained, among others, the following clause: 'The company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery of any unrepeatable telegrams, beyond the amount received for sending the same.' By Act of June 18, 1910, amending an act to regulate commerce (chapter 309, 36 Stat. at Large, 539), Congress has undertaken to occupy the field of interstate commerce by telegraph, and has declared that as to all such business, telegraph, telephone, and cable companies are common carriers within the meaning and purposes of the act. The act further prescribes that with respect to that class of business telegraph companies shall print and publish rates, rules, classifications, regulations, and practices, and file the same with the Interstate Commerce Commission, and confers upon that tribunal jurisdiction to

determine what rates, etc., are just and reasonable. This action on the part of Congress is exclusive, superseding state laws on the subject, and of course is controlling upon state courts. The principles here involved were gone into so fully by this court in the case of *Boyce v. Western Union Tel. Co.,* (1916) 119 Va. 14, 89 S. E. 106, as to obviate the necessity for extended discussion."

See also notes under section 1 (c) *infra*. And see notes *infra*, page 578, as to effect of Carmack Amendment on the right to limit liability.

### 3. Carriers by Water (p. 345).

The Interstate Commerce Commission is without jurisdiction over ocean carriage of export and import traffic destined to or coming from nonadjacent foreign countries. *Pacific Mail Steamship Co. v. Western Pac. R. Co.,* (C. C. A. 9th Cir. 1918) 251 Fed. 218, 163 C. C. A. 374.

### 5. Pipe Lines (p. 346).

The transportation of oil and gas from state to state through the medium of pipe lines is commerce between the states. *Pennsylvania Gas Co. v. Public Service Commission, etc.,* (1919) 225 N. Y. 397, 122 N. E. 260.

## IX. COMMERCE AS INTERSTATE OR INTRA-STATE (p. 348)

**Reshipment of interstate shipment.**—It is well settled that whether a given transportation is interstate or intrastate must be determined by the essential character of the commerce, and that an interstate character cannot be evaded by the mere device of billing to an intermediate point and then rebilling from that point. On the other hand a new shipment by a consignee of an interstate shipment in the cars in which received to other points of destination does not necessarily establish continuity of movement or prevent reshipment to a point within the same state from having an independent and interstate character. So, in holding a reshipment to be independent and therefore intrastate the test was stated as follows:

While the question is not free from difficulty, upon a careful consideration of the authorities we are disposed to think that the character of the shipment from Oakley to Madisonville is to be ultimately tested by the consideration whether or not there was an actual good-faith delivery of the shipments to the consignees at Oakley, and actually a new and independent shipment therefrom by defendants to Madisonville while the lumber was physically present and in their possession, and that the effect of such good-faith delivery, possession and independent reshipment is not, as a mere matter of law, converted into an interstate shipment by the existence of an original and continuing intention so to reship in intrastate commerce for the saving of expense Little



*v. Baltimore etc., R. Co.* (C. C. A. 6th Cir. 1918) 249 Fed. 913, 162 C. C. A. 111.

See also note to preceding subdivision as to relayed telegrams.

**Intention of shipper as controlling.**—The mere intention of the owner of a carnival show equipment to continue his tour beyond the state did not convert a contemplated movement of the show between two points within the state into an interstate movement so as to preclude the state from requiring that the transportation service between such points be performed by a carrier, and fixing the rate chargeable by the carrier for such service. *Southern Pac. Co. v. Arizona*, (1919) 249 U. S. 472, 39 S. Ct. 313, 63 U. S. (L. ed.) —, *affirming* (1917) 19 Ariz. 20, 165 Pac. 303.

**Question of fact.**—Whether a shipment was at a given time in interstate commerce is a question of fact. *Southern Pac. R. Co. v. Arizona*, (1919) 249 U. S. 472, 39 S. Ct. 313, 63 U. S. (L. ed.) —, *affirming* (1917) 19 Ariz. 20, 165 Pac. 303.

#### XI. COMMON CONTROL, ETC. (p. 349)

**Telegraph company.**—The initial carrier of messages, whose line is wholly within the state, does not come within the purview of the statute by receiving an interstate message and the delivery of same to an interstate carrier of messages, unless it has an arrangement with the interstate company and its connection for through, continuous transmission of the message. *La Cost v. Chicago, etc., R. Co.*, (1918) 134 Ark. 92, 203 S. W. 586.

### Vol. IV, p. 351, sec. 1 (B). [First ed., 1912 Supp., p. 113.]

#### III. Bridges.

##### V. Transportation as including what.

###### 1. In general.

#### VI. Furnishing transportation on reasonable request.

#### III. BRIDGES (p. 353)

The federal Act to regulate commerce expressly includes within the scope of its provisions bridges used or operated in connection with any railroad, and an interurban electric railway, other than a street passenger railway, passing over an interstate bridge and participating in the interstate movement of persons and property, is a "railroad" within the meaning of the Act, and the bridge over which it passes is therefore subject to the provisions of the Act. *Schrader v. Steubenville, etc., Traction Co.*, (W. Va. 1919) 99 S. E. 207.

#### V. TRANSPORTATION AS INCLUDING WHAT

##### 1. In General (p. 353)

**Furnishing cars.**—"Congress evidently recognized that the duty to the public included a variety of services that, according to the theory of the common law, were separable

from the service of carriers as carriers, so that by the Act of Congress the entire body of the services to be performed falls under the general head of transportation, among which is furnishing cars. So it is made the duty of the carrier to 'furnish suitable' cars as part of the transportation." *Ft. Worth, etc., R. Co. v. Strickland*, (Tex. 1919) 208 S. W. 410.

**Removal of cattle from car.**—The liability of a terminal carrier of an interstate live-stock shipment for a loss due to its negligence while the animals were awaiting removal from the car at destination through a cattle chute, owned, operated and controlled by the carrier must be regarded as controlled by a provision in the bill of lading requiring presentation of a written claim for loss or damage within five days from the time the stock is removed from the car,—although the shippers contracted to do the work of actual removal—in view of the provision of this section enlarging the definition of the term "transportation" so as to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, storage, and hauling of property transported." *Erie R. Co. v. Shuart*, (1919) 250 U. S. 465, 39 S. Ct. 519, 63 U. S. (L. ed.) —.

#### VI. FURNISHING TRANSPORTATION ON REASONABLE REQUEST (p. 354)

**To whom request is to be made.**—In *Ft. Worth, etc., R. Co. v. Strickland*, (Tex. 1919) 208 S. W. 410, it was held on the evidence that the agent at one station had authority to receive a request for cars to be furnished to another station.

**Car of particular type.**—Where there is a demand for a type of car suitable for the shipment of live poultry, it is the duty of a railroad to furnish such cars on reasonable request. *Ft. Worth, etc., R. Co. v. Strickland*, (Tex. 1919) 208 S. W. 410.

**Unusual conditions before war.**—In *Fletcher v. Chicago, etc., R. Co.*, (1918) 103 Kan. 834, 177 Pac. 1, in holding that a carrier was negligent in failing to furnish stock cars promptly on request despite the unusual conditions existing in February, 1917, the court said: "There was a 'steady increase' in the volume of traffic, beginning with the first of the year 1916, which culminated in an acute shortage of cars in January, 1917. The cause of this increase was well known to all men. It lay in the great expansion of trade and industry generally, as the result of demands made upon the United States arising out of what was still essentially an European war. By the beginning of 1916, a full year before the plaintiff made his request for transportation, every barometer used in gauging business activity was steadily rising, and

the effect on railroad transportation was already patent. As a matter of fact, according to statistics compiled by the Commercial and Financial Chronicle (not embraced in the record), this expansion was registered in railroad revenues as early as September or October, 1915, and there continued to be a net surplus of idle cars until September 1, 1916, when the first shortage for that year, amounting to approximately 20,000 cars, appeared. However this may be, while the expansion was quite rapid after it once gained headway, and while it assumed unprecedented proportions before the end of 1917, it had ceased to be sudden or unexpected by the beginning of 1916. Every day's experience instructed the defendant that it would become less and less capable of fulfilling the demands made upon it, and the abstract is barren of any testimony that any effort was made to meet the needs of the growing number of shippers and the swelling volume of traffic, beyond shifting from division to division an increasingly inadequate supply of cars."

**Vol. IV, p. 355, sec. 1 (C).** [First ed., 1912 Supp., p. 113.]

**II. "Just and Reasonable Charges."**

**1. In general.**

**8. Telegraph messages.**

**II. "JUST AND REASONABLE CHARGES."**

**1. In General (p. 356)**

**Damages for unreasonable rates.**—"Where a shipper has paid a rate afterwards declared to be excessive by the Interstate Commerce Commission, he may recover as damages the difference between the excessive rate and the rate declared to be just and reasonable by the Commission, without proof of actual injury." *Athison, etc., R. Co. v. Spiller*, (C. C. A. 8th Cir. 1918) 249 Fed. 677, 161 C. C. A. 587.

**8. Telegraph Messages (p. 358)**

**"Exchange of services."**—In *Postal Tel.-Cable Co. v. Tonopah, etc., R. Co.*, (1919) 248 U. S. 471, 39 S. Ct. 162, 63 U. S. (L. ed.) —, *affirming* (1917) 176 App. Div. 910, 162 N. Y. S. 1140, *Baltimore, etc., R. Co. v. Western Union Tel. Co.*, (C. C. A. 2d Cir. 1917) 242 Fed. 914, 155 C. C. A. 502 (C. C. A. 7th Cir. 1918), 249 Fed. 664, 161 C. C. A. 574, which reversed (N. D. Ill. 1917) 245 Fed. 592, the court had under consideration three cases brought to it for review, all involving similar contracts entered into between telegraph companies and railroad companies for exchange of service. The only question upon which the decision of the court was sought was the validity of the agreements, and this question was decided in favor of their validity. The court said: "The contracts elaborately provide for the reciprocal rights of the companies, for a division of expenses between the railroad and telegraph, for the use by the telegraph of the railroad's right of way for its poles, for monthly

payment of a certain sum by the telegraph, and then agree, this being the point now material, that up to a certain amount calculated at the regular day rates of the telegraph, it should deliver free of charge messages pertaining to the railroad business to any points on its system on or beyond the railroad lines, and that up to an amount calculated in similar manner the railroad should transport the materials, supplies and employees of the telegraph, needed for the construction, maintenance or renewal of the telegraph lines whether on or off the lines of the road. The latest ruling of the Interstate Commerce Commission is that these contracts for an exchange of service while valid for services on the line are invalid as to services off the line, which last, it is held, must be charged for by the railroad upon the basis of its published rates and by the telegraph upon that of its charges reasonably charged to other customers for similar services. The commission construes in this way a proviso added to § 1 of the Act to regulate commerce by an amendment of June 18, 1910, c. 309, § 7. [36 Stat. 539, 544.] This amendment brought telegraph, telephone and cable companies within the act but also inserted a proviso 'that nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services.' The question more specifically stated is whether the construction adopted by the commission is right. We do not see how that construction can be got from the words of the act. The words are general and as certainly allow services off the line as services on it to be exchanged. In fact they do so almost in terms by allowing common carriers to exchange with cable companies. This being obvious, it is said that while the abstinence of the act from preventing exchanges covers the whole ground, the exchange of services off the line must be on the terms that we have stated, which makes the act as to them merely a superfluous permission to settle accounts periodically instead of paying for each transaction in cash. But 'exchange' is barter and carries with it no implication of reduction to money as a common denominator. It contemplates simply an estimate, determined by self interest, of the relative value and importance of the services rendered and those received. This is admitted with regard to services on the line, and if so whatever services can be exchanged can be exchanged in the same way. We cannot follow the argument from *Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Brothers Construction Co.*, 228 U. S. 177, that the exchange properly so called should be confined to cases where the common carrier is not acting as such. That seems to us a perverse conclusion from a proviso permitting 'common carriers' to exchange."

**Liability for damages.**—A telegraph company is liable for all the damages which result proximately to the sender of an inter-

state message written upon a blank containing no restrictions upon its liability, where such message is accepted, but negligently delayed in transmission, provided such damages may reasonably be supposed to have been contemplated by the parties when the message was accepted as the probable result of such negligence. *Dettis v. Western Union Tel. Co.*, (Minn. 1919) 170 N. W. 334, wherein evidence was considered and held to raise a question for the jury as to whether plaintiffs had notice of the regulations and terms printed on the back of defendant's blank forms ordinarily used in sending messages, and as to whether the company accepted the message here involved under an agreement with plaintiffs that its transmission should be delayed on account of wire trouble. The court said: "We recognize the fact that the act of Congress of June 18, 1910, occupies the entire field and has taken complete control of the interstate business of telegraph companies in so far as state statutes or the common law may be in conflict therewith; but we have searched in vain for any federal decision holding that the liability of a telegraph company for damages for negligence in transmitting or delivering a message is restricted where the message is written on a blank sheet of paper."

**Discrimination in rates.**—No discrimination in the rates charged for an interstate message arises from the fact that such message is written upon a telegraphic blank containing no restrictions upon the liability of the company for damages growing out of its negligent delay in transmitting such message, instead of the blank ordinarily supplied by the company for the use of its patrons in sending messages. *Dettis v. Western Union Tel. Co.*, (Minn. 1919) 170 N. W. 334.

**"Repeated message."**—"A repeated message is one telegraphed back to the sending office for comparison. Obviously a message cannot be repeated until it has been received at its destination. The object of repeating it is not to guard against delays but mistakes in transmission. This was held in *Francis v. Western Union Tel. Co.*, (1894) 58 Minn. 252, 59 N. W. 1078, 49 A. S. R. 507, 25 L. R. A. 406, as applied to a case where the company wholly failed to transmit a message and we see no difference in principle between a failure to transmit and an unreasonable delay in transmitting a message in so far as its repetition is concerned. Numerous cases sustain this view. See *Box v. Postal Tel. Cable Co.*, (C. C. A. 5th Cir. 1908) 165 Fed. 138, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566, and note." *Dettis v. Western Union Tel. Co.*, (Minn. 1919) 170 N. W. 334.

See also notes under section 1 (a) *supra*.

**Vol. IV, p. 359, sec. 1 (E). [First ed., 1912 Supp., p. 114.]**

- I. Validity of state statutes.
- II. Persons excepted.

**IV. Injuries received while riding on free pass.**

1. Rule stated.
2. Limitation of liability.

- V. Contracts for issuance of free passes.
- VI. Acts constituting violation.

**I. VALIDITY OF STATE STATUTES (p. 360)**

Congress not having legislated on the subject of the rights and liabilities of the parties in cases of the interstate carriage of passengers under free passes issued under the Hepburn Act or otherwise, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability, these questions may be determined from a consideration of state enactments or constitutional provisions. *Clark v. Southern R. Co.*, (Ind. App. 1918) 119 N. E. 539.

**II. PERSONS EXCEPTED (p. 361).**

**"Families."**—By the terms of this section a railroad company is impliedly authorized to issue an interstate free pass to a wife of an employee. Such a pass is issued as a gratuity. *Clark v. Southern R. Co.*, (Ind. App. 1918) 119 N. E. 539.

**Effect of procuring fraudulent passes for caretakers of cattle.**—The fact that a shipper of cattle billed them falsely in the names of persons not owners, thus procuring round trip transportation for caretakers not otherwise entitled thereto, in violation of the Interstate Commerce law, does not preclude a recovery for delay in forwarding. *Chicago, etc., R. Co. v. Manby*, (Tex. 1918) 207 S. W. 157.

**IV. INJURIES RECEIVED WHILE RIDING ON FREE PASS**

**1. Rule Stated (p. 362)**

Where a carrier of passengers voluntarily undertakes to carry a passenger gratuitously or under a free pass, in the absence of a contract or stipulation to the contrary, it owes him a duty to exercise care for his safety, and a failure to discharge such duty is negligence which may form the basis of an action. *Clark v. Southern R. Co.*, (Ind. App. 1918) 119 N. E. 539.

**2. Limitation of Liability (p. 362)**

**In absence of statute.**—Where a passenger is carried gratuitously, the carrier may by contract or stipulation relieve itself from liability for its negligence, in the absence of a valid prohibiting statute. *Clark v. Southern R. Co.*, (Ind. App. 1918) 119 N. E. 539.

**State statute not complied with.**—A free pass was issued in Indiana for transportation from that state into Kentucky. The pass had printed on it a limitation of liability but the printed matter did not comply with an Indiana statute in that the type was too small. The person using the pass who was the wife of an employee of the interstate railroad issuing it was negligently injured in Kentucky. Action for damages

was brought in an Indiana court which refused to enforce the limitations of liability clause because it violated the provisions of the Indiana statute. *Clark v. Southern R. Co.*, (Ind. App. 1918) 119 N. E. 539.

#### V. CONTRACTS FOR ISSUANCE OF FREE PASSES (p. 362)

**Severability of contract.**—While a contract on consideration to furnish telegraph franks to a stated amount is by the act invalidated as to interstate messages it is valid as to intrastate messages. *Irvine v. Postal Tel. Cable Co.*, (Cal. App. 1918) 173 Pac. 487.

**Grant of right of way.**—Where a right of way was granted on the sole condition that the owner should be furnished free transportation and five years later the statute made the grant of such transportation illegal, the road will be excused from further performance except as to intrastate travel. *Bell v. Kenawha Traction, etc., Co.*, (W. Va. 1919) 98 S. E. 885, holding that the conveyance of the right of way could not be rescinded.

#### VI. ACTS CONSTITUTING VIOLATION

**Pass on toll bridge.**—The giving of a pass by a toll bridge operated in connection with and as an instrumentality of an interstate railway is within the act. *Shrader v. Steubenville, etc., Traction Co.*, (W. Va. 1919) 99 S. E. 207.

#### Vol. IV, p. 367, sec. 1 (G). [First ed., 1912 Supp., p. 115.]

**Effect on powers of state commission.**—This section does not prevent the Public Service Commission of a state from requiring an interstate railroad to provide shipping facilities to a shipper who offers intrastate commerce in a quantity justifying the installation of the facilities, notwithstanding the fact that, when provided, they may also be used for interstate commerce. *Norfolk, etc., R. Co., v. Public Service Commission*, (1918) 82 W. Va. 408, 96 S. E. 62.

#### Vol. IV, p. 371, sec. 2. [First ed., vol. III, p. 813.]

##### III. Unjust discrimination.

1. In general.
2. What constitutes.
5. By whom determined.
6. Effect on contracts.

##### III. UNJUST DISCRIMINATION

###### 1. In General (p. 373)

No special contract can be made different from that open to the general public or which gives any additional advantages to the shipper or imposes any more extended duties on the carrier. *Adams Express Co. v. Burr Oak Jersey Farm*, (1918) 182 Ky. 116, 206 S. W. 173.

**Military movement of troops.**—This Act does not forbid a contract for the military movement of troops at less than tariff rates. (1915) 30 Op. Atty-Gen. 381.

###### 2. What Constitutes (p. 373)

**Discrimination in switching charges.**—In *Seaboard Air Line R. Co. v. U. S.*, (E. D. Va. 1918) 249 Fed. 368, this section was held to be violated, the facts being stated as follows: "At certain points south of Richmond the Seaboard Air Line Railway Company, the Southern Railway Company, and the Atlantic Coast Line Railroad Company are competitors for traffic to and from that city. Each of these roads has switching facilities at Richmond connecting with the other. Each of them delivers traffic from competitive points to industries on its own tracks in Richmond at its tariff rate to Richmond, without extra charge for switching. Each of them charge, however, for carload freight received from a competitor from a competing point to be delivered to an industry on its own rails. To equalize the advantage which each has over the other as to industries on its own tracks, each of these roads absorbs the switching charge of its competitor on freight to be hauled by it to industries on its competitors' tracks."

"Stating the matter more concretely, and taking Oxford, N. C., as a competitive point, the Seaboard Air Line delivers freight from that city to industries on its own rails without extra charge beyond its tariff to Richmond. For freight consigned over the Seaboard for industries located on the rails of the Southern or Coast line, the Seaboard absorbs the switching charge of the Southern or Coast Line, so that the cost to the shipper is the same as if he had shipped over the Southern or Coast Line to the industry on that line. The same rules are applied to shipments from industries located on the several switches to competitive points."

"The Chesapeake & Ohio Railroad Company and the Richmond, Fredericksburg & Potomac Railroad Company have switching facilities connecting with the other roads above named, but they are not competitors for the Southern business to and from Richmond. Basing the difference entirely on this absence of competition, the Seaboard, Southern, and Coast Line do not absorb the switching charges on any freight to be delivered to industries on the switches of the Chesapeake & Ohio and the Richmond, Fredericksburg & Potomac."

See also *infra*, subdivision 6 of this annotation, p. 573.

**Free switching of cars.**—In *American Smelting, etc., Co. v. Union Pac. R. Co.*, (C. C. A. 8th Cir. 1919) 256 Fed. 737, 168 C. C. A. 83, it was contended that a lease by an interstate railroad of land as a site for a smelting company's plant was invalid as violating this section and sec. 1 of the Elkins Act (4 Fed. Stat. Ann. (2d ed.) 549), where it

provided for the switching of cars about the grounds of the plant free of charge, such switching being disconnected from the transportation of cars over its lines. Answering this contention, the court said: "With reference to section 2 of the Interstate Commerce Act and section 1 of the Elkins Act, there is no evidence that the plaintiff, by performing the switching service in question, according to the terms of the lease, charges, demands, collects, or receives from the defendant a greater or less compensation for the transportation of passengers or property subject to the provisions of the Act to regulate commerce, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. Nor is there any evidence that, by the performance of the switching service in question, the plaintiff offers, grants, or gives any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce, by it, whereby any such property is transported at a less rate than that named in its tariffs published and filed, or whereby any such other advantage is given or discrimination practiced in the transportation of property in interstate commerce. The switching service in question is performed wholly within the state of Nebraska, and so far as this record is concerned is not connected with interstate commerce at all. Therefore the Interstate Commerce Act and its amendments are not applicable to it. We do not say that this lease between the plaintiff and the defendant may not, in a proper case, be shown to be an unlawful concession or rebate; all we say is that it is not shown in this case."

#### 5. By Whom Determined (p. 377)

**Power of commission to define.**—In *Seaboard Air Line R. Co. v. U. S.*, (E. D. Va. 1918) 249 Fed. 368, the court, in discussing discriminatory switching charges, said: "We are of opinion that the act in question confers upon the Interstate Commerce Commission the power of determining as to whether the services rendered are 'like and contemporaneous;' also as to whether the respective traffic was 'of a like kind.' Further, as to whether the transportation was made under 'substantially similar circumstances and conditions' (Texas & P. R. Co. v. I. C. C., 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940), while the act does not undertake to define the particular acts which constitute unlawful discrimination, it undoubtedly commits that to the commission and its findings are conclusive."

#### 6. Effect on Contracts (p. 378)

**Agreement to divert shipment.**—An agreement by a carrier to divert a shipment by wire so as to secure its arrival at a specified

time is invalid. *Cicardi Bros. Fruit, etc., Co. v. Pennsylvania Co.*, (Mo. App. 1919) 213 S. W. 531.

**Guaranty of date of arrival.**—A contract with a shipper of cattle that the shipment will arrive at a specified time is discriminatory and void, and will not support an action. *Texas, etc., R. Co. v. West*, (Tex. 1919) 207 S. W. 918.

### Vol. IV, p. 379, sec. 3. [First ed., vol. III, p. 816.]

#### III. UNDUE OR UNREASONABLE PREFERENCE OR ADVANTAGE

##### 5. Rates and Charges (p. 387)

**Joint through rates.**—Where a joint tariff promulgated by two railroads provides for a through rate on shipments of lumber but there is no provision for the stoppage of the lumber in transit for remilling at a junction point of the railroads, and one of the railroads collects a local rate to the junction point on such remilled shipments, the company so collecting may be compelled to repay the portion of the through rate paid to it by the other railroad. *Washington, etc., R. Co. v. Mobile, etc., R. Co.*, (C. C. A. 5th Cir. 1919) 255 Fed. 12, 166 C. C. A. 340.

### Vol. IV, p. 396, sec. 4. [First ed., 1912 Supp., p. 115.]

#### I. Decisions under Amendment of 1910.

##### 3. Construction.

##### 5. Application under first proviso.

#### I. DECISIONS UNDER AMENDMENT OF 1910

##### 3. Construction (p. 398)

**"Changed conditions."**—The prohibition against the increase of railway rates which the carrier has reduced in competition with water routes, unless, after hearing by the Interstate Commerce Commission, it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition, which was added to this section by the Act of June 18, 1910, § 8, does not apply where the reduction was with the approval of the commission, granted after hearing on application of the carrier for relief from the operation of the long and short haul clause of that section. *Skinner, etc., Corp. v. U. S.*, (1919) 249 U. S. 557, 39 S. Ct. 375, 63 U. S. (L. ed.) —.

The existence of changed conditions other than the "elimination of water competition," which Congress intended by the Act of June 18, 1910, § 8, should not justify the raising of transcontinental railway rates which the carriers had once reduced in competition with water routes, is clearly implied in findings by the Interstate Commerce Commission that the conditions formerly existing have materially changed, that the withdrawal of boats from coast-to-coast service

has not been on account of the rates made by the rail carriers with which the boats compete, but on account of slides in the Panama canal, and an extraordinary rise in ocean freight, that the substantial disappearance of water competition was merely temporary, that competing water carriers announced their intention ultimately to return to this service, and that the time of such return depended in part upon the measure of the rates they would be able to secure for this service in competition with the rail lines. *Skinner, etc., Corp. v. U. S.*, (1919) 249 U. S. 557, 39 S. Ct. 375, 63 U. S. (L. ed.) —.

#### 5. Application under First Proviso (p. 398)

Application by the carrier is not a prerequisite to modification from time to time by the Interstate Commerce Commission of relief originally granted upon application by the carrier for relief from the operation of the long and short haul clause. *Skinner, etc., Corp. v. U. S.*, (1919) 249 U. S. 557, 39 S. Ct. 375, 63 U. S. (L. ed.) —.

### Vol. IV, p. 406, sec. 6 (A). [First ed., 1909 Supp., p. 260.]

#### III. Shipments and rates affected.

#### IV. Contents, construction and sufficiency of schedules.

1. In general.
2. Accessorial services.
4. Demurrage.
7. Ticket regulations.

#### V. Publication of schedules.

1. Necessity.

#### VI. Effect of published rates.

1. In general.
2. Presumption of reasonableness of rate.
3. Contracts of transportation.

### III. SHIPMENTS AND RATES AFFECTED (p. 407)

**Telegraph rates.**—A telegraph company engaged in transmitting interstate messages is not required to file copies of its regulations and tariffs with the Interstate Commerce Commission by virtue of the provisions of this Act. And notice of such regulations is not to be imputed to the sender of an interstate message solely by reason of the fact that the company has voluntarily filed them with the commission. *Dettis v. Western Union Tel. Co.*, (Minn. 1919) 170 N. W. 334.

#### IV. CONTENTS, CONSTRUCTION AND SUFFICIENCY OF SCHEDULES

##### 1. In General (p. 409)

**Construction generally.**—In *Swift v. U. S.*, (C. C. A. 7th Cir. 1918) 255 Fed. 291, 166 C. C. A. 461, the court in discussing the construction of published schedules said: "The correct rule of construction in a situation like this is announced in *Newton Gum Co. v. C.*,

*B. & Q. R. R. Co.*, 16 Interst. Com. Com'n R. 340, as follows:

"The law compels carriers to publish and post their schedules of charges upon the theory that they will be informative. A shipper who consults them has a right to rely upon their obvious meaning. He cannot be charged with knowledge of the intention of the framers or the carrier's canons of construction or of some other tariff not even referred to in the one carrying the rate. The public posting of tariffs will be largely useless if the carrier's interpretation is to be dependent upon tradition and the arbitrary practices of a general freight office. . . . A classification sheet is put before the public for its information. It is supposed to be expressed in plain terms, so that the ordinary business man can understand it, and, in connection with the rate sheets, can determine for himself what he can be lawfully charged for transportation."

**Construction of parts together.**—Where there is no ambiguity in the language of the tariff filed, but difficulty arises in relating one feature or rate in the tariff with another, they must all be considered, and if a plain meaning can be gathered it will control. *Portland Cattle Loan Co. v. Oregon Short Line R. Co.*, (C. C. A. 9th Cir. 1918) 251 Fed. 33, 163 C. C. A. 283.

##### 2. Accessorial Services (p. 409)

**Limited to scope of Act—Ocean carriers.**—A railroad tariff which provides for the absorption by the railroad among other charges of switching charges and state tolls, must be limited to the field of the operation of the service performed by the railroad company, and cannot relate to liability, service or obligation of the ocean carrier for the reason that ocean carriers are not subject to the jurisdiction of the Interstate Commerce Commission. *Pacific Mail Steamship Co. v. Western Pac. R. Co.*, (C. C. A. 9th Cir.) 251 Fed. 218, 163 C. C. A. 374.

##### 4. Demurrage (p. 410)

**Cars on private siding.**—A railroad may charge demurrage on private cars on a side track owned by the consignee and the carrier jointly. *Pittsburgh, etc., R. Co. v. Freedom Oil Works*, (W. D. Pa.) 247 Fed. 573.

**Demurrage and storage on cars of explosives.**—In *Pittsburgh, etc., R. Co. v. Freedom Oil Co.*, (W. D. Pa.) 247 Fed. 573, two rules filed by the carrier with the Interstate Commerce Commission were construed, the court saying: "Under the head of 'Storage,' rule one-a provides:

"Carload shipments of explosives or other dangerous articles are subject to both demurrage and storage rules. (See rule 6.) B. Other carload freight, held in cars for delivery and subsequently unloaded, is subject to demurrage rules while in cars and to these storage rules after it is unloaded."

"Thus a clear distinction is made between explosives, or other dangerous articles, and other carload freight. Turning to rule 6, we find the following provisions:

"Storage will be charged at the following rates per day of twenty-four hours or fraction thereof, on explosives or other dangerous articles held in excess of free time allowed:

"A. On less than carload shipments of the more dangerous explosives [naming them], unloaded in or on railroad premises, twenty-five cents per hundred pounds.

"On carload shipments five dollars per day in addition to the regular demurrage charges.

"B. On less than carload shipments of the less dangerous and relatively safe explosives [naming them], or less than carload shipments of dangerous articles other than explosives, unloaded in or on railroad premises, ten cents per hundred pounds.

"On carload shipments two dollars per day (Sundays and holidays excluded) in addition to the regular demurrage charges."

"From this rule, it is clear that a distinction is made as to storage charges between carload and less than carload shipments on explosives and dangerous articles, in two particulars: (1) On less than carload shipments, storage is charged only when unloaded on railroad premises. In that case, when the demurrage ends, the storage charge begins. While in carload shipments the storage charge is not dependent on the unloading of the car, but is made in addition to the regular demurrage charges."

#### 7. Ticket Regulations (p. 412)

Forms of free passes on stipulations incident to them need not be filed as a part of the schedules of rates, fares, and charges required by this section. *Clark v. Southern R. Co.*, (Ind. App. 1918) 119 N. E. 540, wherein the court said: "The word 'rate' as used in the Interstate Commerce Act means the net cost to the shipper; the net amount the carrier receives and retains for the transportation service. *U. S. v. Chicago, etc., R. Co.*, (N. D. Ill. 1906) 148 Fed. 646. The word 'fare' means the rate of charge for the carriage of passengers (19 Cyc. 456); money paid for a voyage or passage (*Bouvier's Law Dictionary*). A charge is the price fixed or demanded for services rendered. *Fulmer v. Southern R. Co.*, (1903) 67 S. C. 262, 45 S. E. 196. It is apparent that each of these words -- rates, fares, charges -- as used in the Commerce Act, has in it the idea of compensation for services performed. A free pass, however, such as is involved in this action is otherwise."

#### V. PUBLICATION OF SCHEDULES

##### 1. Necessity (p. 413)

**Higher rate for special service.**—An interstate carrier must make and publish a rate open to all, in order to exact a higher rate

for a special service, but it cannot be assumed, merely because the contrary has not been established by proof, that an interstate railway carrier is conducting its affairs in violation of law. *Draper v. Georgia, etc., R. Co.*, (1918) 21 Ga. App. 707, 95 S. E. 16.

#### VI. EFFECT OF PUBLISHED RATES

##### 1. In General (p. 415)

**Undercharges.**—Where freight rates less than those shown by the published schedule of rates are charged and paid by the consignee of goods he is liable for the difference. *Portland Cattle Loan Co. v. Oregon Short Line R. Co.*, (C. C. A. 9th Cir. 1918) 251 Fed. 33, 163 C. C. A. 283; *Alabama Western Ry. v. Collins*, (Ala. 1918) 78 So. 833; *New York Cent., etc., R. Co. v. York, etc., Co.*, (1918) 230 Mass. 206, 119 N. E. 855; *Southern R. Co. v. Latham*, (N. C. 1918) 97 S. E. 234.

Where an interstate bill of lading contains any provision authorizing the consignee to pay the freight, an implied contract by the consignee to pay the freight charges arises from his acceptance of the delivery of the goods under the bill, into which contract there will be read the provisions of the Elkins Act, requiring payment of the full charges in compliance with the duly established rate; and where the consignee pays the charges demanded, which are less than the established rate, the carrier may maintain an action against him for the unpaid balance of the legal charges. *Atchison, etc., R. Co. v. Wagner*, (1918) 102 Kan. 817, 172 Pac. 519, holding also that in such an action where it is admitted that a schedule of rates has been duly filed with and approved by the Interstate Commerce Commission, the presumption, in the absence of any showing to the contrary, is that the rates were duly published, and not that the carrier has violated the provisions of the Elkins Act, subjecting him to severe fines and penalties for failure to publish the same.

**Liability for overcharge.**—A carrier is not liable for the amount of an overcharge resulting from the misquoting of a rate or the failure to post rates. *St. Louis, etc., R. Co. v. Wood*, (1918) 136 Ark. 585, 207 S. W. 32.

##### 2. Presumption of Reasonableness of Rate (p. 416)

**Review by court.**—The question as to the reasonableness of the rates charged is not for the courts where they are the same as in the schedules filed in accordance with this section. *Baltimore, etc., R. Co. v. Carnegie Steel Co.*, (N. D. Pa. 1918) 251 Fed. 682.

##### 3. Contracts of Transportation (p. 416)

**Who liable for transportation charges.**—The consignee is primarily liable for the lawful transportation charges and liability can only be released by payment. *New York Cent. R. Co. v. Philadelphia, etc., Iron Co.*, (1919) 286 Ill. 267, 121 N. E. 581, wherein

the court said: "Counsel for appellant also argues with great earnestness that the federal law as to interstate commerce shipments should be so construed as to hold that in every contract of shipment it is implied that, where payment of freight is not made by the consignee before delivery, notice of such fact must be given to the consignor, in order to hold him liable in the event of the consignee's insolvency. No authorities are cited to uphold this argument. The Act to regulate interstate commerce does not so provide. To so construe it would be contrary to the uniform holdings of the courts on this question. The wisdom of inserting such a provision in the act regulating interstate commerce should be addressed to the legislative branch of the federal government, and not to the courts."

**Vol. IV, p. 426, sec. 6 (M).** [First ed., 1914 Supp., p. 379.]

**Effect on state statutes.**—Where state authority is exerted to require the re-establishment of a pre-existing local transportation facility by rebuilding and repairing a wharf adjacent to, and lying immediately between, a depot of a rail carrier and a river point where a water carrier may land, such authority does not conflict with the asserted federal authority under the Canal Act of August 24, 1912, to require physical connection between the lines of the rail and the water carriers by connecting the track of the rail carrier with the dock of the water carrier. *State v. Atlantic Coast Line R. Co.*, (Fla. 1919) 81 So. 498.

**Vol. IV, p. 430, sec. 8.** [First ed., vol. III, p. 833.]

**Form of action.**—The form in which an action for failure to furnish cars may be brought is not material. *Pletcher v. Chicago, etc., R. Co.*, (1918) 103 Kan. 834, 177 Pac. 1. The court said: "In this case the facts of the transaction relating to the application for cars were stated, and it makes no difference that the plaintiff characterized his grievance as one for breach of contract. The essential nature of defendant's liability, if any, was the same, and the court properly instructed the jury that the plaintiff must recover, if at all, because of the failure of the defendant to furnish cars within a reasonable time."

**Vol. IV, p. 432, sec. 9.** [First ed., vol. III, p. 833.]

**II. EXCLUSIVENESS OF REMEDIES (p. 433)**

**Two remedies are provided for the ascertainment of damages, which are exclusive, "one to the commission and one to the federal courts."** *Petition of Southern Lumber Co.*, (Tenn. 1919) 210 S. W. 639.

**Vol. IV, p. 440, sec. 10 (B).** [First ed., 1912 Supp., p. 117.]

**Indictment—Sufficiency.**—An indictment against a railroad under this section for assisting a shipper by means of false billing and classification to obtain transportation of goods at less than the regular rates, is not defective because the waybills for the shipments are not set out in the indictment; nor because it fails to state the means for steps taken to adopt the rate, nor because it fails to set forth the means by which the shipper was assisted to obtain such transportation, nor because it fails to allege that the shipper paid the freight. Such imperfections are mere matters of form and, after verdict, are cured by the operation of R. S. sec. 1025 (see vol. 2, p. 681). *Elgin, etc., R. Co. v. U. S.*, (C. C. A. 7th Cir. 1918) 253 Fed. 907, 166 C. C. A. 7.

**Vol. IV, p. 440, sec. 10 (C).** [First ed., 1912 Supp., p. 117.]

**Evidence of want of fraudulent intent.**—In a prosecution of a corporation for making false claims for injury to goods the knowledge of the falsity of the claim or invoice and the willful intent of the defendant to commit the offense denounced by this Act of Congress are indispensable elements of the fraud which it declares to be a misdemeanor. It is not any company that by false statement as to the nature or extent of injury or damage, or by the use of a false bill or invoice attempts to obtain an excessive allowance or payment of damages, that is declared to be guilty of this fraud. It is any company that knowingly and willfully by false statement or representation, or by the use of a false bill or voucher, knowing the same to be false, attempts to obtain an excessive allowance or payment of damages that is declared to be guilty of the misdemeanor. A corporation can know, intend to defraud, and willfully misrepresent only by and through the officer, agent, or employee in whom it vests the authority to know, to intend, to will, and to act for it. Accordingly the officer or agent acting for the corporation may testify directly to his lack of fraudulent intent. *Laser Grain Co. v. U. S.*, (C. C. A. 8th Cir. 1918) 250 Fed. 826.

**Vol. IV, p. 448, sec. 12.** [First ed., vol. III, p. 838.]

**III. PROCEEDINGS IN EQUITY (p. 452)**

**Remedy given is exclusive.**—In *Ketchum v. Denver, etc., R. Co.*, (C. C. A. 8th Cir. 1917) 248 Fed. 106, 160 C. C. A. 246, it was held that the remedy given is exclusive of an action by a private person, the court, however, adding: "But if we are in error in regard to this last proposition, we are satisfied that the plaintiff has not made a



sufficient showing of wrongs suffered to authorize a court of equity to grant the extraordinary relief prayed for."

**Vol. IV, p. 458, sec. 15 (a).** [First ed., 1912 Supp., p. 119.]

**II. Regulation of rates.**

1. Power of commission.
4. Order of commission.
5. Review.

**II. REGULATION OF RATES.**

**1. Power of Commission (p. 460)**

The commission has power to investigate a preferential practice of dividing joint rates and stop it by an appropriate order. *Chestnut Ridge R. Co. v. U. S.*, (D. C. N. J. 1917) 248 Fed. 791, wherein an order fixing the share of a railroad company in a joint rate was held not to be arbitrary or based on a mistake of law, but was held to be erroneous in that there was an error in calculation.

**4. Order of Commission (p. 464)**

**Effect—Intrastate rates.**—There is nothing to hinder a state from providing that after a judicial inquiry into the validity of an order of a state railroad commission fixing the rate on logs carried within the state it shall be binding upon the parties until changed. *Detroit, etc., R. Co. v. Fletcher Paper Co.*, (1918) 248 U. S. 30, 39 S. Ct. 13, 63 U. S. (L. ed.) —, *affirming* (1917) 198 Mich. 469, 164 N. W. 528.

**Limitation in order.**—Where the Interstate Commerce Commission issues an administrative order to a railroad requiring it to cease making payments during a certain period to an elevator company pursuant to a contract between the companies, a limitation in such order becomes effective when the order goes into force and ceases to be effective when the order lapses by expiration of time. *Omaha Elevator Co. v. Union Pac. R. Co.*, (C. C. A. 8th Cir. 1918) 249 Fed. 827, 162 C. C. A. 61.

**5. Review (p. 465)**

A finding without evidence is beyond the power of the commission and will be set aside by the court. *Chestnut Ridge R. Co. v. U. S.*, (D. C. N. J. 1917) 248 Fed. 791, wherein the court added: "This court does not assume that it is vested with power to supervise the actions of the Interstate Commerce Commission, but it proposes, as a practical consideration, postponing the entry of a decree in this case for a period of ninety days from the filing of this opinion, to afford the commission an opportunity, should it desire it, to rectify its mistake by such action as may be appropriate. If the commission shall have taken no action within the period indicated, a decree will be entered upon the expiration of the period, annulling the order and enjoining its enforcement, leaving the opposing parties to their rights as of that date."

**Vol. IV, p. 476, sec. 16 (B).** [First ed., 1912 Supp., p. 123.]

**II. Enforcement of orders.**

**1. Jurisdiction.**

**V. Venue.**

**VII. Petition, complaint or declaration.**

**VIII. Hearing.**

**4. Evidence.**

**IX. Relief granted.**

**II. ENFORCEMENT OF ORDERS**

**1. Jurisdiction (p. 478)**

Both state and federal courts have jurisdiction of actions to enforce an order made by the commission. *Petition of Southern Lumber, etc., Co.*, (Tenn. 1919) 210 S. W. 639.

**V. VENUE**

**Extraterritorial service of process.**—This section does not authorize process to be served beyond the district in which the suit is filed. *Graustein v. Rutland R. Co.*, (D. C. Mass. 1919) 256 Fed. 409.

**VII. PETITION, COMPLAINT OR DECLARATION (p. 480)**

**Amendment.**—No error was committed by the trial court in allowing, near the close of the trial, an amendment to correct a transposition of awards in declarations in two suits tried together, brought upon reparation orders made by the Interstate Commerce Commission, based upon alleged discrimination against shippers in railway car distribution. *Pennsylvania R. Co. v. Minds*, (1919) 250 U. S. 368, 39 S. Ct. 531, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 3d 1917) 244 Fed. 53, 156 C. C. A. 481.

**VIII. HEARING**

**4. Evidence (p. 482)**

**Findings of Commission—Going behind findings.**—At trial, plaintiff introduced the findings and order of the commission, which by this section of the act are "prima facie evidence of the facts therein stated," and rested. Defendants offered the record before the Interstate Commerce Commission, and agreed that Elliott had succeeded to whatever were the rights of Michigan Motors Company. The District Court held, as a conclusion of law, that "no legal competent evidence" had been adduced "upon the trial of this action to rebut the prima facie evidence furnished by the report and order of the Interstate Commerce Commission," and gave judgment for the amount fixed in the reparation order, with interest, costs, and counsel fee. Whereupon this writ was taken. The case for Elliott in final analysis is based on the proposition that the findings and order of the Interstate Commerce Commission, though shown to rest on nothing that the law calls evidence, must, nevertheless, be themselves received as satisfactory evidence of whatever facts, or assertions of fact, are therein contained, unless rebutted by new

and more persuasive testimony. Such is not the law. It was the duty of the trial court to inquire whether there was any substantial evidence before the commission to justify its order. The matter has been so recently and exhaustively considered in *Atchison, etc., Co. v. Spiller*, 246 Fed. 1, 158 C. C. A. 227, 249 Fed. 677, 161 C. C. A. 587, that no further citation is necessary. *Michigan Cent. R. Co. v. Elliott*, (C. C. A. 2d Cir. 1919) 256 Fed. 18.

#### IX. RELIEF GRANTED (p. 484)

**Interest.**—Charging the jury in a suit upon reparation orders made by the Interstate Commerce Commission, based upon alleged discrimination against shippers in railway car distribution, that they might add interest, not exceeding six per cent. on the damages found, is not error, although the recoveries are less than the amounts claimed before the Commission, where for years these claims have been contested, and the carrier has never offered any payment of the awards. *Pennsylvania R. Co. v. Minds*, (1919) 250 U. S. 368, 39 S. Ct. 531, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 3d Cir. 1917) 244 Fed. 53, 156 C. C. A. 481.

### Vol. IV, p. 506, sec. 20 (K). [First ed., 1916 Supp., p. 124.]

- I. Introductory.
- II. Purpose and dominating features of amendment.
- IV. Definition and construction.
- V. Effect on state laws.
- VI. Shipments affected.
- VII. Receipt or bill of lading.
- IX. Liability of initial carrier.
  1. In general.
  3. Period of liability.
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  7. Wrongful delivery or diversion.
- X. Liability of connecting carrier.
- XI. Joint liability of initial and connecting carriers.
- XII. Limitation of liability.
  1. In general.
  2. Exemption from negligence.
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  5. Time for bringing suit.
- XIV. Venue.
- XV. Parties.
- XVI. Pleading.
- XVII. Trial.
  1. Burden of proof.
  2. Sufficiency of evidence.
- XVIII. Damage.

#### I. INTRODUCTORY

The cases in this note arose, practically without exception, under the "Cummins Act" of March 4, 1915, which was substituted for the "Carmack amendment." However, the "Cummins Act," while in terms a substitute for the "Carmack amendment," was in effect merely an amendment thereof in re-

spect to limitation of liability, preserving the original language in other respects. The cases therefore continue to discuss and apply the "Carmack amendment" *eo nomine*, when in fact the "Cummins Act" is intended, and the decisions here collated are to be so understood, though the inaccurate reference to the "Carmack amendment" has frequently been preserved by the annotator because so made by the court. The instances where the effect of the "Cummins Act" on the pre-existing law has been discussed specifically have throughout the annotation been brought out by catch lines for ready reference.

#### II. PURPOSE AND DOMINATING FEATURES OF AMENDMENT (p. 508)

The spirit of the Act is to treat connecting lines of transportation as one line so far as the shipper is concerned and to compel the different companies forming a through route to deal as a unit with the shipper and then to adjust all differences as to individual liability among themselves. The wisdom and fairness of this course has been demonstrated and is obvious. *Lancaster v. Schreiner*, (Mo. 1919) 212 S. W. 19.

**Relieving from liability as insurer.**—By the Carmack amendment to the Interstate Commerce Act, Congress has relieved carriers of interstate shipments from the liability of insurers as it was at common law, and the liability imposed on such a carrier is limited, by this statute, to any loss, injury, or damage caused by it, or by a succeeding carrier to whom the property may be delivered for carriage, and in such a case the loss alleged must be attributable to some breach of duty or default on the part of the carrier. *Atlantic Coast Line R. Co. v. Sandlin*, (Fla. 1918) 78 So. 667.

#### IV. DEFINITION AND CONSTRUCTION (p. 510)

**Definition — Property.**—The Carmack amendment deals only with shipments of property, and not with transportation of persons. *Keairnes v. Chicago, etc., R. Co.*, (S. D. 1919) 171 N. W. 86.

"The Carmack amendment deals only with the shipment of property. Its language is so clear as to leave no ground for the contention that Congress intended to deal with the transportation of persons." *Chicago, etc., R. Co. v. Maucher*, (1919) 248 U. S. 359, 38 S. Ct. 108, 63 U. S. (L. ed.) —, *dismissing* writ of error to review, (1916) 100 Neb. 237, 150 N. W. 422.

The Carmack amendment is silent respecting the carriage of persons; it contains no provision relative to duties and liabilities growing out of the relation of carrier and passenger. It deals only with the transportation of property. *Clark v. Southern R. Co.*, (Ind. App. 1918) 119 N. E. 539.

#### V. EFFECT ON STATE LAWS (p. 511)

**In general.**—To same effect as original annotation, see *Missouri, etc., R. Co. v. Miller*,

(Tex. 1919) 211 S. W. 543; Chesapeake, etc., R. Co. v. National Bank of Commerce, (1918) 122 Va. 471, 95 S. E. 454.

The specific effect of the Carmack amendment was to supersede the special regulations and policies of particular states upon the subject of the carrier's liability to shippers for loss or damage to interstate shipments and the contracts of carriers with respect thereto. Atlantic Coast Line R. Co. v. Sandlin, (Fla. 1918) 78 So. 667.

**Construction of proviso of amendment.**—To same effect as first paragraph of original annotation, see *Lysaght v. Lehigh Valley R. Co.*, (S. D. N. Y. 1918) 254 Fed. 351; *Clark v. Southern R. Co.*, (Ind. App. 1918) 119 N. E. 539.

#### VI. SHIPMENTS AFFECTED (p. 513)

**Foreign shipments.**—To the same effect as the original annotation, see *Chicago, etc., R. Co. v. Jewett*, (Wis. 1919) 171 N. W. 757, wherein the court said: "This being a shipment to a foreign country, the Carmack amendment did not apply, and it was competent for the parties to make a contract limiting the plaintiff's liability to its own line. *Best v. Great Northern R. Co.*, (1915) 159 Wis. 429, 150 N. W. 484."

**Shipment forwarded by subsequent order.**—Where at the termination of an intrastate shipment, the shipper forwards them to a point outside the state by another carrier, there is not an interstate shipment by connecting carriers within the Carmack amendment. *Bracht v. San Antonio, etc., R. Co.*, (Mo. 1919) 209 S. W. 579.

#### VII. RECEIPT OR BILL OF LADING (p. 514)

The failure to deliver a receipt by an express company receiving goods for shipment does not exempt it from liability as a common carrier, but on the contrary imposes on it the highest responsibility. *Southern Express Co. v. Malone*, (Ala. App. 1918) 78 So. 408.

**Power of connecting carrier to engraft condition on shipper's contract with initial carrier.**—The settled construction of the federal statute law aforesaid is that if an interstate shipment of freight is begun under an express contract of carriage between the initial carrier and the shipper, and subsequently a connecting carrier, en route of the shipment, beyond the terminal of the initial carrier, issues another contract of carriage to the shipper for a remaining portion of the original route and takes up the original bill of lading evidencing the original contract upon its surrender by the shipper, the second contract of carriage does not supersede the first, and in such case the first contract remains in force by virtue of said federal statute law, and the shipper and all assignees of his claiming through him (all of whom could have enforced such original contract) have no right of action for damages against such subsequent carrier, but only against the in-

itial carrier. In such case there can be, in contemplation of law, but one initial carrier, and no action by the shipper or one claiming under him can be maintained against any subsequent carrier en route, although instituted upon a subsequent contract of carriage with the latter, such as that aforesaid. And the same would be true if the initial contract of carriage were not an express contract, but one implied in law because of the duty imposed by the federal statute, where the initial carrier received the shipment for interstate transportation to a destination beyond the terminal of its line. Such holding is based, however, upon the fundamental consideration that in such cases the initial contract of carriage was one which was enforceable by the plaintiff under the federal statute, as covering the entire route of the original shipment; that any subsequent contract of carriage with any intermediate carrier was needless, was not required in such case by the federal statute, and was against its policy. Consequently, where owing to a lawful tariff regulation filed with the Interstate Commerce Commission according to law, the shipment of live stock from points west of Chicago to points east of that place on shipper's order contract, i. e., on an "order notify" bill of lading, was invalid, the shipper or the consignee might make a second contract of carriage from Chicago to the place of destination of the live stock. Such second contract of carriage is not forbidden by the Interstate Commerce Law and its amendments, and the carrier with whom it is made becomes the initial carrier and is the proper defendant in an action for injury and damage whether caused by its own line or some connecting carrier en route from Chicago to the place of destination of the live stock. *Chesapeake, etc., R. Co. v. National Bank of Commerce*, (1918) 122 Va. 471, 95 S. E. 454.

**Presumption as to consignee's knowledge of bill of lading.**—Since this section requires that a bill of lading or receipt be issued by the carrier, a consignee must be presumed to know that fact. But he cannot be presumed to know the terms of the bill of lading. *New York Cent., etc., R. Co. v. York, etc., Co.*, (1918) 230 Mass. 206, 119 N. E. 855.

**"Lawful holder."**—Where a bill of lading while made out to the order of the consignee is deposited with sight draft attached by the consignor with a bank for collection, and by that bank forwarded to another bank as its agent which presents it to the consignee for collection, and the draft not being honored the bill of lading is returned to the forwarding bank, the consignor was during all that period the "lawful holder" of the bill of lading. *Babbitt v. Grand Trunk Western R. Co.*, (1918) 285 Ill. 267, 120 N. E. 803.

**Interpretation of bill of lading.**—The federal decisions are controlling as to the proper construction of a bill of lading. *Crenshaw v. Southern Pac. R. Co.*, (Cal. App. 1919) 181 Pac. 252; *St. Louis, etc., R. Co. v. Patterson*, (Okla. 1919) 182 Pac. 701.

## IX. LIABILITY OF INITIAL CARRIER

1. *In General* (p. 517)

To the same effect as the first paragraph of the original annotation, see *Haglin-Stahr Co. v. Montpelier, etc., R. Co.*, (Vt. 1918) 102 Atl. 940; *Baker v. Memphis, etc., R. Co.* (Tex. 1918) 208 S. W. 182.

**Compliance with penal laws.**—The fact that a carrier has complied with sections 232-235 of the Penal Laws (7 Fed. Stat. Ann. 857) in transporting munitions, does not affect its civil liability for damages occasioned by their explosion while in transit. *Lysaght v. Lehigh Valley R. Co.*, (S. D. N. Y. 1918) 254 Fed. 351.

**Loss by fire while the goods are in hands of the connecting carrier may be recovered from the initial carrier.** It is not necessary that the loss should be caused by some affirmative act of the connecting carrier, since the connecting carrier is to be treated as though it was a part of the initial carrier's own line. *Yazoo, etc., R. Co. v. Craig*, (1918) 118 Miss. 299, 79 So. 102.

**Common-law liability.**—The Carmack amendment does not take away the right of the shipper to maintain an action on the common-law liability of the carrier for the negligent delay in the shipment of live stock resulting in loss by shrinkage and a decline in the market, although the same be an interstate shipment. However, as to interstate shipments, the common-law liability of the carrier for safe carriage of property may be limited by a special contract with the shipper, where such contract, being supported by a consideration, is reasonable and fairly entered into by the shipper, and does not attempt to cover losses caused by the negligence or misconduct of the carrier. *St. Louis, etc., R. Co. v. Ladd*, (Okla. 1919) 178 Pac. 125.

**Limitation of common-law liability.**—The provision of this section making a carrier receiving property for transportation in interstate commerce liable for "any loss, damage, or injury to such property caused by it," does not have the effect of limiting the carrier's common-law liability. *Lysaght v. Lehigh Valley R. Co.*, (S. D. N. Y. 1918) 254 Fed. 351.

3. *Period of Liability* (p. 518)

To the same effect as the original annotation, see *Vogel v. Delaware, etc., R. Co.*, (1919) 168 Wis. 567, 171 N. W. 198.

**Beginning of liability.**—The acceptance of a bill of lading providing that the liability of the carrier for a shipment of hogs shall not attach until they are loaded in the cars does not waive the shipper's right to recover for hogs which died in the shipping pen because of the failure of the carrier to furnish cars promptly. *Pletcher v. Chicago, etc., R. Co.*, (1918) 103 Kan. 834, 177 Pac. 1.

**Negligence as warehouseman.**—The negligence of the terminal carrier as warehouseman after the goods have arrived at destination is not chargeable to the initial carrier.

*Texarkana, etc., R. Co. v. Twin City Products Co.*, (Tex. 1919) 208 S. W. 989.

Where the interstate bill of lading of the form approved by the Interstate Commerce Commission provides, among other conditions, "that property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only," and the property transported remains in the car at its destination nine days after notice given of its arrival and is then destroyed by fire, the liability of the terminal carrier is that of warehouseman, and the initial carrier is liable for the damages negligently arising therefrom. *Briggs Hardware Co. v. Aroostook Valley R. Co.*, (1918) 117 Me. 321, 104 Atl. 8.

4. *Nature of Liability* (p. 519)

**In general.**—The initial carrier of live stock, notwithstanding the Interstate Commerce Act and its amendments, is only liable for some default in its common-law duty as a carrier or for some default in the like duty of some of its connecting carriers. *Chesapeake, etc., R. Co. v. National Bank of Commerce*, (1918) 122 Va. 471, 95 S. E. 454.

**Not an insurer.**—Under the Carmack amendment a carrier is liable for a default in its common-law duty and not as an insurer. *Nabors v. Colorado, etc., R. Co.*, (Tex. 1919) 210 S. W. 276. See to the same effect, *Atlantic Coast Line R. Co. v. Sandlin*, (Fla. 1918) 78 So. 667.

**Act of God.**—The amendment does not attempt to change the common-law rule as to the effect of an act of God in excusing the carrier where loss results proximately therefrom. *Barnet v. New York Cent., etc., R. Co.*, (1918) 222 N. Y. 195, 118 N. E. 625.

6. *Liability for Delay* (p. 519)

**Delay in transportation.**—To the same effect as the original annotation, see *Erickson v. Chicago, etc., R. Co.*, (S. D. 1918) 170 N. W. 144.

7. *Wrongful Delivery or Diversion* (p. 521)

To the same effect as the original annotation, see *French v. Pere Marquette R. Co.*, (Mich. 1919) 171 N. W. 491; *King v. Barbarin*, (C. C. A. 6th Cir. 1917) 249 Fed. 303, 161 C. C. A. 311.

To the same effect as the second paragraph of the original annotation, see *Babbitt v. Grand Trunk Western R. Co.*, (1918) 285 Ill. 267, 120 N. E. 803.

X. LIABILITY OF CONNECTING CARRIER  
(p. 524)

**Rule stated.**—A connecting or terminal carrier's liability is subject to the same rules

as the initial carrier's. *Lysaght v. Lehigh Valley R. Co.*, (S. D. N. Y. 1918) 254 Fed. 351.

**Limited to personal negligence.**—A connecting carrier is not liable for the negligence of any other connecting carrier, but is liable for any damage which can be traced to its own negligence. *Gray v. Colorado Southern R. Co.*, (Tex. 1918) 204 S. W. 347.

**An intermediate carrier is not liable for acts of succeeding carriers.** *Ocean Steamship Co. v. People's Shoe Co.*, (Ala. 1919) 81 So. 241, wherein the court said that the Act "affects the liability of the receiving or initial carrier, but does not make the intermediate carrier liable for the acts of other connecting carriers. It makes the initial or receiving carrier the principal, and the other connecting carriers its agents, and makes it

liable for any succeeding carriers; but it does not make each of the connecting carriers liable as for the wrongs of any other connecting carrier."

The terminal carrier is liable only for injuries occurring on its own line, but when the goods are received in bad condition the terminal carrier has the burden of showing that the injury did not occur while the goods were in its hands. *Houston, etc., R. Co. v. Reichardt*, (Tex. 1919) 212 S. W. 208.

Plaintiffs' employee forwarded to them at New York city from Batavia, Iowa, a car of bagged hickory nuts. Shipment was made by the Chicago, Burlington & Quincy Railroad as initial carrier. In due course, the shipment reached destination, the car intact as the first carrier had sealed it, over the line of the principal defendant, the New York Central Railroad Company, as terminal carrier. Claiming a loss of 142 bags of nuts, plaintiffs sued the latter, counting on default of its responsibility as a common carrier of goods. It was held that the accountability created by the Congress of the United States, on the part of the initial carrier of goods in interstate commerce, does not preclude the right to enforce responsibility against the particular carrier on whose line loss, damage, or injury was occasioned. Indeed, the statute expressly preserves such right. To maintain the action, when the suit is against other than the initial carrier, the evidence must establish the fact not merely that there was loss, damage or injury to the shipment in the course of its transportation in interstate commerce, but that such loss, damage, or injury was caused by the carrier named as defendant. *Lewis Poultry Co. v. New York Cent. R. Co.*, (1914) 117 Me. 482, 105 Atl. 109.

A common-law action against the last of several connecting carriers, to recover for injury or damage to a shipment of freight in the course of interstate transportation, where the injury or damage complained of was caused by the negligence of the last connecting carrier, is not prohibited by the terms of the Carmack amendment. Under this

amendment the lawful holder of the bill of lading issued by the initial carrier for freight to be transported in interstate commerce may maintain his common-law action against any one of several connecting carriers for loss or injury on its own line. *Southern R. Co. v. Morris*, (1918) 147 Ga. 729, 95 S. E. 284.

**Not liquidated by judgment against initial carrier.**—A judgment against the initial carrier does not liquidate the liability of the terminal carrier so as to make it subject to garnishment by a creditor of the holder of the bill of lading. *Southern R. Co. v. Hodgson Bros. Co.*, (Ga. 1919) 98 S. E. 541.

**Pleading.**—In a suit for damages against a carrier other than the initial carrier, it must be alleged that the injury to the shipment of freight was caused by the negligence of the defendant to the action. *Southern R. Co. v. Morris*, (1918) 147 Ga. 729, 95 S. E. 284.

#### XI. JOINT LIABILITY OF INITIAL AND CONNECTING CARRIERS (p. 524)

To the same effect as the original annotation, see *Bassett v. Chicago, etc.*, (1919) 168 Wis. 617, 171 N. W. 749, 752.

#### XII. LIMITATION OF LIABILITY

##### 1. In General (p. 524)

**Effect of Cummins amendment.**—"This statute, approved March 4, 1915, retains so much of the Carmack amendment as requires, in interstate commerce, the issuance of a through bill of lading by the initial carrier and making such carrier liable for any loss, damage or injury to a shipment of that character, caused either by such initial carrier or any connecting carrier and, in addition, makes such carrier liable, whether a bill of lading has been issued or not, for the full actual loss or damage or injury to such property caused by it, etc., 'notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, etc., or in any contract, rule, regulation or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner and form in which it is sought to be made, is hereby declared to be unlawful and void.' The single restriction, as to the effect of this very sweeping provision, is that, if the goods are 'hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods the carrier may require the shipper to . . . state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated.' While the statute recognizes the right of the carrier, in proper instances, to stipulate for the presentation and filing of claims within a stated period, restricting such rights to a minimum period of ninety days in the one case and four months in the other, the last

clause of this amendatory act provides that: 'If the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice nor filing of claim shall be required as a condition precedent to recovery.' The verdict having established that the loss and damage complained of in the present instance was caused by the negligence of the connecting carrier, the plaintiff's claim comes clearly within the express terms of the statute, and defendant is thereby deprived of any defense which might arise from failure of plaintiff to give the notice." *Mann v. Fairfield, etc., Transp. Co.*, (1918) 176 N. C. 104, 96 S. E. 731.

**Property not hidden from view.**—Under the *Cummins* Act it is only when property is hidden from view by wrapping, etc., and the carrier is not notified of its character, that the carrier may require a statement of value. *Thompson v. Great Northern R. Co.*, (1918) 31 Idaho 492, 174 Pac. 607, holding that a declaration of the shipper that the shipment consisted of household goods was sufficient to preclude the requirement of a binding statement of value.

**Limitation to loss occurring on initial line.**—A restriction of liability in the bill of lading to loss or injury sustained before the goods reach the terminus of the line of the initial carrier is invalid. *Reidsville Paper Box Co. v. Southern Ry.*, (N. C. 1919) 99 S. E. 23.

**Construction of contract.**—In *Cudahy Packing Co. v. Bixby*, (Mo. 1918) 205 S. W. 865, it was said of a bill of lading made under the Act: "It is not the same as the ordinary private contract with which no one, except the immediate parties, is concerned. It is an interstate shipping contract, made under and pursuant to the National Commerce Act, and therefore must be regarded, construed, and enforced in the light of that act and in view of the broad governmental policies it was designed to set up and enforce."

## 2. Exemption from Negligence (p. 525)

**Stipulation void**—*Cummins* Act.—A stipulation against liability for damages caused by the carrier's negligence is invalid under the *Cummins* amendment. *Bevens Bros. v. Atlantic Coast R. Co.*, (N. C. 1918) 97 S. E. 215.

**Loss by fire not due to negligence** may be stipulated against where a reduced rate is given. *Borneman v. New Orleans, etc., R. Co.*, (1919) 145 La. —, 81 So. 882.

**Telegraph companies**, although brought under the jurisdiction of the Interstate Commerce Commission by the Act of June 18, 1910, are not within the restrictions imposed on limitation of liability. *Merriweather v. Western Union Tel. Co.*, (1919) 183 Ky. 710, 210 S. W. 190.

See also *supra*, p. 568, as to right of interstate telegraph company to limit liability.

## 3. Agreed Valuation (p. 526)

**In general.**—"Under the Act every initial carrier is required 'to issue a receipt or bill of lading' upon receipt of a shipment, which constitutes the contract between the shipper and all the carriers. Under the Act the parties may agree upon a valuation of the property shipped for the purpose of charging the published rates prescribed under the Act based upon valuation and a carrier is obligated to charge such rates to carry out the purposes of Congress in regulating interstate transportation to secure uniformity of rate and prevent unjust discrimination. Such published rates are presumed to be equally within the knowledge of carrier and shipper, and both are bound by them as a matter of law." *Bassett v. Chicago, etc., R. Co.*, (1919) 168 Wis. 617, 171 N. W. 749, 752.

"The Carmack amendment to the Hepburn Act of 1906 makes the carrier liable for some value, as we understand the decisions of the United States Supreme Court." *Hill Mfg. Co. v. New Orleans, etc., R. Co.*, (1918) 117 Miss. 548, 78 So. 187.

**Presumptions.**—While an interstate carrier may, by a fair, open, and reasonable agreement, limit the amount recoverable by the shipper to an agreed value made for the purpose of obtaining the lower of two or more rates proportioned to the amount of the risk, and knowledge of the shipper that the rate is based on value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Interstate Commerce Commission, and the effect of so filing the schedules makes the published rates binding upon shipper and carrier alike, requirements of the Interstate Commerce Law as to the filing and publication of such schedules are not applicable, and no such presumption arises when property is being transported free under the provision of section 22 (see vol. 4, p. 539) that nothing therein shall prevent the carriage of property free or at reduced rates to or from fairs and expositions for exhibition thereat. *De Bow v. Vicksburg, etc., R. Co.*, (1918) 21 Ga. App. 732, 95 S. E. 261.

**Alternative rate on file.**—"The shipper has the right to have the carrier carry his goods on the common-law liability, and before the carrier can exonerate itself from this liability it must have an alternative rate on file with the commission and at its station where the goods are tendered for shipment." *Hill Mfg. Co. v. New Orleans, etc., R. Co.*, (1918) 117 Miss. 548, 78 So. 187.

## 4. Notice of Claim (p. 529)

**In general.**—To the same effect as the original annotation see: *Southern Pac. Co. v. Stewart*, (1919) 248 U. S. 446, 39 St. Ct. 139, 63 U. S. (L. ed.) —, reversing (1917) 233 Fed. 956, and following *Southern Pac. Co. v. Stewart*, 245 U. S. 359, 38 S. Ct. 130, 62 U. S. (L. ed.) 345, which reversed (1915) *St. Louis, etc., R. Co. v. Starbird*, 118 Ark. 485, 177 S. W. 912; *Nashville, etc., R. Co.*

*v. Camper*, (Ala. 1918) 78 So. 925. See *Keeney v. Chicago, etc., R. Co.*, (1918) 183 Ia. 522, 167 N. W. 475; *St. Louis, etc., R. Co. v. Ladd*, (Okla. 1919) 178 Pac. 125.

The parties to an interstate shipment of live stock may validly stipulate that no liability shall be incurred to the shipper for loss or damage unless a verified written claim be made and delivered to the general freight agent within five days after unloading, and such stipulation is not satisfied by prompt advisement of the carrier's agent at final destination of all essential facts. *Baltimore, etc., R. Co. v. Leach*, (1919) 249 U. S. 217, 39 S. Ct. 254, 63 U. S. (L. ed.) —, *reversing* (1917) 173 Ky. 452, 191 S. W. 310, wherein Mr. Justice Clarke dissenting said: "Permit me to add that the many cases coming into this and other courts show that this five-day limitation is unreasonably short, and in my judgment, for this reason, it should be declared void upon its face. Certainly it should not be made a favorite of the law and extended beyond its strict terms, in presence of the Act of Congress approved March 4, 1915, c. 176, 38 Stat. 1196, declaring that where in such suit the 'damage or injury complained of was due to delay . . . or damage in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.' While the case before us arose prior to the passing of this act, it is an important declaration of public policy by Congress, which should not be overlooked."

**Negligence in transporting live stock.**—Where a shipping contract for an interstate shipment of horses is similar in its terms to the provision of this section regarding notice of claim for damage in transit caused by negligence and carelessness, notice is unnecessary for loss occasioned by such cause. *Hailey v. Oregon Short Line R. Co.*, (D. C. Idaho 1918) 253 Fed. 569.

**Time for filing claim.**—In *Missouri Pac. R. Co. v. Martindale*, (Ark. 1919) 213 S. W. 777, it was said with respect to the third proviso: "Our interpretation of this amendment is that it prevents the carriers on interstate shipments from contracting with shippers for notice of claims on account of loss, damage, or injury to the subject-matter of the shipment in a shorter time than 90 days, or for filing claims in a shorter period than four months, or for the institution of suits on claims for a shorter period than two years. The language is plain and unambiguous. The object and purpose of the act was to protect shippers against the short time for giving notices of claims on account of loss, damage, or injury to the subject of shipment imposed by carriers on them in bills of lading or contracts of shipment. Appellant, however, seeks to uphold the contract clause in the instant case because it applies to a notice regarding loss or injury, and not to a notice of claim. In other words, it is asserted that the Cummins amendment only prevents carriers from contracting for a notice of the claim in a shorter period than ninety days,

and does not affect their right to contract for a notice regarding loss or injury. The claim must necessarily be founded upon the loss or injury, and the word 'claim' used in the amendment is broad enough to cover loss or injury. Any other construction would deprive the shipper of the protection intended by the act. We can see no good reason for preventing a carrier from contracting for a notice of claim in a shorter period than ninety days and permitting it to contract for notice of loss or injury when the shipment reaches its destination. We do not think the statute intended such a distinction."

**Sufficiency of notice.**—A notice stating that goods arrived in poor condition, making no claim for damages and containing no intimation that the carrier was at fault or that reimbursement was demanded, is not sufficient. *Cudahy Packing Co. v. Bixby*, (Mo. 1918) 205 S. W. 865.

**Waiver of notice.**—A provision of the contract for notice of claim cannot be waived by the carrier. *Olson v. Chicago, etc., R. Co.*, (C. C. A. 8th Cir. 1918) 250 Fed. 372, 162 C. C. A. 442; *Cudahy Packing Co. v. Chicago, etc., R. Co.*, (Mo. 1918) 201 S. W. 596; *Cudahy Packing Co. v. Bixby*, (Mo. 1918) 205 S. W. 865; *Mexico Northwestern R. Co. v. Williams*, (Tex. 1919), 208 S. W. 712.

Where a shipper enters into a valid contract with the carrier for an interstate shipment of live stock, by the terms of which he agrees that no suit or action against the carrier for loss, damage, or delay to the shipment shall be sustained unless such suit or action is commenced within six months after the cause of action shall occur, the carrier cannot waive the terms of the contract, nor ignore those terms applicable to the conduct of the shipper; a different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed. *St. Louis, etc., R. Co. v. Patterson*, (Okla. 1919), 182 Pac. 701.

##### 5. Time for Bringing Suit (p. 532)

**Validity of limitation.**—Under the Carmack amendment, which furnishes the exclusive rule on the subject of the liability of the carrier under contracts for interstate shipment, a stipulation in a contract for an interstate shipment of live stock, providing that no suit or action against the carrier shall be sustained in any court of law or equity "unless such suit or action shall be commenced within six months next after the loss or damage shall have occurred," and that the failure to institute suit within said time shall be a complete bar to such suit, is a reasonable provision and binding upon the parties to such contract. *Atchison, etc., R. Co. v. Cooper*, (Okla. 1918), 175 Pac. 539; *St. Louis, etc., R. Co. v. Bentley*, (Okla. 1918) 176 Pac. 250; *St. Louis, etc., R. Co. v. Patterson*, (Okla. 1919), 182 Pac. 701.

**Estoppel to rely on stipulation.**—Connecting carriers of an interstate shipment cannot

be prevented by estoppel or otherwise from relying upon a provision in the bill of lading issued by the initial carrier, conformably to the Carmack amendment, that suits for damages must be brought within six months after the loss occurs, although such connecting carriers exacted from the shipper, as a condition of carriage over their lines, new bills of lading which did not contain any such limitation as to time for suit,—at least, where the shipper repudiates the new bills of lading issued by the connecting roads. *Texas, etc., R. Co. v. Leatherwood*, (1919) 250 U. S. 478, 39 S. Ct. 517, 63 U. S. (L. ed.) —. This case was not affected by the Cummins Act now in force in place of the Carmack amendment and which prohibits a common carrier from providing by contract or otherwise for a shorter period than two years for the institution of suits.

#### XIV. VENUE (p. 534)

**State laws control.**—The Carmack amendment which fixes a liability on the initial carrier for loss or injury to goods, does not purport to deal with the venue of actions to enforce such liability; and the question of venue, which is determined by state laws, is not affected thereby. *Central of Ga. R. Co. v. Touchstone*, (1919) 148 Ga. 861, 98 S. E. 485.

#### XV. PARTIES (p. 535)

**In general.**—To the same effect as the original annotation, see *Babbitt v. Grand Trunk Western R. Co.*, (1918) 285 Ill. 267, 120 N. E. 803.

**Substitution of stockholders for corporation.**—Where a corporation sues under the Carmack amendment and it appears that the bill of lading was issued not to the corporation but to stockholders owning practically all the stock, the substitution of those stockholders for the corporation will not be permitted. *Norfolk Southern R. Co. v. Greenwick Corp.*, (1918) 122 Va. 631, 95 S. E. 389.

#### XVI. PLEADING (p. 535)

**A redundant allegation such as a denial of notice of claim in a case where notice is unnecessary, will be stricken out.** *Hailey v. Oregon Short Line R. Co.*, (D. C. Idaho 1918) 253 Fed. 569.

#### XVII. TRIAL.

##### 1. Burden of Proof (p. 535)

In *Barnet v. New York Cent., etc., R. Co.*, (1918) 222 N. Y. 195, 118 N. E. 625, the court having before it the question of burden of proof said: "In both the state and the United States courts where proof is given that goods are damaged in the hands of the carrier, the burden is upon him to show that the damage arose from some cause for which he was not liable. They differ, however, in this: In the United States courts where the carrier shows that the loss was occasioned by the act of God he has done all that is required. If the shipper then claims

that the carrier's negligence also directly contributed to the injury, he must show that fact. In New York, on the other hand, the burden is upon the carrier to show both the act of God and his own freedom from contributing negligence. *Michaels v. New York Cent. R. Co.*, (1864) 30 N. Y. 564, 86 Am. Dec. 415; *Read v. Spaulding*, (1864) 30 N. Y. 630, 86 Am. Dec. 426. That is the only distinction. Both jurisdictions hold that the act of God to relieve the carrier must be the immediate, direct, and efficient cause of the loss. Neither excuses him if his own negligence also directly and proximately contributes to the result. They may have differed as to when negligence did so directly contribute, as in the case of delays. Not as to the rule, only as to its application. . . . As to the question of proximate cause, when we have to do with interstate shipments we must follow the United States courts. If, however, the rule as to the burden of proof is simply a rule as to procedure and evidence we should be guided by our own precedents. For some purposes it has been so held by us. *Sackheim v. Piqueron*, (1915) 215 N. Y. 62, 109 N. E. 109. But in determining the boundary between state and federal jurisdiction the Supreme Court has held it to be a rule of substance. *Southern R. Co. v. Prescott*, (1916) 240 U. S. 632, 36 S. Ct. 469, 60 U. S. (L. ed.) 836; *Central Vermont R. Co. v. White*, (1915) 238 U. S. 507, 35 S. Ct. 865, 59 U. S. (L. ed.) 1433, Ann. Cas. 1916B 252. We are bound by the federal decisions as the shipment was interstate. The case was tried upon this theory. The jury was charged that the burden was on the plaintiff to establish the defendant's negligence. This was right."

The Carmack amendment does not cast upon the shipper the burden of proving affirmatively that a loss which occurred on a connecting line was "caused by" the connecting carrier. *Chicago, etc., R. Co. v. Collins Produce Co.*, (1919) 249 U. S. 186, 39 S. Ct. 189, 63 U. S. (L. ed.) — (*affirming* (C. C. A. 7th Cir. 1916) 235 Fed. 857, 149 C. C. A. 169), wherein the court said: "Assuming that the question is presented by the record, which is doubtful, *Galveston, etc., R. Co. v. Wallace*, (1912) 223 U. S. 481, 491, [32 S. Ct. 205, 56 U. S. (L. ed.) 516, 523], rules that, under the act as construed in *Atlantic Coast Line R. Co. v. Riverside Mills*, (1911) 219 U. S. 186, 205, 206 [31 S. Ct. 164, 55 U. S. (L. ed.) 167, 182, 31 L. R. A. (N. S.) 7], in such a case as we have here the liability of the initial carrier is as if the shipment had been between stations in different states, but both upon its own line, and this renders the contention untenable. *Adams Express Co. v. Croninger*, (1913) 226 U. S. 491 [33 S. Ct. 148, 57 U. S. (L. ed.) 314, 44 L. R. A. (N. S.) 257], does not conflict with this conclusion. *Cincinnati, etc., Pac. R. Co. v. Rankin*, (1916) 241 U. S. 319, 326 [36 S. Ct. 555, 60 U. S. (L. ed.) 1022, 1026, L. R. A. 1917a, 265].



## 2. Sufficiency of Evidence (p. 535)

Loss caused by "the authority of the law."

—A carrier's failure to carry and deliver an interstate shipment is not excused as having been caused by "the authority of law," within the meaning of an exception in the bill of lading, if the carrier by false representations, or by representations which though not intentionally false were not known to be true, procured the appropriation of the shipment by military authority, and, but for such confiscation, the shipment, or some part of it, in the exercise of ordinary care, could have been transported to destination. *Chicago, etc., R. Co., v. Collins Produce Co.*, (1919) 249 U. S. 186, 39 S. Ct. 189, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 7th Cir. 1916) 235 Fed. 857, 149 C. C. A. 169.

Value of goods shipped from Germany to the United States may be proven by consular invoices under R. S. sec. 2852, 2855, 2862 (see vol. 2, p. 998 et seq.). *Vogel v. Delaware, etc., R. Co.*, (1919) 168 Wis. 567, 171 N. W. 198.

## XVIII. DAMAGE (p. 535)

Invoice value.—Where the bill of lading given under the Carmack amendment provides that the "loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee . . . [etc.])" the invoice price and not the market value at destination is the basis from which damage must be estimated. *Houston, etc., R. Co. v. Reichardt*, (Tex. 1919) 212 S. W. 208.

Effect of Cummins Act.—The enactment after loss and before suit thereof of the Cummins Act providing for the recovery of the "full actual loss, damage or injury" does not affect the rights of the parties under a bill of lading given under the Carmack amendment providing that the invoice price shall be the basis from which loss shall be computed. *Houston, etc., R. Co. v. Reichardt*, (Tex. 1919) 212 S. W. 208.

The Cummins amendment renders invalid a stipulation in the bill of lading, that if goods are lost in transit they shall be valued at the place of shipment. *McCaull-Dinsmore Co. v. Chicago, etc., R. Co.*, (D. C. Minn. 1914) 252 Fed. 664.

## Vol. IV, p. 536, sec. 20 (L). [First ed., 1909 Supp., p. 274.]

Recovery over by initial carrier.—This section imposes upon an interstate carrier voluntarily receiving property for transportation from a point in one state to a point in another state liability to the holder of a bill of lading for loss anywhere en route with a right, when sued with a connecting carrier for loss occurring upon its line, by cross-petition to recover over against the connecting carrier for the amount of such loss or damage evidenced by the judgment against it. *St. Louis, etc., R. Co. v. Elk City First Nat.*

*Bank*, (Okla. 1918) 171 Pac. 467, wherein the court said: "'Required to pay' does not mean that the judgment must be paid as a condition precedent to the right to recover, as contended. 'Required,' when used in this connection, means asked to pay or asked of right and by authority of law to pay (U. S. v. Armour, [N. D. Ill. 1906] 142 Fed. 808, 822), as evidenced by the judgment in this case in favor of plaintiff and against the Wichita Falls & Northwestern Railway Company, and not by the actual payment of said judgment."

Recovery over by terminal carrier.—A terminal carrier against whom a recovery based on its negligence is had cannot recover over against prior carriers. *Texas, etc., R. Co. v. West*, (Tex. 1919) 207 S. W. 918.

## Vol. IV, p. 539, sec. 22. [First ed., vol. III, p. 851.]

### I. Discrimination in rates.

### II. Reservation of existing remedies.

#### I. DISCRIMINATION IN RATES (p. 541)

Carriage for federal government.—In view of the Interstate Commerce Act, § 22, providing the statute shall not prevent carriage, storage, or handling of property free or at reduced rates for federal, state, or municipal governments, and of the constitution of Louisiana of 1913, art. 287, special services rendered the United States government by a railroad in handling carloads of coal from its yards in a single case of emergency, were held not acts of illegal discrimination against a private shipper over another line, desiring to use the terminal facilities of the road, even though the services for the government were gratuitous. *Miller Engineering Co. v. Louisiana R., etc., Co.*, (1919) 144 La. 786, 81 So. 314.

#### II. RESERVATION OF EXISTING REMEDIES (p. 541)

Effect of proviso.—Section 22 simply reserves to the shipper his remedies existing at common law or by statute in so far as they do not conflict with provisions of the Act; that is to say, where no administrative question is involved. Where the shipper does not invoke the aid of the commission, he may prosecute his common law or statutory remedies. Where he applies to the commission he must proceed in accordance with the Act. *Petition of Southern Lumber Co.*, (Tenn. 1919) 210 S. W. 639.

## Vol. IV, p. 549, sec. 1 (A). [First ed., vol. X, p. 170.]

### II. Nature and purpose.

### IV. Carriers, etc., liable.

### VI. Willfulness and knowledge.

### VIII. Rebates.

### IX. Concession or discrimination.

### XI. Indictment.

## II. NATURE AND PURPOSE (p. 550)

**Suspension during federal control.**—The operation of this Act was not suspended by the presidential proclamation of December 26, 1917, whereby the President as a war measure assumed control of the railroads of the country under the authority of the Act of August 29, 1916 (9 Fed. Stat. Ann. 1095). *U. S. v. Metropolitan Lumber Co.*, (D. C. N. J. 1918) 254 Fed. 335.

## IV. CARRIERS, ETC., LIABLE (p. 552)

**Consignee as "shipper."**—Where consignees exercise such direct control over shipments as enables them, by their own acts, to procure for themselves discriminations in respect to transportation service, they are "shippers" within the meaning of this section. *U. S. v. Metropolitan Lumber Co.*, (D. C. N. J. 1918) 254 Fed. 335, the court stating that the language of the Act "every person or corporation, whether carrier or shipper" indicates an intent that the Act shall not be confined to such shippers only as occupy the position of consignors.

## VI. WILFULNESS AND KNOWLEDGE (p. 553)

"Bearing in mind the purpose which Congress had in mind in enacting the Elkins Act, as before set forth, and considering, as will be hereafter shown, that a construction such as defendants urge would in many cases defeat that purpose, and further bearing in mind that one of the ways in which it was sought to eliminate all favoritism and inequality of treatment was by visiting criminal punishment on those who would be the beneficiaries thereof, it would be unjustifiable, I think, in the absence of language from which it can be clearly found, to attribute to Congress an intention to limit the operation of the Act to only such transactions as are consciously participated in by both the shipper and the carrier." *U. S. v. Metropolitan Lbr. Co.*, (D. C. N. J. 1918) 254 Fed. 335.

## VIII. REBATES (p. 554)

**The mere offer of a rebate, concession, or discrimination, knowingly made by a railroad, is a violation of this section.** *U. S. v. Lehigh Valley R. Co.*, (S. D. N. Y. 1918) 254 Fed. 332. The court said: "To constitute the crime it is not necessary that the railroad should 'offer' and the shipper 'accept' the discrimination. The mere offer of the rebate, concession, or discrimination, knowingly made by the railroad, is one of the offenses denounced by the statute. The proof may show that the unlawful agreement was that there should be given, and at the same time received, the discrimination complained of. If the proof so develops, the trial judge can deal with the question as he may be advised, and will consider that he is not to be hampered by this memorandum opinion. Here, however, the question must be dealt with as it appears on the face of the indictment.

The indictment charges, not only that the railroad and its duly authorized agent and the shippers conspired, but makes as parties to the conspiracy the oldtime 'divers other persons to the grand jurors unknown.' In many conspiracy cases these 'divers other persons' unknown to the grand jury never appear and are never mentioned; but the court, in passing on the indictment, must assume that there are such divers other and unknown persons. I think the indictment is good, and the demurrer is overruled."

## IX. CONCESSION OR DISCRIMINATION (p. 555)

**Permit during embargo.**—This section forbids the giving or receipt of a discriminatory permit during an embargo regardless of whether it affects transportation rates or charges. *U. S. v. Metropolitan Lumber Co.*, (D. C. N. J. 1918) 254 Fed. 335. The court said: "It needs no argument to demonstrate that there is fully as much room for the exercise of favoritism and resulting inequality in the granting or withholding of transportation service or facilities as there is in the matter of compensation to be paid for such service, for as was said by the Interstate Commerce Commission in the matter of *The New England Investigation*, 27 Interst. Com. Com'n R. 560, 616, 'service is often of even greater importance than the rate itself.' This is especially manifest when there exists an embargo, such as the indictments in these cases allege. Hence, bearing in mind that the purpose of Congress in passing the Elkins Act was to utterly eliminate every form or kind of discrimination, favoritism, and inequality, it is quite impossible to believe that when Congress used the broad and comprehensive language which it did, 'whereby any other advantage is given or discrimination is practiced,' it intended to cover only advantages or discriminations in the matter of rates or compensation for transportation service. If discrimination in rates was the only evil aimed at, why were the words above quoted added? Discrimination in respect to rates had been as completely covered as the English language is capable of, by the use of the words 'whereby any such property shall by any device whatever be transported at a less rate,' etc. The purpose of Congress being ascertained, and it being apparent that to permit discriminations in transportation service would thwart that purpose, and the language used in the Act being amply sufficient to embrace such discriminations, it seems to me that the conclusion is irresistible that such a discrimination as is complained of in these indictments is within the criminal provisions of the Elkins Act."

**Mere issue of a discriminatory permit for transportation during an embargo, with no transportation thereunder is not an offense.** *U. S. v. Lehigh Valley R. Co.*, (S. D. N. Y. 1918) 254 Fed. 332. The court said: "This indictment contains ten counts, and may be subdivided into two heads—those counts

numbered 1 to 5 inclusive, and those numbered 6 to 10 inclusive. As to counts 1 to 5 inclusive, the indictment sets forth that there was an embargo in respect of the transportation of hay, and that hay would not be transported for shippers by the Lehigh unless a permit or authorization for such transportation was obtained from Signer, acting for the Lehigh; that the Schaefer received such permits, while others similarly situated did not, even though these others requested such permits or authorization. The mere receiving of permits, unaccompanied by transportation, is not a crime under the Act; for the Act provides that it is unlawful to 'offer, grant or give . . . any rebate, concession or discrimination in respect to the transportation of any property in interstate . . . commerce.' If there is no transportation, the mere giving of a permit is an idle act, although the case might be different if the railroad 'offered' to transport."

A permit to ship goods during an embargo may constitute a discrimination though no other person similarly situated applied for a permit. *U. S. v. Metropolitan Lbr Co.*, (D. C. N. J. 1918) 254 Fed. 335, wherein the court said: "When the embargo was laid, every person desiring to avail himself of transportation facilities within the area of the embargo had a right to presume that it would be enforced. I do not think, therefore, that it would be necessary, in order to show the receipt of discriminations on the part of the defendants, that others had actually applied for transportation service similar to that which the defendants received, and had been denied it; it would be sufficient to show the promulgation of the embargo, the desire of the others to ship, the fact that they did not do so or attempt to do so, by reason of the embargo, and the method by which the defendants procured transportation service in violation of the embargo. I think the remarks of Judge Hazel, in *United States v. Vacuum Oil Co.*, 153 Fed. 598, 607 (D. C. W. D. N. Y.), support this view. The indictment in *United States v. Hanley* [71 Fed. 672] was framed under section 2 of the Act to regulate commerce, long before the Elkins Act was passed, and the objection was that it did not allege that the rebate which had been given to the defendant had been denied to others similarly situated. The fact that there were other shippers of lumber, who desired to avail themselves of transportation facilities while the embargo was in force, and who did not do so by reason of the embargo, coupled with the means by which the defendants did procure such service, readily distinguishes this case from the *Hanley* case."

In a prosecution for a violation of this section in obtaining a discrimination in transportation service during and in violation of an embargo authorized by the Director General of Railroads, it is no defense that the embargo was not submitted to the Interstate Commerce Commission and its reasonableness

ascertained and adjudicated by that body, or that the commission had not first determined that the defendants' actions constituted a violation of the embargo. *U. S. v. Metropolitan Lumber Co.*, (D. C. N. J. 1918) 254 Fed. 335, wherein the court said: "It is further urged that the defendants cannot be prosecuted in the absence of proceedings before or previous action by the Interstate Commerce Commission. This proposition seems to be based on two theories. It is first claimed that the embargo should have been submitted to the Interstate Commerce Commission, and its reasonableness ascertained and adjudicated by that body. The obvious answer is that the reasonableness of the embargo is not in issue in these cases; but the question is whether the defendants have knowingly received a discrimination or concession in transportation service which a strict and impartial enforcement of the embargo would not have permitted them to receive. If the railroad company were being prosecuted for having given, or the defendants for having received, discriminations by means of or through the embargo rather than by violating it, in all probability the defendants' contention would be well taken, for in such a case the question would be whether the embargo was reasonable, or whether it produced unjust and unreasonable discriminations among shippers. In that event an administrative question would probably be presented, which, under the decisions of the Supreme Court, must be passed on by the Interstate Commerce Commission prior to the institution of either 'civil or criminal proceedings. . . . In the cases at bar the defendants are charged, not with having secured discriminations through or by means of the embargo, but in violation of it; therefore, the reasonableness of the embargo is not in question. There would be nothing for the Interstate Commerce Commission, so far as any action on their part could affect the issues in this case, to pass upon."

**Guaranty of train connections.**—A statement by a station agent to a shipper that a certain train would stop to take on cattle, on the strength of which the shipper brought his cattle to the station, is not a preference in violation of the Elkins Act. It was so held in an action by the shipper for damages for failure to stop the train specified. *Chicago, etc., R. Co. v. Stallings*, (1918) 132 Ark. 446, 201 S. W. 294.

#### XI. INDICTMENT (p. 557)

**Failure to collect demurrage.**—Indictments which merely allege that a railroad has failed to collect demurrage and that shippers have not paid it, do not charge a violation of this section. *U. S. v. Lehigh Valley R. Co.*, (S. D. N. Y. 1918) 254 Fed. 332. The court said: "Stripped of indictment language, all that these indictments amount to is a charge in one indictment that the railroads have not collected demurrage and a charge in the other indictment that the shippers have not paid

it. The use of the word 'unlawfully' does not help out, because this is merely a conclusion. While, under certain circumstances, a device need not be set forth in the indictment, yet when, in point of fact, it is set forth, the court can determine whether such device is of a character to constitute or help constitute the crime charged. Of course it is plain that what is sought to be shown is that there was an agreement or understanding by which demurrage should not be collected; but these indictments do not set forth an agreement, but are drawn in such a way as to amount merely to charging that the railroad has not collected certain accrued and proper charges and that the shipper has not paid them. The demurrer to each of these indictments is sustained."

**President's consent to laying embargo.**—An indictment for a violation of this section in obtaining a discriminatory permit during an embargo laid by the railroad while under federal control, which alleges that the Director General of Railroads consented to the embargo, is sufficient in its averment of the authority to declare the embargo. *U. S. v. Metropolitan Lumber Co.*, (D. C. N. J. 1918) 254 Fed. 335. The court said: "It is also urged that the railroad officials were without authority to lay the embargo, because the railroad had passed under the control of the President, and that the Pennsylvania Railroad was thereafter, as a corporate entity, powerless to act either in respect to laying an embargo or in granting discriminations or concessions. Hence it is argued that the indictments are defective, because they allege that the discriminations were received from the 'Pennsylvania Railroad,' and because the embargo was laid by it, notwithstanding that they also allege that the embargo was authorized by the Director General. It was, of course, intended by Congress that the President should, in the performance of the duties imposed upon him by the Act of August 29, 1917, act through agents. In the proclamation of December 26, 1917, he provided that the Director General of Railroads should perform the duties imposed upon him (which were the duties imposed upon the President, after he had assumed control) 'so long and to such extent as he shall determine, through the boards of directors, receivers, officers and employees of said systems of transportation.' The embargo, therefore, was laid through the agency which the President had created, and the discriminations or concessions were given or granted by those charged by him with the conducting of the Pennsylvania Railroad system of transportation, and that is what I construe the indictments to charge. They are entitled to receive a fair and reasonable construction."

**Vol. IV, p. 573, sec. 1.** [First ed., 1914 Supp., p. 203.]

Consent of the station agent makes it lawful for the consignee to break the seals of a

car. *Chicago, etc., R. Co. v. Gage*, (Ark. 1918) 206 S. W. 141.

**Receiving stolen goods—Retaining character as stolen goods.**—In *Copertino v. U. S.*, (C. C. A. 3d Cir. 1919) 256 Fed. 519, it appeared that property stolen while in transit was found by a railroad detective who secreted himself near by to watch and who arrested the accused when he came about an hour later to remove it. It was held that the discovery by the detective and his subsequent acts did not reinvest the carrier with possession of the stolen goods.

**Constructive possession of goods stolen while in the course of interstate commerce** is sufficient to justify a conviction for a violation of this section. Thus, where silk stolen from an express company while in interstate commerce was offered for sale to a saloon keeper by employees of the company, and he directed them to drive to a certain place and throw it off their wagon, which they did on signal from the accused who had preceded them, it was held that the saloon keeper's constructive possession of the goods through his agents was sufficient to justify a conviction under this section. *U. S. v. Le Fanti*, (D. C. N. J. 1919) 255 Fed. 210.

**Possession by thief.**—One who stole the goods found in his possession may be convicted of receiving and having them in possession. *U. S. v. Sullivan*, (E. D. Pa. 1918) 250 Fed. 632.

**Belief that goods were either embezzled or stolen** is sufficient to support a conviction for receiving the goods in violation of this section where the proof demonstrates that they were actually stolen as distinguished from embezzled. *U. S. v. Le Fanti*, (D. C. N. J. 1919) 255 Fed. 210.

**Former conviction in state court.**—In *U. S. v. Porria*, (W. D. Wash. 1918) 255 Fed. 172, the facts and holding were stated as follows:

"Count 1 charges larceny of property moving in interstate commerce, and count 2 with receiving property stolen while moving in interstate commerce. The conviction in the state court was upon the charge of—'did . . . receive and aid in concealing and withholding . . . the same property.'

"The protection intended is against second jeopardy for the same offense. Do the charges in the indictment require different or additional proof to that required in the state court? Is this charge the same in law and in fact? Consideration of the indictment and consideration of the charge and judgment of conviction in the state court bring the inevitable conclusion that the same character and degree of proof will be necessary to sustain count 2 of the indictment as was necessary to sustain the conviction in the state court. The same may not be said as to count 1, where a felonious taking, stealing and carrying away must be established. Every issue here presented was determined by the Supreme Court in *Gavieres v. United States*, 220 U. S. 338, 31 Sup. Ct. 421, 55 L. Ed. 489."

**Indictment.**—In *Greenberg v. U. S.* (C. C. A. 7th Cir. 1918) 253 Fed. 728, 165 C. C. A. 322, the indictment was set out as follows:

Par.

- 1 in the county of St. Clair, in the state of Illinois, in the Eastern District aforesaid and within the jurisdiction of said court,
- 2 did unlawfully and feloniously break the seal of a certain railroad car then and there bearing the name and number to wit: "Southern 38005,"
- 3 which said car then and there contained an interstate shipment of freight, to wit: a large quantity of cigarettes,
- 4 then and there consigned and in transit from Winston-Salem, in the state of North Carolina, to Paris, and Peoria, in the state of Illinois, and Bagnell, Saint Louis, and Kansas City, in the state of Missouri,
- 5 which said railroad car was then and there in the possession of the Southern Railway Company, a corporation and common carrier then and there being,
- 6 with the unlawful and felonious intent then and there in them, the said [here naming all the defendants] and each of them, to then and there commit larceny in said car.

Holding it to be sufficient, the court said: "The attack upon the sufficiency of the indictment to set forth a crime arises out of the use of the word 'there' in the fifth paragraph quoted above, it being plaintiff's contention that this word refers to Kansas City, Mo. In other words, it is claimed that the government charged the plaintiffs in error with having stolen a large quantity of cigarettes from a box car in Kansas City, Mo. As we construe this count and the others similarly worded, so far as the use of the word 'there' is concerned, we unhesitatingly conclude that the government charged the plaintiffs in error with unlawfully breaking the seal of a box car located in the county of St. Clair, state of Illinois; that paragraphs 3 and 5 refer back to paragraphs 1 and 2, and contain descriptive clauses modifying the car referred to in paragraph 2. So construed, the indictment is sufficient."

**Evidence.—Admissibility.**—Evidence that the accused had received similar stolen goods from the same persons on a previous occasion, is admissible in a prosecution under this section for receiving stolen goods. *U. S. v. Le Fanti*, (D. C. N. J. 1919) 255 Fed. 210.

**Sufficiency.**—In *Greenburg v. U. S.* (C. C. A. 7th Cir. 1918) 253 Fed. 728, 165 C. C. A. 322, the evidence was held to be sufficient, the facts being stated as follows:

"Plaintiffs in error did not testify in their own behalf. The testimony introduced by the government clearly justified the jury in finding: That there was a shipment of cigarettes of the Camel brand from North Carolina to Peoria, Ill.; that the car containing such

shipment arrived in East St. Louis on June 9, 1917, seal intact, was there duly checked and found undisturbed; that such car remained in East St. Louis until June 16, 1917, when a new check was made, disclosing a cut seal and a shortage of some 32 cases of cigarettes; that on the night of June 9th or 10th, plaintiffs in error, who made a practice of breaking into box cars and stealing therefrom, selling the loot, and dividing the spoils, broke into several box cars in the yards wherein the car in question was located, and took therefrom many cases of cigarettes, also of the Camel brand, which were later sold to a retailer. It further appears from the record that this car seal was identified as R J R — 6, while the witness who testified against his co-conspirators described the seal of the car that was entered as being R J — 6. This discrepancy in the identification of the seal hardly justifies the argument of the counsel that the testimony affirmatively and conclusively establishes the innocence of his clients. The similarity in the identification marks suggests a corroboration of the witness's other testimony rather than a negation thereof. Taken altogether, the evidence presented a jury question."

In *Copertino v. U. S.* (C. C. A. 3d Cir. 1919) 256 Fed. 519 it appeared that certain copper bars were stolen from a freight car, and placed in a cemetery adjacent to the track. The next morning the accused "entered the cemetery and immediately went to the place where the copper was located" and began to load it into an automobile. It was held that the circumstances were sufficient to show knowledge on the part of the accused that the property was stolen.

**Scope of cross-examination.**—In *Heard v. U. S.*, (C. C. A. 8th Cir. 1919) 255 Fed. 829, a prosecution for a violation of this section, the court said regarding the scope of cross-examinations: "The rule on this subject in the national courts is that the party in whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination, and a violation of this right is reversible error. If the cross-examiner would inquire of the witness concerning matters not opened on direct examination, he must call him in his own behalf. *Philadelphia & Trenton Railway Co. v. Stimpson*, 39 U. S. (14 Pet.) 448, 460, 10 L. Ed. 535; *Houghton v. Jones*, 1 Wall. 702, 706, 17 L. Ed. 503; *Resurrection Gold Mining Co. v. Fortune Gold Mining Co.*, 129 Fed. 668, 674, 64 C. C. A. 180, and cases there cited; *Illinois Central Railway Co. v. Nelson*, 212 Fed. 69, 74, 128 C. C. A. 525; *Harrold v. Territory of Oklahoma*, 169 Fed. 47, 52, 94 C. C. A. 415, 17 Ann. Cas. 868.

It is no answer to a refusal to permit a full cross-examination that the party against whom the witness is called might have made him his own witness, and might then have proved by him or by some other witness, or by some writing, the facts which the cross-examiner was entitled to draw from

the testimony of his adversary's witness. No one is bound to make his adversary's witness his own to prove facts which he is lawfully entitled to establish by the cross-examination of that witness. The testimony given by a witness on his cross-examination is the evidence of the party in whose behalf he is called and the cross-examiner has the right to bind his adversary by the truth elicited from his own witness. *Wilson v. Wagar*, 26 Mich. 457, 458; *Campau v. Dewey*, 9 Mich. 417, 418; *Chandler v. Allison*, 10 Mich. 460, 473; *New York Mine v. Negaunee Bank*, 39 Mich. 644, 660. A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error. It is only after the right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary. *Gilmer v. Higley*, 110 U. S. 47, 50, 3 Sup. Ct. 471, 28 L. ed. 62; *Resurrection Gold Mining Co. v. Fortune Gold Mining Co.*, 129 Fed. 668, 674-676, 64 C. C. A. 180, and cases there cited;

*Safford v. United States*, 233 Fed. 495, 501, 503, 147 C. C. A. 381."

**Repugnancy in verdict.**—"The contention that the verdict is repugnant for the reason that a conviction on count 8 is necessarily inconsistent with a conviction on counts 5, 6, and 7, must fail for want of support in fact. Count 5 charges plaintiffs in error with breaking the seal of a box car; count 6 charges these same parties with entering the box car with intent to steal; while count 7 charges them with having stolen cigarettes from the box car. Count 8, which it is claimed is inconsistent with the other three, charges plaintiffs in error with having in their possession a large quantity of cigarettes. It is quite apparent to us that count 8 is in no way inconsistent with either count 5 or count 6, and it is therefore not even necessary to consider the asserted repugnancy between counts 8 and 7. There being two perfectly good counts, either one of which is sufficient to support the sentence, this assignment of error must be overruled." *Greenburg v. U. S.*, (C. C. A. 7th Cir. 1918) 253 Fed. 728, 165 C. C. A. 322.

## INTOXICATING LIQUORS

The Eighteenth Amendment to the Federal Constitution supersedes the statutes annotated in this title. For page where Amendment is set out, see Index.

**Vol. IV, p. 593.** [*Shipment of liquors, etc.*] [First ed., 1914 Supp., p. 208.]

II. Constitutionality.

III. Purpose of statute.

V. State laws.

1. In general.

2. Validity, scope and effect of state laws.

VI. Duties and liabilities of common carriers.

II. CONSTITUTIONALITY (p. 594)

**Act sustained.**—The Webb-Kenyon law is valid. *Ex p. Pratt*, (W. Va. 1918) 97 S. E. 301.

III. PURPOSE OF STATUTE (p. 596)

To the same effect as original annotation, see *U. S. v. Lazaro*, (W. D. Wash. 1918) 255 Fed. 237.

V. STATE LAWS

1. In General (p. 600)

To the same effect as the "compare" decision in the third paragraph of the original annotation, see *Stajcar v. Dickinson*, (Ia. 1918) 169 N. W. 756, wherein the court said: "The Supreme Court of the United States, in *Rhodes v. Iowa*, (1898) 170 U. S. 412, 18 S. Ct. 664, 42 U. S. (L. ed.) 1088, held section 2419 unconstitutional. Although non-enforceable, it remained a part of the statute, and by the enactment of the so-called Webb-

Kenyon Act . . . became operative and enforceable the same as though it had not previously been declared unconstitutional or had been enacted by the legislature subsequent to the passage of the law of Congress. *State v. United States Express Co.*, (1914) 164 Ia. 112, 145 N. W. 451; *Miller Brewing Co. v. Stevens*, (1897) 102 Ia. 60, 71 N. W. 186."

Since the Webb-Kenyon Act divests interstate shipments of intoxicating liquor of their immunity from state regulation, a state statute prohibiting the importation of liquor is valid. *State v. Frazee*, (W. Va. 1918) 97 S. E. 604.

The Act is not inconsistent with and does not supersede a state statute prohibiting the bringing of intoxicants into the state. *Ex p. Pratt*, (W. Va. 1918) 97 S. E. 301.

Laws of Oklahoma are held to make the sale of intoxicants illegal, so that the Webb-Kenyon Act applies to shipments to that state. *Missouri, etc., R. Co. v. Danciger*, (C. C. A. 8th Cir. 1918) 248 Fed. 36, 160 C. C. A. 176.

2. *Validity, Scope and Effect of State Laws* (p. 600)

**When state law becomes operative.**—A shipment of liquors from one state to another through a third state although by automobile and consequently over public highways is not affected by the liquor laws of the third state,

as the shipment is an interstate one. *Moragne v. State*, (Ala. App. 1918) 78 So. 98.

A statute forbidding railroads to bring intoxicants into the state is valid since the federal Act removes the objection that it interferes with interstate commerce. *Gulf, etc., R. Co. v. State*, (Tex. 1919) 212 S. W. 845.

**Ordinances.**—Shipments sought to be forbidden by an ordinance, but not in violation of any law of the state, are not prohibited by this Act. *West Jersey, etc., R. Co. v. Millville*, (1918) 91 N. J. L. 572, 103 Atl. 245.

**Liquors passing through state.**—In *Moragne v. State*, (Ala. 1917) 77 So. 322, L. R. A. 1918 E. 948, it was held that the state prohibition statutes as extended by the Webb-Kenyon Act were inapplicable to the transportation of intoxicating liquors through Alabama in transit from Georgia to Florida, and that if such statutes were construed to prohibit the transportation of intoxicating liquors in transit from Georgia to Florida through Alabama they would be unconstitutional.

#### VI. DUTIES AND LIABILITIES OF COMMON CARRIERS (p. 601)

**Liability for unlawful delivery.**—Under the Act a common carrier has no right to transport and deliver intoxicating liquors into any state in contravention of its local laws. *Kirksville v. Warden*, (1918) 276 Mo. 105, 207 S. W. 66.

**Carriers cannot be compelled to accept illegal shipment.** *Missouri, etc., R. Co. v. Danciger*, (C. C. A. 8th Cir. 1918) 248 Fed. 36, 160 C. C. A. 176.

#### 1918 Supp., p. 394, sec. 5.

**Constitutionality.**—This section is constitutional. *U. S. v. James*, (E. D. Tex. 1918) 256 Fed. 102.

**Federal cognizance of state prohibition laws** is given by this amendment, which also fixes a penalty for violation. *U. S. v. Lazaro*, (W. D. Wash. 1918) 255 Fed. 237.

The act is highly penal and is to be strictly construed, and in order to bring a case within its purview it must come within both the spirit and the letter of the Act. "There are no such things as constructive crimes." *Sickel v. Com.*, (Va. 1919) 99 S. E. 678.

**Effect on state laws.**—This section does not supersede or abrogate a state statute forbidding the bringing of liquor into the state. *Ex p. Pratt*, (W. Va. 1918) 97 S. E. 301.

See to the same effect *Sickel v. Com.*, (Va. 1919) 97 S. E. 783; *New Orleans, etc., R. Co. v. Hanna*, (1918) 118 Miss. 40, 78 So. 953.

**Necessity of state-wide prohibition.**—This section does not apply unless the state, into which intoxicating liquors are transported, shall have prohibited their manufacture or sale throughout the entire state. *U. S. v. Collins* (W. D. La. 1919) 254 Fed. 869.

**Necessity of using instrumentality of interstate commerce.**—If the owner of liquor brings it into another state in violation of the law thereof but uses no instrumentality of interstate commerce and intends to use the liquor for his personal purposes he does not violate the federal Act. *Sickel v. Com.*, (Va. 1919) 99 S. E. 678.

**"Manufacture or sale."**—This section applies to the transportation in interstate commerce of intoxicating liquors into a state where either their manufacture or sale is prohibited, the word "or" not being construed conjunctively. *U. S. v. Collins*, (W. D. La. 1919) 254 Fed. 869.

**Transportation "into" state.**—The prohibition of the Reed amendment against transporting intoxicating liquor in interstate commerce "into" any state or territory the laws of which prohibit the manufacture and sale of intoxicating liquors for beverage purposes, does not include the movement through a dry state as a mere incident of the transportation to another state, whether such transportation be by personal carriage or by common carrier. *U. S. v. Gudger*, (1919) 249 U. S. 373, 39 S. Ct. 323, 63 U. S. (L. ed.) —.

Transportation of intoxicating liquors in order to be in violation of this section must be "into" a state the laws of which prohibit their manufacture or sale for beverage purposes. "There must be a transportation from a point without the state to a point within the state." *U. S. v. Collins*, (W. D. La. 1919) 254 Fed. 869.

**Transportation of liquor on the person for personal use.**—This section applies to the transportation of liquor on the person for personal use, and as so construed is constitutional, and it is immaterial that the state into which it is carried permits the introduction of liquor for personal use in limited quantities. *U. S. v. Hill*, (1919) 248 U. S. 420, 39 S. Ct. 143, 63 U. S. (L. ed.) —.

**Transportation of intoxicating liquors by automobile** from one state to another is transportation "in interstate commerce" within the meaning of this section. *Ex p. Westbrook*, (S. D. Fla. 1918) 250 Fed. 636.

**Forfeiture of automobile.**—A violation of this section by transporting liquor by automobile into a state where its manufacture or sale is prohibited, does not render the automobile liable to forfeiture under Act of March 2, 1917, ch. 146, for such Act relates only to Indian affairs and to the introduction of liquor into Indian country. *U. S. v. One Cadillac Eight Automobile*, (M. D. Tenn. 1918) 255 Fed. 175.

**Sufficiency of indictments.**—See *Williams v. Boswell*, (C. C. A. 5th Cir. 1919) 255 Fed. 889; *Sickel v. Com.*, (Va. 1919) 99 S. E. 678.

**Evidence.**—In *Malcolm v. U. S.*, (C. C. A. 4th Cir. 1918) 256 Fed. 363, it was held that, in a prosecution for a violation of this section in transporting liquor into a prohibition state, evidence of a prior trip

made between the same places and by the same parties and as part of the same scheme, was admissible.

**Variance.**—A variance between the indict-

ment and proof regarding the place from which the liquor was transported, is not fatal. *Malcolm v. U. S.*, (C. C. A. 4th Cir. 1918) 26 Fed. 363.

## JUDGMENTS

**Vol. IV, p. 604, sec. 966.** [First ed., vol. IV, p. 2.]

**Judgments in criminal cases.**—This section applies only to judgments in civil cases,

and hence the United States is not entitled hereunder to interest on a judgment imposed as a fine for the violation of a criminal statute. *U. S. v. Jacob Schmidt Brewing Co.*, (D. C. N. D. 1918) 254 Fed. 714.

## JUDICIAL OFFICERS

**Vol. IV, p. 678, sec. 829.** [First ed., vol. IV, p. 107.]

### XI. KEEPING BOATS, VESSELS OR OTHER PROPERTY (p. 685)

**Agreement as to fees.**—Since a marshal's fee for keeping an attached vessel is fixed by this section at \$2.50 per day, no agreement is valid by which he may charge more than that sum. *The Neptune*, (C. C. A. 2d Cir. 1918) 252 Fed. 129, 164 C. C. A. 241.

**Charge for raising sunken vessel.**—The fee allowed a marshal by this section for keeping attached vessels covers only the cost of the custody proper of the vessel, and if it sinks without his fault, a charge for raising and beaching it is proper. *The Neptune*, (C. C. A. 2d Cir. 1918) 252 Fed. 129, 164 C. C. A. 241.

**Inclusion of poundage in bill of costs.**—The clerk should include in the libellant's bill of costs the marshal's poundage, calculated at the lesser rate allowed under subdivision 15 of this section. *The Eros*, (C. C. A. 2d Cir. 1918) 251 Fed. 45, 163 C. C. A. 295.

**Vol. IV, p. 707, sec. 844.** [First ed., vol. IV, p. 125.]

**Interest moneys accruing on money collected by a clerk for official services rendered, and held by him pending his semi-annual return, do not constitute emoluments of the clerk's office to be accounted for to the United States.** *U. S. v. MacMillan*, (C. C. A. 7th Cir. 1917) 251 Fed. 55, 163 C. C. A. 305.

## JUDICIARY

**Vol. IV, p. 829, Jud. Code, sec. 17.** [First ed., 1914 Supp., p. 136.]

**Orders by judge while without district.**—A district judge designated under this section to hold court in an adjacent district may make an order while without such district directing the drawing of a panel of petit jurors, for the order is one which may be made at the chambers of the judge, and in such case "it is not necessary that it be made within the territorial limits of the district in which the order is to be effective, if it is made where the judge at the time is performing the duties of his office, as the judge's chambers are considered to be where he is, and authorized to be, engaged in performing his judicial duties." *Appar v. U. S.*, (C. C. A. 5th Cir. 1919) 255 Fed. 16, 166 C. C. A. 344.

**Vol. IV, p. 832, Jud. Code, sec. 21.** [First ed., 1914 Supp., p. 137.]

**A territorial court is not within the purview of this section, which is applicable only to the district courts of the United States and does not extend to the United States District Court for Alaska.** *Tjosevig v. U. S.*, (C. C. A. 9th Cir. 1919) 255 Fed. 5, 166 C. C. A. 333.

**Discrediting judge by collateral evidence.**—Where no application has been made under this section by a defendant for the transfer of a case to another judge, he cannot introduce evidence of a collateral nature for the purpose of discrediting the judge. *Wierse v. U. S.*, (C. C. A. 4th Cir. 1918) 252 Fed. 435, 164 C. C. A. 359.



**Time of filing affidavit.**—In *Shea v. U. S.*, (C. C. A. 6th Cir. 1918) 251 Fed. 433, 163 C. C. A. 451, it appeared that the opinion of the Circuit Court of Appeals on the first review of the case was handed down on October 13, 1916. The mandate was received below November 18th following. The then current term of the District Court began October 31st, and in due course the case was assigned for trial December 4th following, or as soon thereafter as it could be taken up. On the date last named, on application of plaintiff in error that the trial be passed for a few weeks, the case was specially set for trial on Monday, January 8, 1917. On Saturday, January 6th, when the jurors were under notice, and witnesses for the government at distant places had been subpoenaed to attend on the following Monday, an affidavit of plaintiff in error, verified on information and belief, but containing formally sufficient averments of the judge's disqualification, was tendered for filing and the tender refused. The certificate of counsel was made by an attorney who had not theretofore appeared in the case. The only reason given for failing to file the affidavit sooner was that the mandate of the Circuit Court of Appeals was not filed in the District Court until after the current term had begun. It was held that the affidavit was filed too late, the court saying: "Assuming, however, for the purposes of this case, that it could not have been filed before the mandate went down, it clearly could and should have been filed at the nearest available time thereafter. The delay in filing, after the mandate issued was in no way explained or accounted for. There is no claim of ignorance of the actual filing of the mandate, or of the announcement of this court's decision more than a month previously. Counsel's appearance had not been entered at the time the affidavit was tendered for filing. Appearance was entered later in the day, but was withdrawn still later in the same day, but after the denial of leave to file affidavit. We do not pass upon the sufficiency of the certificate, nor (though intimating no opinion to the contrary) whether the affidavit in question, made, as it was, on information and belief, was technically sufficient under the statute. We rest our affirmance of the action of the district judge upon the ground that the affidavit of disqualification was not tendered in due season, and that the circumstances were such as to justify belief that the affidavit was purposely held back, and its use on the eve of trial resorted to for the purpose of securing a postponement. The better practice would have been to permit the affidavit to be filed, and then strike it from the file, thus preserving a more complete record. But no prejudice resulted from the specific practice followed."

**Vol. IV, p. 842, Jud. Code, sec. 24, par. first. [First ed., 1912 Supp., p. 139.]**

- I. Jurisdiction in general.
  1. Definition and nature.
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- II. Suits of civil nature at common law or equity.
  2. "Suits."
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- VII. Amount in controversy.
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- VIII. Suits arising under constitution, laws or treaties.
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    - h. Suit by state.
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  2. Pleading federal question.
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- IX. Suits arising under constitution.
  2. Municipal ordinances.
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  3. Impairment of contract obligation.
  5. Violation of due process clause.
  10. Taxation of federal bonds.
- X. Suits arising under laws of United States.
  3. Where state law is real determinant.
  4. Suit by or against federal corporation.
    - c. Other federal corporations.
  24. Suit involving federal mining laws.
- XII. Diverse citizenship.
  1. In general.
  2. Citizen of state.
  7. Unincorporated association as citizen.

10. Nature of suit.
11. Several parties plaintiff or defendant.
12. Arrangement of parties as to adverse interest.
15. Indispensable parties.
18. Interveners and substituted parties.
19. Waiver as to citizenship.
20. Pleading citizenship.

#### XVI. Suits by assignees.

2. Construction.
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7. Applicability.
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#### XVII. Service of process.

#### XVIII. Ancillary proceedings.

1. Meaning of term.
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3. Particular proceedings and matters.
  - b. Cross bills.
  - e. Enjoining pending actions.
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  - g. Judgments and decrees.
  - j. Receivers.
  - k. Miscellaneous matters.

### I. JURISDICTION IN GENERAL.

#### 1. Definition and Nature (p. 845)

The burden of proving lack of jurisdiction falls on the defendant where the plaintiff in his declaration has alleged all the facts essential to federal jurisdiction. *Bjornquist v. Boston, etc., R. Co.*, (C. C. A. 1st Cir. 1918) 250 Fed. 929, 163 C. C. A. 179.

#### 2. Judicial Power Granted by Constitution (p. 846)

A District Court's jurisdiction is the creature of the acts of Congress enacted in pursuance of the Constitution, and apart from the powers inherent in a lawfully constituted judicial tribunal, has no jurisdiction other than that legislatively conferred upon it. *Venner v. Pennsylvania Steel Co.*, (D. C. N. J. 1918) 250 Fed. 292.

#### 5. Necessity for Pleading Jurisdiction (p. 847)

The ground of jurisdiction in the District Court is the statement of the suing party of his cause of suit, and there must be substance in it, not mere verbal assertion or the anticipation of defenses. *Butte, etc., Copper Co. v. Clark-Montana Realty Co.*, (1919) 249 U. S. 12, 39 S. Ct. 231, 63 U. S. (L. ed.) —.

#### 8. Effect of State Legislation (p. 848)

**Diversity of citizenship.**—Where a suit is brought in a District Court by a resident of the district against a foreign corporation on the ground of diversity of citizenship, a state rule of procedure permitting the bringing in of additional defendants may not be invoked for the purpose of enlarging the court's juris-

diction and impleading thereunder a municipality of the state. *Devost v. Twin State Gas, etc., Co.*, (C. C. A. 1st Cir. 1918) 250 Fed. 349, 162 C. C. A. 419.

### II. SUITS OF CIVIL NATURE AT COMMON LAW OR EQUITY

#### 2. "Suits" (p. 850)

**Probate proceedings.**—Proceedings in a probate court to probate a will are not "suits" within the meaning of this section. *Thompson v. Nichols*, (D. C. Me. 1919) 254 Fed. 973.

#### 4. At Law and Equity

##### c. "In equity" (p. 853)

**Partition of land.**—A federal court of equity has jurisdiction to entertain suits for the partition of land where diversity of citizenship exists. *Hastings v. Douglass*, (N. D. W. Va. 1918) 249 Fed. 378.

#### 6. Administration or Probate (p. 856)

**Administration.**—To same effect as first paragraph of original annotation, see *Hastings v. Douglass*, (N. D. W. Va. 1918) 249 Fed. 378.

Although federal courts will not interfere in the administration of estates of decedents, where it is necessary for the court, through its officers, to lay its hands in any way upon the property, or interfere with the actual administration of the estate, yet where a case is made inter partes, the necessary diversity of citizenship and the jurisdictional amount existing, a federal court can hear a case looking to the determination of the rights of the plaintiff in and to property of a decedent's estate, without in any way interfering with the possession of the property or the management of the estate. *Swann v. Austell*, (N. D. Ga. 1918) 253 Fed. 807.

**Probate.**—To same effect as original annotations, see *Thompson v. Nichols*, (D. C. Me. 1919) 254 Fed. 973.

**Establishment of claim.**—A suit in equity by the United States to subject to a judgment land which has descended to the heirs of the judgment debtor, is within the jurisdiction of a federal District Court, where it is conceded that the administrator has no personal assets and it is necessary to bring in the decedent's heirs and other parties, such land by the provisions of a state statute not being subject to sale on execution. *U. S. v. Minor*, (C. C. A. 4th Cir. 1918) 254 Fed. 57, 165 C. C. A. 467.

### V. SUITS AFFECTING LANDS UNDER GRANTS FROM DIFFERENT STATES (p. 862)

One who claims title to lands under a grant from one state as land situated in that state, may sue to recover it from citizens of another state who claim under a grant from that other state, in a federal court of the first state, and have the title finally adjudicated by that court. *Ferguson v. Babcock Lumber, etc., Co.*, (C. C. A. 4th Cir. 1918) 252 Fed. 705, 164 C. C. A. 545.

## VII. AMOUNT IN CONTROVERSY

## 3. Cases Requiring Jurisdictional Amount

## b. Diverse Citizenship (p. 864)

To the same effect as the original annotation, see *New York Cent. R. Co. v. Mutual Orange Distributors*, (C. C. A. 8th Cir. 1918) 251 Fed. 230, 163 C. C. A. 386; *Fuerst v. Polasky*, (C. C. A. 2d Cir. 1918) 249 Fed. 447, 162 C. C. A. 13.

## 4. Necessity of Matter in Dispute Having Pecuniary Value

## c. Divorce and Alimony (p. 865)

To same effect as original annotation, see *Hastings v. Douglass*, (N. D. W. Va. 1918) 249 Fed. 378.

## 5. Ascertainment of Value of Matter in Dispute (p. 865)

In general.—“It is not the amount claimed in the prayer for relief which determines the jurisdiction of the court, if the unmistakable fact and legal certainty be that the plaintiff could not have had any reasonable expectation that she could recover, exclusive of interest and costs, an amount within the jurisdiction of the court. In such a case it is the duty of the court to dismiss it for want of jurisdiction, although the ad damnum clause demands judgment for a sum sufficient to confer jurisdiction on the court.” *New York Life Ins. Co. v. Johnson*, (C. C. A. 8th Cir. 1919) 255 Fed. 958.

**Injunction.—Protection of claimed property right.**—In a suit to restrain the defendant from indulging in unfair competition, where there is proof that the plaintiff's property right, sought to be protected, exceeds the jurisdictional amount, a federal court has jurisdiction although the damages recovered are less than that amount. *Ury v. Mazer Cigar Mfg. Co.*, (C. C. A. 8th Cir. 1918) 253 Fed. 551, 165 C. C. A. 221.

## 6. Aggregate of Claims and Joinder (p. 872)

**Several claims for fraudulent sales of stock.**—A number of suits, each below the jurisdictional amount, against the same defendant for fraudulent sales of stock cannot be joined so as to aggregate the jurisdictional amount and give a federal court jurisdiction to restrain the complainants on the ground of a multiplicity of suits. *Robinson v. Wemmer*, (N. D. Ohio 1918) 253 Fed. 790.

**Assignment of claims.**—A creditor who acquires by absolute assignment other claims aggregating with his own over \$3,000 may sue in the federal court if diversity of citizenship exists. *Kentucky Wagon Mfg. Co. v. Jones, etc., Mfg. Co.*, (C. C. A. 5th Cir. 1918) 248 Fed. 272, 160 C. C. A. 350.

## 7. Interest and Costs (p. 876)

In a suit by a purchaser of state tax certificates to enjoin a county treasurer from issuing redemption certificates without including interest and costs which had accrued

to the date of the purchase, such interest and costs are not within the meaning of those terms as used in this section, where they are not incidental to the amount in controversy but are one of the main items in making up the amount. *Glen Invest. Co. v. Romero*, (C. C. A. 8th Cir. 1918) 254 Fed. 239, 165 C. C. A. 527.

In a tort action in which it was alleged that the plaintiff was damaged by the purchase of worthless stock, the court said: “The action was one of tort, and the jury might have allowed her an annual percentage, not as collateral interest, but as an element in giving her entire compensation for her loss. Damages of that kind, although computed at a percentage rate and equivalent to contract interest, would not be that ‘interest’ which the jurisdictional statute (then section 1 of Act of March 3, 1887; now section 24, Judicial Code) says must be excluded. *Brown v. Webster*, 156 U. S. 328, 329, 15 Sup. Ct. 377, 39 L. Ed. 440. With ‘interest’ thus defined and damages thus estimated, the damages might have exceeded \$2,000 when the suit was commenced.” *Chesbrough v. Woodworth*, (C. C. A. 6th Cir. 1918) 251 Fed. 881, 164 C. C. A. 97.

In an action in assumpsit for failure to perform a contract, interest on the amount of the loss by the defendant's breach of contract may be included as part of the damages claimed in determining whether the amount is sufficient to give the court jurisdiction. *Central Commercial Co. v. Jones-Dusenbury Co.*, (C. C. A. 7th Cir. 1918) 251 Fed. 13, 163 C. C. A. 263.

Where two specific and specified sums were alleged to be due the plaintiff, and were sued for and judgment therefor specifically demanded, “together with interest thereon from” the date when claimed to have become due the plaintiff, it was held that the demand for interest on the sums specifically named was a demand for “interest as such,” and not “an interest calculation as an instrumentality in arriving at the amount of damages to be awarded on the principal demand,” and therefore the amount of interest was not to be added to the principal demand to ascertain the amount in controversy. *A. H. Marshall Co. v. Buick Motor Co.*, (N. D. N. Y. 1918) 251 Fed. 685.

**Suit by beneficiary of life insurance policy.**—Even though there is diversity of citizenship of the parties, a District Court has no jurisdiction of a suit to recover \$3,000, with interest, brought by a beneficiary of a life insurance policy against the insurance company, where the policy entitles the beneficiary to that amount but makes no provision for the payment of interest, for in such case the interest is not a part of the principal sum but merely an incident to the recovery allowed as compensation for the withholding of the principal sum. *Vorhees v. Aetna L. Ins. Co.* (D. C. N. J. 1918) 250 Fed. 484. In distinguishing this case from that of *Continental Casualty Co. v. Spradlin*, in the original annotation, the court said: “The Cir-

cuit Court of Appeals for the Fourth Circuit followed *Brown v. Webster* in the case of *Continental Casualty Co. v. Spradlin*, supra. The suit in the latter case grew out of an insurance policy similar to the one involved in the case at bar. The company contracted to pay the beneficiary in said policy the sum of \$3,000 in case her son, R. D. Spradlin, should receive personal bodily injuries purely from accidental causes within a year from the date of issuance, which injuries, solely and independently of all other causes, resulted in his death. Such injuries were received and death resulted. The company refused to pay. There was no contract to pay interest in the policy. The plaintiff did not sue for the \$3,000, the amount due, 'the price' and interest thereon, but 'for breach of contract of assurance,' and laid 'her damages in \$3,000,' and demanded judgment for that sum. The court said: 'The action is in assumpsit for damages for failure to perform. The interest, therefore, was not a mere incident or accessory to the amount demanded, but constituted, together with the amount set out in the policy, aggregate damages for the breach.' This case stretches the principle of *Brown v. Webster* almost to breaking. In this case, so far as can be discovered from the opinion, there is no ground for the damages demanded, except the delayed payment, and such damages are adequately measured, as a general rule, by legal interest, which is called by some courts and writers 'moratory interest.' The form of the action, rather than the substance, seems to be the basis of jurisdiction in *Casualty Co. v. Spradlin*. There seems to be nothing but amount of the policy and 'moratory interest' constituting the elements of damage in this case, while in *Brown v. Webster* there was price, interest, eviction, and 'other things,' for all of which interest simply might be a very inadequate measure of damages. So far as the facts appear, demand might have been made for the amount of the policy, \$3,000, and interest thereon, in which case federal jurisdiction could not have been maintained. *Simmons v. Life Association*, supra. In the suit under consideration, the 'plaintiff as beneficiary demands \$3,000, with interest thereon.' Since the insurance policy upon which suit is based does not provide for interest, the plaintiff is in fact asking for 'moratory interest.'

#### 8. Pleading Amount by Plaintiff

##### a. Necessity and Sufficiency (p. 877)

**Sum demanded as controlling.**—The amount in dispute or matter in controversy which determines the jurisdiction of the District Court, in suits for the recovery of money only, is the amount demanded by the plaintiff in good faith. *Central Commercial Co. v. Jones-Dusenbury Co.*, (C. C. A. 7th Cir. 1918) 251 Fed. 13, 163 C. C. A. 263.

**Set-off.**—For the purposes of jurisdiction it has been held that the matter involved includes the demands of both the plaintiff

and defendant. *Central Commercial Co. v. Jones-Dusenbury Co.*, (C. C. A. 7th Cir. 1918) 251 Fed. 13, 163 C. C. A. 263.

#### VIII. SUITS ARISING UNDER CONSTITUTION, LAWS OR TREATIES

##### 1. In General

##### d. Jurisdiction Independent of Merits (p. 884)

The jurisdiction does not turn upon the validity of the claim set up, but upon the fact that there is a real and substantial controversy respecting a federal question. *Benedict v. New York*, (C. C. A. 2d Cir. 1917) 247 Fed. 758, 159 C. C. A. 616.

##### f. Citizenship Immaterial (p. 885)

Diversity of citizenship is immaterial and unnecessary where a federal question is pleaded in good faith. *Benedict v. New York*, (C. C. A. 2d Cir. 1917) 247 Fed. 758, 159 C. C. A. 616.

##### g. Equitable Jurisdiction (p. 886)

**Authority of state court to enjoin federal officer.**—A suit to restrain action by a federal officer which is asserted to be in excess of his powers, to the detriment of the rights and duties of the state authority, could be entertained by a state court, although that court may have been mistaken in its view that the acts complained of were not authorized by the laws of the United States, unless the contentions concerning the want of power were so unsubstantial and frivolous as to afford no basis for jurisdiction, and hence caused the suit to be from the beginning one against the United States. *Northern Pac. R. Co. v. North Dakota*, (1919) 250 U. S. 135, 39 S. Ct. 502, 63 U. S. (L. ed.) —.

**Enjoining enforcement of railway franchise ordinances.**—Substantial federal questions sufficient to sustain the original jurisdiction of a federal District Court are presented by a bill which seeks to enjoin the continued enforcement of street railway franchise ordinances fixing rates, on the ground that such rates, because of increased operating costs and decreased net revenues, due to war conditions and an increased wage scale fixed by the war labor board, are inadequate and confiscatory, and that to compel street railway operation at unremunerative rates is to take the property of the street railway company without due process of law. *Columbus, etc., Power Co. v. Columbus*, (1919) 249 U. S. 399, 39 S. Ct. 349, 63 U. S. (L. ed.) —, affirming (S. D. Ohio 1918) 253 Fed. 499.

##### h. Suit by State (p. 886)

**Recovery of taxes.**—A suit by a state against a railroad company to recover certain taxes imposed under the laws of the state is not one arising under the Constitution, laws or treaties so as to give a federal court jurisdiction. *Chicago, etc., R. Co. v. Nebraska*, (C. C. A. 8th Cir. 1918) 251 Fed. 279, 163 C. C. A. 435.

## k. Want of Jurisdiction Judicially Noticed (p. 887)

**Noticed sua motu.**—To the same effect as the original annotation, see *Chicago, etc., R. Co. v. Nebraska*, (C. C. A. 8th Cir. 1918) 251 Fed. 279, 163 C. C. A. 435.

It is the duty of the trial court on its motion to refrain from exercising jurisdiction in a case where no actual or colorable federal question is stated. *Columbus R., etc., Co. v. Columbus*, (S. D. Ohio 1918) 253 Fed. 499.

## 2. Pleading Federal Question

### a. Plaintiff Required to Show (p. 888)

**In general.**—Jurisdiction must be determined not upon the conclusion on the merits of the action, but upon consideration of the grounds upon which federal jurisdiction is invoked. *Flanders v. Coleman*, (1919) 250 U. S. 223, 39 S. Ct. 472, 63 U. S. (L. ed.) —, reversing on other grounds (S. D. Ga. 1918) 249 Fed. 757.

A bill to restrain the collection of a drainage tax under a state statute, which does not make any specific attack upon the statute but alleges that it deprives certain persons of their property without due process of law, sufficiently raises a federal question. *Everglades Drainage League v. Napoleon B. Broward Drainage Dist.*, (S. D. Fla. 1918) 253 Fed. 246.

## IX. SUITS ARISING UNDER CONSTITUTION

### 2. Municipal Ordinances

#### c. Violation of Due Process Clause (p. 914)

**Illustrations.**—Where it is alleged that the conditions of use of its streets imposed by municipal authorities upon a franchiseless and privately operated public utility, are so unfair and unreasonable as to amount to a deprivation of property without due process of law in violation of the Fourteenth Amendment, the District Court has jurisdiction. *Doherty v. Toledo Rys., etc., Co.*, (N. D. Ohio 1918) 254 Fed. 597.

#### 3. Impairment of Contract Obligation (p. 916)

**In general.**—“Even when the threatened act may be an impairment of a contract, or a deprivation of property without due process of law, still if the only means threatened to be used are resort to the courts or to legal proceedings, a case is not stated within the jurisdiction of a federal court.” *Columbus, etc., R. Co. v. Columbus*, (S. D. Ohio 1918) 253 Fed. 499.

#### 5. Violation of Due Process Clause (p. 918)

**Review of assessments.**—If a state by valid and constitutional statutes establishes a board of tax commissioners and vests it with the sole power to make assessments, and provides for a review of its assessment by certiorari and for full relief against overvaluation and inequality of assessment, a

federal court is without jurisdiction to review such an assessment, at least where the complainant has not exhausted his remedy under the state law. *Spencer v. Babylon R. Co.*, (C. C. A. 2d Cir. 1918) 250 Fed. 24, 162 C. C. A. 196.

#### 10. Taxation of Federal Bonds (p. 922)

##### Exemption of Liberty Bonds from taxation.

—A federal court has jurisdiction of a dispute as to the application of a federal statute exempting Liberty Bonds from taxation. *Iowa Loan, etc., Co. v. Fairweather*, (S. D. Ia. 1918) 252 Fed. 605.

## X. SUITS ARISING UNDER LAWS OF UNITED STATES

### 3. Where State Law is Real Determinant (p. 925)

#### Enforcement of fuel administrator's order.

—A federal court has jurisdiction to enjoin a mining company from disobeying an order of a state fuel administrator made under Act of August 10, 1917 (1918 Supp. Fed. Stat. Ann. 181) that it furnish coal to a public service corporation with which it has a contract which it refuses to perform. But it has no jurisdiction to settle conflicting claims as to the construction of the contract, there being no diversity of citizenship between the parties. *West Virginia Traction, etc., Co. v. Elm Grove Min. Co.*, (N. D. W. Va. 1918) 253 Fed. 772.

#### 4. Suit By or Against Federal Corporation

##### c. Other Federal Corporation (p. 925)

**Company engaged in performance of government contract.**—A company manufacturing war munitions from materials purchased and supplied to it by the government is acting under the authority of the laws of the United States to as full an extent as though it had been incorporated under federal laws, and a suit by it to enjoin a labor union from interfering with the performance of government work involves a federal question and is within the jurisdiction of the federal courts. *Wagner Electric Mfg. Co. v. District Lodge No. 9*, (E. D. Mo. 1918) 252 Fed. 597.

#### 24. Suit Involving Federal Mining Laws (p. 937)

**Construction and application involved.**—The jurisdiction of a District Court attaches where the statement of the suing party shows that the construction and application of statutes relating to mining claims are involved in the suit. *Butte, etc., Copper Co. v. Clark-Montana Realty Co.*, (1919) 249 U. S. 12, 39 S. Ct. 231, 63 U. S. (L. ed.) —, affirming (C. C. A. 9th Cir. 1918) 248 Fed. 609, 160 C. C. A. 509.

## XII. DIVERSE CITIZENSHIP

### 1. In General (p. 942)

To the same effect as the first paragraph of original annotation, see *Patterson v.*

Delaware, etc. Co., (C. C. A. 3d Cir. 1918) 251 Fed. 255, 163 C. C. A. 411.

**Lack of diversity as jurisdictional defect.**—Where diversity of citizenship is not established, the court may take notice of the defect on its own motion. *Wise v. Brotherhood of Locomotive Firemen, etc.*, (C. C. A. 8th Cir. 1918) 252 Fed. 961, 164 C. C. A. 469.

**Amendment of pleading as ousting jurisdiction.**—Where defendants, in an action in a District Court based on diverse citizenship, implead as a defendant a municipal corporation of the state of which the plaintiff is a citizen, an amendment by the plaintiff to his declaration alleging that the defendants are joint tortfeasors, ousts the jurisdiction of the court and renders it incapable of entering judgment on the merits in favor of either party. *Devost v. Twin State Gas, etc., Co.*, (C. C. A. 1st Cir. 1918) 250 Fed. 349, 162 C. C. A. 419.

## 2. Citizen of State (p. 942)

**What constitutes.**—The grant of jurisdiction to the federal courts by this section is not of controversies between citizens of the United States domiciled in different states, but of controversies between citizens of different states. This excludes a citizen of the United States who is a mere homeless wanderer and not a citizen of any state. *Pannill v. Roanoke Times Co.*, (W. D. Va. 1918) 252 Fed. 910, wherein it was said: "Beyond any doubt a question of domicile (in fact) is often determinative of the question of citizenship (*Morris v. Gilmer*, 129 U. S. 315, 328, 9 Sup. Ct. 289, 32 L. Ed. 690); but it is a very different thing to assert that a mere theoretical domicile, existing with intent never to return to it, is the same thing as citizenship. In the case before us the plaintiff at the institution of the suit did not reside in California, he had no place of abode there, and he intended never to return there. Assuredly it is very difficult to reconcile any theory of citizenship or any definition of the word 'citizen' with such facts. Citizenship implies membership in a political society, the relation of allegiance and protection, identification with the state, and a participation in its functions. While a temporary absence may suspend the relation between a state and its citizen, the latter's identification with the former remains because of his intention to return."

The term "citizen" as used in this section means a citizen of the United States residing permanently in a particular state. *Delaware, etc., R. Co. v. Petrowsky*, (C. C. A. 2d Cir. 1918) 250 Fed. 554, 162 C. C. A. 570.

**Test of citizenship.**—"Domicile is the test of citizenship for the purpose of the jurisdiction of the courts of the United States." *Bjornquist v. Boston, etc., R. Co.*, (C. C. A. 1st Cir. 1918) 250 Fed. 929, 163 C. C. A. 179.

**Domicile of minor.**—A minor, who has reached years of discretion and who has no

natural or statutory guardian, may establish a domicile wherever he desires for the purpose of federal jurisdiction. *Bjornquist v. Boston, etc., R. Co.*, (C. C. A. 1st Cir. 1918) 250 Fed. 929, 163 C. C. A. 179.

## 7. Unincorporated Association as Citizen (p. 949)

**Citizenship of members as determining jurisdiction.**—If the defendant is an unincorporated society, the citizenship of its members determines the jurisdiction of the federal court. *Wise v. Brotherhood of Locomotive Firemen, etc.*, (C. C. A. 8th Cir. 1918) 252 Fed. 961, 164 C. C. A. 469.

## 10. Nature of Suit (p. 951)

**Ancillary suit.**—A suit to enjoin the prosecution of an action at law in a federal court is so far ancillary to the original action that the federal court takes jurisdiction thereof without regard to diversity of citizenship. *Sherman Nat. Bank v. Shubert Theatrical Co.*, (C. C. A. 2d Cir. 1917) 247 Fed. 258, 159 C. C. A. 350.

## 11. Several Parties Plaintiff or Defendant (p. 952)

**In general.**—To same effect as original annotation, see *Rogers v. Chickamauga Trust Co.*, (C. C. A. 5th Cir. 1918) 253 Fed. 541, 165 C. C. A. 211.

**Joint promissory note.**—Where, in an action on a joint promissory note, both defendants appear and join in an answer objecting to the court's jurisdiction, on the ground that one of them and the plaintiff are residents of the same state, the plaintiff may not discontinue the action as to such defendant and deprive them of the right of making such objection. *Chase v. Lathrope*, (E. D. N. Y. 1918) 254 Fed. 713.

## 12. Arrangement of Parties as to Adverse Interest (p. 954)

**In general.**—To same effect as original annotation, see *Brown v. Denver Omnibus, etc., Co.*, (C. C. A. 8th Cir. 1918) 254 Fed. 560, 166 C. C. A. 118.

"By making persons who are necessary parties plaintiff defendants, jurisdiction is not conferred upon a federal court where, if they had been made plaintiffs, there would not have been the necessary diversity of citizenship. *Bland v. Fleeman*, (D. C.) 29 Fed. 669." *Lindauer v. Compania Palomas, etc.*, (C. C. A. 8th Cir. 1918) 247 Fed. 428, 159 C. C. A. 482.

**Suits by stockholder.**—Where stockholders sue the corporation and its president in a District Court to set aside a fraudulent transfer of property, the corporation may not be placed with the plaintiffs so as to defeat the jurisdiction of the court, after it has joined in an answer denying the fraud. *Cutting v. Woodward*, (C. C. A. 9th Cir. 1918) 255 Fed. 633.

**15. Indispensable Parties (p. 960)**

**Suit for accounting.**—Where a bill is amended by the plaintiff to bring in an indispensable party who is a citizen of the same state as the plaintiff the federal court thereby loses jurisdiction. *Patterson v. Delaware, etc., Co.*, (C. C. A. 3d Cir. 1918) 251 Fed. 255, 163 C. C. A. 411, wherein the court said: "The bill was amended on the plaintiffs' own motion, and not against their objection or under the compulsion of an order, so that the proceeding is to be judged in the form they have chosen. *Peninsular Iron Co. v. Stone*, 121 U. S. 631, 7 Sup. Ct. 1010, 30 L. Ed. 1020; *Merchants' Co. v. Ins. Co.*, 151 U. S. 384, 14 Sup. Ct. 367, 38 L. Ed. 195. Thus viewed, we cannot assent to the argument that the dispute should be treated as in substance between the plaintiffs and the company to which Coyne is merely an incidental party. On the contrary, he was an indispensable party (1 Fos. Fed. Prac. [5th Ed.], § 120), his rights are as directly involved as the rights of the company, and we do not see how the suit could have proceeded in his absence. He had not only bought the culm and paid for it, but was occupying the land and removing the culm, when the restraining order compelled him to forbear. If the plaintiffs' contention were sustained, he could remove no more, and must account for all he had taken, being remitted to his action against the company for such damages as he might be able to recover. Recognizing that he would of necessity be directly affected by an adverse decree, the plaintiffs properly made him a defendant; but they lost thereby the right to continue the action in a federal court."

**Suit to establish title in certain property.**—In *Harris, etc., Corp. v. Tarr*, (C. C. A. 9th Cir. 1918) 251 Fed. 570, 163 C. C. A. 564, it appeared that there was an agreement whereby the plaintiffs, with consent of certain of their creditors, continued in force previous assignments to the defendant of the leases of oil property mentioned in the agreement. There was a provision in the agreement for the appointment of a bank as the trustee of the parties, to disburse the receipts derived from the operation of the oil wells by the defendant until the creditors had been fully paid, and for the transfer of the possession of that property by the plaintiffs to the defendant after all the creditors had signed the agreement. It was held that the creditors and the bank were indispensable parties.

**Dismissal as to dispensable parties.**—Where the jurisdiction of a District Court is based on diverse citizenship of the plaintiff and principal defendant, the fact that another defendant is a citizen of the same state as the plaintiff will not divest the court of jurisdiction if such defendant is not an indispensable party. *Brown v. Denver Omnibus, etc., Co.*, (C. C. A. 8th Cir. 1918) 254 Fed. 560, 166 C. C. A. 118.

**18. Interveners and Substituted Parties (p. 963)**

Where a bill is filed by a deceased partner's executor against the surviving partners, who are citizens of another state, for the purpose of winding up the partnership and dividing alleged assets, and creditors intervene, the court has jurisdiction to adjudicate the amount of the claims and enter decrees in favor of the claimants against the executor and surviving partners, irrespective of the creditors' citizenship and although the alleged assets prove worthless. *Lackner v. McKechney*, (C. C. A. 7th Cir. 1918) 252 Fed. 403, 164 C. C. A. 327.

**19. Waiver as to Citizenship (p. 964)**

To same effect as first paragraph of original annotation, see *Primos Chemical Co. v. Fulton Steel Corp.*, (N. D. N. Y. 1918) 254 Fed. 454.

Diversity of citizenship, where jurisdiction is based on that ground, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed, and even if the parties consent that it may be waived. *Devost v. Twin State Gas, etc., Co.*, (C. C. A. 1st Cir. 1918) 250 Fed. 349, 162 C. C. A. 419.

**20. Pleading Citizenship (p. 964)**

**How issue raised.**—In *Parkerson v. Borst*, (C. C. A. 5th Cir. 1918) 251 Fed. 242, the court said: "In the view we have taken of the side of the court upon which the case was properly triable, the issue as to the citizenship of the plaintiff would have been better presented by a plea in abatement in the nature of a plea to the jurisdiction, as held in the case of *Hartog v. Memory*, 116 U. S. 588, 6 Sup. Ct. 521, 29 L. Ed. 725; upon which plea an issue could have been framed, which would have been triable by a jury. However, the defendant elected to present the question by way of a motion, addressed to the court and tried by him, with the consent of the defendant. This was equivalent to a waiver of defendant's right to a jury trial upon this issue and a consent that it be heard by the district judge without a jury. The district judge found, upon the facts submitted to him upon hearing of the motion to dismiss for want of jurisdiction, that the plaintiff was a citizen of Mississippi, and the finding is supported by tendencies of the evidence set out in the record. Giving to the finding the effect a verdict of a jury would have been entitled to if the issue had been so tried, we do not think the evidence was so clearly against the conclusion of the district judge as to warrant us in setting aside his conclusion, on the motion to dismiss for want of jurisdiction in the District Court as a federal court."

## XVI. SUITS BY ASSIGNEES

2. *Construction* (p. 974)

A suit by the nonresident assignee of a remainder interest upon the life tenant's bond, given to secure the payment of the remainder interests, is within the provision of this section governing suits by assignees, although there was no formal assignment of the bond, and such suit is therefore not justiciable in a federal District Court, where both of the defendants, who are the executor of the life tenant and the surety on the bond, are residents and citizens of the same state as was the deceased assignor remainderman. *Brainerd, etc., Quarry Co. v. Brice*, (1919) 250 U. S. 229, 39 S. Ct. 458, 63 U. S. (L. ed.) —, wherein the court said: "*Brown v. Fletcher*, (1915) 235 U. S. 589 [35 S. Ct. 154, 59 U. S. (L. ed.) 374], is an entirely different suit from the one now under consideration. In that action there was an assignment of an interest in a trust estate by the beneficiary, who was a resident and citizen of New York, to the complainants who were residents and citizens of Pennsylvania, and suit was brought in the District Court of the United States for the Southern District of New York, the defendants being residents and citizens of New York. It was held that the suit to recover this interest in a trust estate was not a suit by an assignee within the meaning of § 24 of the Judicial Code. That suit, this court held, was not a suit upon a chose in action, but was one to recover upon the conveyance of an alienable interest acquired from the owner in a trust estate. Such interests might be sued for in the federal courts when the requisite amount and diversity of citizenship exist. 235 U. S. 598, 599. But here the case is different, the suit was upon the bond, the right to recover arising from the assignment of the interest of Eugene Van Schaick in the fund in the hands of Henry Van Schaick. It was not a suit to recover the interest of Eugene Van Schaick in the estate because of the wrongful conversion thereof by Henry Van Schaick. To such a suit the surety company would not be a proper party. It was, as we have stated, an action upon a single cause of action against the executor of the principal and the surety upon the contract evidenced by the bond. The right to such action was derived by assignment from Eugene Van Schaick, a citizen and resident of New York, and, as he could not have sued in the federal court, his assignee, the plaintiff, could not by reason of § 24 of the Judicial Code."

4. "*Chose in Action*" (p. 975)

**Construction of term—Assignment of oil and gas lease.**—Where, under the law of the state in which the land is situated, an oil and gas lease grants a present vested interest in the premises to the lessee, a suit by an assignee of the lease for the protection of his interest thereunder is not a suit "on a chose of action" within the meaning of this

section, and the citizenship of his assignor is therefore immaterial. *Aggers v. Shaffer*, (C. C. A. 8th Cir. 1919) 256 Fed. 648, 168 C. C. A. 42.

7. *Applicability*

c. Application with Regard to Suit and Subject Matter (p. 983)

**Assignment of building contract.**—Where a contract for the construction of a courthouse provided for its assignment it was held that the amount earned by the assignee after the assignment was due primarily to the substitute contractor, and did not arise out of the assignment of a chose in action, and therefore was not within the prohibition of this subdivision. *Cullman County v. Vincennes Bridge Co.*, (C. C. A. 5th Cir. 1918) 251 Fed. 473, 163 C. C. A. 467.

## XVII. SERVICE OF PROCESS (p. 988)

**Service on foreign corporation.**—To same effect as first paragraph of original annotation, see *Golden, Belknap & Golden v. Connersville Wheel Co.*, (E. D. Mich. 1918) 252 Fed. 904.

## XVIII. ANCILLARY PROCEEDINGS

1. *Meaning of Term* (p. 989)

**Ancillary proceeding defined.**—To same effect as original annotation, see *Hume v. New York*, (C. C. A. 2d Cir. 1918) 255 Fed. 488, 166 C. C. A. 564.

2. *Jurisdiction in General* (p. 989)

**When ancillary relief may be had generally.**—To the same effect as original annotation, see *Pell v. McCabe*, (C. C. A. 2d Cir. 1919) 256 Fed. 512, 168 C. C. A. 18, *modifying and affirming* (S. D. N. Y. 1918) 254 Fed. 356.

"A suit in equity, dependent upon an original suit or action of which the federal court had jurisdiction, may be maintained in that court (1) to aid, enjoin, or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; (3) to enforce or adjudicate liens upon or claims to property in the custody of the court in the original suit; and (4) to enforce its decree or judgment in the original suit, to prevent the relitigation in other courts of the issues it has heard and adjudged in the original suit, and to protect the titles and rights acquired by purchasers under its decree, or judgment from attacks by suit or otherwise, based on the theory that its adjudications in the original suit were illegal and ineffective, and to accomplish these ends the court has the jurisdiction and authority to use its writs of injunction and its writs of assistance." *St. Louis-San Francisco R. Co. v. McElvain*, (E. D. Mo. 1918) 253 Fed. 123.

**Citizenship or amount or nature of controversy not controlling.**—To same effect as original annotation, see *Brown v. Crawford*, (D. C. Ore. 1918) 252 Fed. 248; *Pell v. McCabe*, (C. C. A. 2d Cir. 1919) 256 Fed. 512,



168 C. C. A. 18, *modifying and affirming* (S. D. N. Y. 1918) 254 Fed. 356.

In *Hume v. New York*, (C. C. A. 2d Cir. 1918) 255 Fed. 488, 166 C. C. A. 564, regarding the right to institute ancillary suits the court said: "The right to institute and maintain ancillary suits in the District Court in which the action was originally instituted, in aid of the objects of the receivership, is well settled. The original equity action resulting in the appointment of the receivers was between a citizen of New Jersey and a citizen of New York, and if the present action is ancillary to that suit it is controlled by the rule announced in the Supreme Court in *White v. Ewing*, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67. There it was said:

"As was observed by this court in *Porter v. Sabin*, 149 U. S. 473, 479 [13 Sup. Ct. 1008, 1010 (37 L. Ed. 815)]: "When a court exercising a jurisdiction in equity appoints a receiver to hold the property of a corporation that court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it." The Circuit Court obtained jurisdiction over the Cardiff Coal & Iron Company by the filing of the original creditors' bill by Bosworth, a citizen of Massachusetts, and by the appointment of a receiver, and any suit by or against such receiver, in the course of the winding up of such corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded as ancillary to the main suit, and as cognizable in the Circuit Court, regardless either of the citizenship of the parties, or of the amount in controversy."

"In a later case, *Pope v. Louisville, etc., Ry. Co.*, 173 U. S. 573, at page 577, 19 Sup. Ct. 500, at page 501 (43 L. Ed. 814), the Supreme Court again took occasion to say: "When an action or suit is commenced by a receiver appointed by a Circuit Court (now the District Court), to accomplish the ends sought and directed by the suit in which the appointment was made, such action or suit is regarded as ancillary so far as the jurisdiction of the Circuit Court as a court of the United States is concerned; and we have repeatedly held that jurisdiction of these subordinate actions or suits is to be attributed to the jurisdiction on which the main suit rested."

"In *Hollander v. Heaslip*, 222 Fed. 808, 137 C. C. A. 1, it was held that an ancillary bill would be sustained where the receiver in equity, administering the estate of an insolvent corporation, sought to recover against stockholders for liability against them for agreements to subscribe. Walker, J., said:

"We are not of opinion that the court was in error in overruling the abovementioned demurrer. The bill to which it was interposed was auxiliary to the original suit in which, by means of a receivership, the court

had acquired possession of the assets of the World Publishing Company, Limited, for the purpose of applying them to the payment of its debts. This enabled it to cause a debtor to that corporation who was within reach of its process to be brought into the original cause, to the end that his debt might be ascertained and payment coerced. It was for the court, in its discretion, to decide whether it would determine for itself all claims of the corporation whose estate it was administering, or would allow them to be litigated elsewhere. It was within its power to hear and determine all controversies regarding such claims, at least in so far as it would acquire jurisdiction of the persons of those who were parties to such controversies, though the questions thus collaterally involved were of a purely legal nature."

**Lack of jurisdiction in main controversy.**—If a District Court has no jurisdiction of a suit, a District Court in another district cannot exercise ancillary jurisdiction therein, and it is the duty of the latter court on its own motion to raise the question and decline to act where such want of jurisdiction is apparent. *Primos Chemical Co. v. Fulton Steel Corp.*, (N. D. N. Y. 1918) 254 Fed. 454.

### 3. Particular Proceedings and Matters

#### b. Cross Bills (p. 991)

In general.—To same effect as original annotation, see *Brown v. Crawford*, (D. C. Ore. 1918) 252 Fed. 248.

#### c. Enjoining Pending Action (p. 993)

In general.—Where in a suit in a federal court the defendant files a bill, the subpoena being served on the attorneys of the non-resident plaintiff, to enjoin the plaintiff from suing him in other jurisdictions in the same cause of action, the bill is ancillary to the original suit and falls with its dismissal. *Venner v. Graves*, (C. C. A. 2d Cir. 1919) 255 Fed. 686.

Where a composition offered by a bankrupt firm provides that all creditors assenting thereto shall be regarded as having released a third person, whose relation to the firm is not stated or determined, from liability for debts of the firm, an order confirming the composition is not an adjudication of the question of his liability, and a suit to enjoin an action brought against him in another jurisdiction on the ground of fraud and his partnership with the bankrupts, by creditors who filed no claim in the bankruptcy proceeding and who did not assent to the composition, is not ancillary to the bankruptcy proceeding. *Pell v. McCabe*, (C. C. A. 2d Cir. 1919) 256 Fed. 512, 168 C. C. A. 18, *modifying and affirming* (S. D. N. Y. 1918) 254 Fed. 356.

#### f. Intervention (p. 994)

Ancillary jurisdiction may be invoked by a stranger to the original suit, and will not fail

because new parties are brought in any more than a subsequent change in conditions arising pendente lite ousts federal jurisdiction after it has once attached. *Venner v. Pennsylvania Steel Co.*, (D. C. N. J. 1918) 250 Fed. 292.

g. Judgment and Decrees (p. 994)

**Cancellation of release of judgment.**—A suit brought to cancel a release of a judgment because of fraud, is ancillary to the suit in which the judgment was recovered and may be maintained in same court irrespective of the citizenship of the parties. *Ross v. Miller*, (C. C. A. 4th Cir. 1918) 252 Fed. 697, 164 C. C. A. 537.

j. Receivers (p. 997)

**Foreign jurisdiction.**—“Since the decision of this court in *Booth v. Clark*, 17 How. 322, it is the settled doctrine in federal jurisprudence that a chancery receiver has no authority to sue in the courts of a foreign jurisdiction to recover demands or property therein situated. The functions and authority of such receiver are confined to the jurisdiction in which he was appointed. The reasons for this rule were fully discussed in *Booth v. Clark*, and have been reiterated in later decisions of this court. *Hale v. Allinson*, 188 U. S. 56; *Great Western Mining Co. v. Harris*, 198 U. S. 561, 575, 577; *Keatley v. Furey*, 226 U. S. 399, 403. This practice has become general in the courts of the United States, and is a system well understood and followed. It permits an application for an ancillary receivership in a foreign jurisdiction where the local assets may be recovered and, if necessary, administered. The system established in *Booth v. Clark* has become the settled law of the federal courts, and if the powers of chancery receivers are to be enlarged in such wise as to give them authority to sue beyond the jurisdiction of the appointing court, such extension of authority must come from legislation and not from judicial action. *Great Western Mining Co. v. Harris*, *supra*, p. 577.” *Sterrett v. Cincinnati Second Nat. Bank*, (1918) 248 U. S. 73, 39 S. Ct. 27, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 6th Cir. 1917) 246 Fed. 753, 159 C. C. A. 55.

k. Miscellaneous Matters (p. 998)

**Supplemental bill.**—Where an original bill to restrain a corporation from selling its assets on the ground that it would violate the Sherman and Clayton Acts, does not make the proposed purchaser a defendant because it is a non-resident, a supplemental bill, filed after the consummation of the sale, asking the same relief, does not invoke the court's ancillary jurisdiction nor give it jurisdiction of the purchaser. *Venner v. Pennsylvania Steel Co.*, (D. C. N. J. 1918) 250 Fed. 292.

**Vol. IV, p. 1005, Jud. Code, sec. 24, par. third.** [First ed., 1912 Supp., p. 139.]

II. Nature and scope of jurisdiction.

1. In general.

IV. Saving of common law remedy.

VI. Waters and places.

VIII. Contracts within admiralty jurisdiction.

1. Shipbuilding contracts.

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IX. Foreign persons or property.

XIII. Maritime contract.

XX. Torts.

2. Locality of injury complained of.

3. Injuries by vessels.

5. Injuries to persons or structures on land.

II. NATURE AND SCOPE OF JURISDICTION

1. In General (p. 1006)

**In personam or in rem.**—“Neither in jurisdiction nor in the method of procedure are our admiralty courts dependent alone upon the theory of implied hypothecation; it being established that in a civil cause of maritime origin involving a personal responsibility the libellant may proceed *in personam* if the respondent is within reach of process. *The General Smith*, 4 Wheat. 438, 443; *Manro v. Almeida*, 10 Wheat. 473, 486; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 390; *Morewood v. Enequist*, 23 How. 491; *The Belfast*, 7 Wall. 624, 644; *The Kalorama*, 10 Wall. 204, 210; *The Sabine*, 101 U. S. 384, 386; *In re Louisville Underwriters*, 134 U. S. 488, 490; *Workman v. New York*, 179 U. S. 552, 573; *Ex p. Indiana Transp. Co.*, 244 U. S. 456; *North Pac. Steamship Co. v. Hall Bros. Marine P., etc., Co.*, (1919) 249 U. S. 119, 39 S. Ct. 221, 63 U. S. (L. ed.) —.

**Equitable powers.**—“Though courts of admiralty are not courts of equity, and may not be able to give affirmative relief in the case of contracts induced by preliminary fraudulent representations (*Williams v. Insurance Co.* [D. C.] 56 Fed. 159), still they do proceed upon equitable principles and may prevent a party from taking advantage of his own fraud in the contract itself. *Pew v. Laughlin* (D. C.) 3 Fed. 39; *The Hero* (D. C.) 6 Fed. 526, and *The Electron* (D. C.) 48 Fed. 689, are examples.” *Higgins v. Anglo-Algerian Steamship Co.*, (C. C. A. 2d Cir. 1918) 248 Fed. 356, 160 C. C. A. 396.

**Non-maritime subjects.**—The jurisdiction of a court of admiralty is confined to maritime subjects, and it cannot, after having obtained jurisdiction, dispose of non-maritime subjects, for the purpose of doing complete justice, after the manner of courts of equity. *The Ada*, (C. C. A. 2d Cir. 1918) 250 Fed. 194, 162 C. C. A. 330.

**American seaman on British vessel.**—The rights of an American seaman in the harbor of New York upon a British vessel can properly be adjudicated in a court of the United States according to the admiralty law, when this admiralty law is in exact accord with what his contract rights would be under the British statute. *The Vestris*, (E. D. N. Y. 1918) 252 Fed. 201.

#### IV. SAVING OF COMMON-LAW REMEDY (p. 1008)

**A stevedore injured while unloading a steamer at a wharf may sue in a state court where no remedy is sought against the vessel.** *Georgia Casualty Co. v. American Milling Co.*, (Wis. 1919) 172 N. W. 148, wherein the court said: "The common-law jurisdiction of the state courts over torts committed at sea is preserved by the clause cited, but remedies by proceedings in rem can only be administered in the admiralty courts. . . . If no remedy is sought against the vessel itself, the case is not within the exclusive jurisdiction of the federal courts, but the state courts, administering common-law remedies, have concurrent jurisdiction."

**Wharfage.**—Assumpsit lies in a state court to recover under an implied contract for wharfage. *Adam v. White*, (R. I. 1918) 103 Atl. 230, wherein the court said: "Of course, if there is an implied contract, a common-law action will lie, and the action in personam can properly be brought in a state court under the saving clause of the Judiciary Act of 1789."

**State Workmen's Compensation Law.**—By amendment to paragraph third in the Act of Oct. 6, 1917, ch. 97, 40 Stat. L. 395 (see 1918 Supp. p. 414) "rights and remedies under the Workmen's Compensation Law of any state" are saved to claimants. Prior to that amendment it was held that the remedy which state workmen's compensation laws give were of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and was not saved to suitors from the grant of exclusive jurisdiction given to the District Courts by the paragraph of section 24. *Barrett v. Marcomber, etc., Co.*, (D. C. R. I. 1918) 253 Fed. 205; *Duart v. Simmons*, (1918) 231 Mass. 313, 121 N. E. 10; *Doey v. Clarence P. Howland Co.*, (1918) 224 N. Y. 30, 120 N. E. 53.

In an action in admiralty by a widow to recover damages for the death of her husband while working as a stevedore in unloading a vessel, a state workmen's compensation act has no application. *Western Fuel Co. v. Garcia*, (C. C. A. 9th Cir. 1919) 255 Fed. 817.

In *Neumann v. Morse Dry Dock, etc., Co.*, (E. D. N. Y. 1918) 255 Fed. 97, it was held that even though a stevedore presented a claim for personal injuries and received compensation therefor under a state compensation law, the acceptance of such compensa-

tion did not bar a libel in admiralty, and that if the payments were made by the state they were to be regarded as gratuities, but if made by the employer they were deductible from the amount recovered.

**Sale under process of state court.**—Where a boat is subject to admiralty jurisdiction, its sale by process of a state court under a state statute on the ground that it is perishable property, does not effect an extinguishment of a maritime lien for supplies furnished prior to the proceedings in the state court. *The Adeline*, (N. D. Fla. 1918) 252 Fed. 953.

#### VI. WATERS AND PLACES (p. 1011)

**In general.**—"The Constitution, Art. III, § 2, extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction;' and the legislation enacted by Congress for carrying the power into execution has been equally extensive. Act of September 24, 1789, c. 20, § 9, 1 Stat. 73, 77; Rev. Stats., § 563 (8); Judicial Code, § 24 (3), 36 Stat. 1087, 1091, c. 231. In defining the bounds of the civil jurisdiction, this court from an early day has rejected those trammels that arose from the restrictive statutes and judicial prohibitions of England. *Waring v. Clarke*, (1847) 5 How. 441, 457-459 [12 U. S. (L. ed.) 226, 234, 235]; *New England Mut. Marine Ins. Co. v. Dunham*, (1870) 11 Wall. 1, 24 [20 U. S. (L. ed.) 90, 97]; *The Lottawanna*, (1874) 21 Wall. 558, 576 [22 U. S. (L. ed.) 654, 661]. It must be taken to be the settled law of this court that while the civil jurisdiction of the admiralty in matters of tort depends upon locality—whether the act was committed upon navigable waters—in matter of contract it depends upon the subject matter—the nature and character of the contract; and that the English rule, which conceded jurisdiction, with a few exceptions, only to contracts made and to be executed upon the navigable waters, is inadmissible, the true criterion being the nature of the contract, as to whether it have reference to maritime service or maritime transactions. *People's Ferry Co. v. Beers*, (1857) 20 How. 393, 401 [15 U. S. (L. ed.) 961, 964]; *Philadelphia, etc., R. Co. v. Philadelphia Steam Towboat Co.*, (1859) 23 How. 209, 215, 16 U. S. (L. ed.) 433, 435; *New England Mut. Marine Ins. Co. v. Dunham*, (1870) 11 Wall. 1, 26 [20 U. S. (L. ed.) 90, 99]; *The Eclipse*, (1890) 135 U. S. 599, 608 [10 S. Ct. 873, 34 U. S. (L. ed.) 269, 272]. In some of the earlier cases the influence of the English rule may be discerned, in that the question whether a contract was to be performed upon the navigable waters was referred to as pertinent to the question whether the contract was of a maritime nature (*The Thomas Jefferson*, (1825) 10 Wheat. 428, 429 [6 U. S. (L. ed.) 358]; *Peyroux v. Howard*, (1833) 7 Pet. 324, 341 [8 U. S. (L. ed.) 700, 707]; *Steamboat Orleans v. Phœbus*, (1837) 11 Pet. 175, 183

[9 U. S. (L. ed.) 677, 680]; *New Jersey Steam Nav. Co. v. Merchants' Bank*, (1848) 6 How. 344, 392; 112 U. S. (L. ed.) 465, 486; but a careful examination of the opinions shows that the place of performance was dealt with as an evidential circumstance bearing with more or less weight upon the fundamental question of the nature of the contract. If they go beyond this, they must be deemed to be overruled by *Insurance Co. v. Dunham*, *supra*; *North Pac. Steamship Co. v. Hall Bros. Marine R., etc.*, (1919) 249 U. S. 119, 39 S. Ct. 221, 63 U. S. (L. ed.) —.

#### VIII. CONTRACTS WITHIN ADMIRALTY JURISDICTION

##### 1. *Shipbuilding Contracts* (p. 1014)

"It is settled that a contract for building a ship or supplying materials for her construction is not a maritime contract. *People's Ferry Co. v. Beers*, (1857) 20 How. 393 [15 U. S. (L. ed.) 961]; *Roach v. Chapman*, (1859) 22 How. 129 [16 U. S. (L. ed.) 294]; *Edwards v. Elliott*, (1874) 21 Wall. 532, 553, 557 [22 U. S. (L. ed.) 487, 491, 492]; *The Winnebago*, (1907) 205 U. S. 354, 363 [27 S. Ct. 509, 51 U. S. (L. ed.) 836, 841]. In the case in 20 Howard the court said (p. 402): 'So far from the contract being purely maritime, and touching rights and duties appertaining to navigation (on the ocean or elsewhere), it was a contract made on land, to be performed on land.' But the true basis for the distinction between the construction and the repair of a ship, for purposes of the admiralty jurisdiction, is to be found in the fact that the structure does not become a ship, in the legal sense, until it is completed and launched. 'A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject to mechanics' liens created by state law enforceable in the state courts.' In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction.' *Tucker v. Alexandroff*, (1902) 183 U. S. 424, 438 [22 S. Ct. 195, 46 U. S. (L. ed.) 264, 271]; *North Pac. Steamship Co. v. Hall Bros. Marine R., etc., Co.*, (1919) 249 U. S. 119, 39 S. Ct. 221, 63 U. S. (L. ed.) —."

##### 5. *Repairs and Supplies* (p. 1015)

In rem or in personam.—"That a materialman furnishing supplies or repairs may proceed in admiralty either against the ship *in rem* or against the master or owner *in personam* is recognized by the 12th Rule in Admiralty adopted in its present form in the year 1872 (13 Wall. XIV) after a long controversy that began with *The General Smith*, 4 Wheat. 438, and ended with *The Lottawanna*, 21 Wall. 558, 579, 581. See *The Glide*, 167 U. S. 606." *North Pac. Steamship Co.*

*v. Hall Bros. Marine R., etc., Co.*, (1919) 249 U. S. 119, 39 S. Ct. 221, 63 U. S. (L. ed.) —.

**Repairs in hull of vessel.**—There is no difference in character as to repairs made upon the hull of a vessel dependent upon whether they are made while she is afloat, while in dry dock, or while hauled up by ways upon land. The nature of the service is identical in the several cases, and the admiralty jurisdiction extends to all. *North Pac. Steamship Co. v. Hall Bros. Marine R., etc., Co.* (1919) 249 U. S. 119, 39 S. Ct. 221, 63 U. S. (L. ed.) —, wherein the court said: "In *The Robert W. Parsons*, (1903) 191 U. S. 17, 33, 34 [24 S. Ct. 8, 48 U. S. (L. ed.) 73, 80, 81], it was held that the admiralty jurisdiction extended to an action for repairs put upon a vessel while in dry dock; but the question whether this would apply to a vessel hauled up on land for repairs was reserved, the language of the court, by Mr. Justice Brown, being: 'Had the vessel been hauled up by ways upon the land and there repaired, a different question might have been presented, as to which we express no opinion; but as all serious repairs upon the hulls of vessels are made in dry dock, the proposition that such repairs are made on land would practically deprive the admiralty courts of their largest and most important jurisdiction in connection with repairs.' In *The Jefferson*, (1909) 215 U. S. 130 [30 S. Ct. 54, 54 U. S. (L. ed.) 125, 17 Ann. Cas. 907], it was held that the admiralty jurisdiction extends to a claim for salvage service rendered to a vessel while undergoing repairs in a dry dock.

"What we have said sufficiently indicates the decision that should be reached in the case at bar. The contract as made contemplated the performance of services and the furnishing of the necessary materials for the repairs of the steamship *Yucatan*. It was an entire contract, intended to take the ship as he was and to discharge her only when completely repaired and fit for the Alaskan voyage. It did not contemplate, as is contended by appellant, either a lease, or a contract for use in the nature of a lease, of the libellant's marine railway and machine shop. The use of these was but incidental; the vessel being hauled out, when consistent with the progress of other work of the Shipbuilding Company, for the purpose of exposing the ship's bottom to permit of the removal and replacement of the broken plates and the examination of the propeller and tail shaft. In *Peyroux v. Howard*, (1833) 7 Pet. 324, 327, 341 [8 U. S. (L. ed.) 700, 702, 707], the vessel, requiring repairs below the water line as well as above, was to be and in fact was hauled up out of the water; and it was held that the contract for materials furnished and work performed in repairing her under these circumstances was a maritime contract. We think the same rule must be applied to the case before us; that the doubt intimated in *The Robert W. Parsons*, (1903) 191 U. S. 17, 33, 34, [24

S. Ct. 8, 48 U. S. (L. ed.) 73, 80], must be laid aside; and that there is no difference in character as to repairs made upon the hull of a vessel dependent upon whether they are made while she is afloat, while in dry dock, or while hauled up by ways upon land. The nature of the service is identical in the several cases, and the admiralty jurisdiction extends to all.

"This is recognized by the Act of Congress of June 23, 1910, c. 373, 36 Stat. 604, which declares that 'Any person furnishing repairs, supplies, or other necessities, including the use of dry dock or marine railway, to a vessel whether foreign or domestic,' upon the order of a proper person, shall have a maritime lien upon the vessel."

### 13. *Affreightment and Charter Parties* (p. 1017)

A charter contract to be enforceable in admiralty must be wholly maritime. The *Ada*, (C. C. A. 2d Cir. 1918) 250 Fed. 194, 162 C. C. A. 330.

### IX. FOREIGN PERSONS OR PROPERTY (p. 1019)

In general.—To same effect as original annotation, see *Cunard Steamship Co. v. Smith*, (C. C. A. 2d Cir. 1918) 255 Fed. 846.

Immunity from process of vessels of foreign navy.—A transport belonging to a foreign navy, even though temporarily chartered to private individuals, is immune from seizure on process issued by a federal court in admiralty in suit brought by a shipper to recover damages to the cargo. The *Maipo*, (S. D. N. Y. 1918) 252 Fed. 627.

### XIII. MARITIME CONTRACT (p. 1022)

Where a section of a dry dock in which a tug has been placed for repairs, is driven across a river and ashore by a storm, a contract by the owner of the dry dock with the owner of the tug to replace the tug in the river, is of a "maritime" nature and the service is a salvage service; hence, a suit to enforce the contract is within the admiralty jurisdiction of the District Court. The *Gulfport*, (C. C. A. 6th Cir. 1918) 250 Fed. 577, 162 C. C. A. 593.

### XX. TORTS

#### 2. *Locality of Injury Claimed of* (p. 1027)

In general.—To the same effect as the original annotation, see *North Pac. Steamship Co. v. Hall Bros. Marine R., etc., Co.*, (1919) 249 U. S. 119, 39 S. Ct. 221, 63 U. S. (L. ed.) —; *Keator v. Rock Plaster Mfg. Co.*, (S. D. N. Y. 1919) 256 Fed. 574.

#### 3. *Injuries by Vessels* (p. 1028)

Injuries to floating pontoons by a ship constitute maritime torts within the admiralty jurisdiction of the federal courts. The *Bart Tully*, (C. C. A. 6th Cir. 1918) 251 Fed. 856, 164 C. C. A. 72.

#### 5. *Injuries to Persons or Structures on Land* (p. 1029)

A court of admiralty has no jurisdiction over an action by an administratrix for the death of her intestate, caused, while he was standing on a dock, by the falling upon him of rock being discharged from a vessel by buckets hoisted by a block and fall, for in such case the tort was not maritime. *Keator v. Rock Plaster Mfg. Co.*, (S. D. N. Y. 1919) 256 Fed. 574.

### Vol. IV, p. 1037, Jud. Code, sec. 24, par. seventh. [First ed., 1912 Supp., p. 139.]

#### I. SUITS ARISING UNDER PATENT LAWS (p. 1037)

Royalties.—A suit does not arise under the patent laws so as to be within the jurisdiction of a District Court irrespective of the amount in dispute where the case, as stated in the bill, is really a suit for royalties based on contract, not at all involving the construction of any law relating to patents. *Odell v. F. C. Farnsworth Co.*, (1919) 250 U. S. 501, 39 S. Ct. 516, 63 U. S. (L. ed.) —, affirming (S. D. N. Y. 1917) 257 Fed. 101.

Accounting for unfair competition.—Where a patent has been held valid and infringed, the unfair competition feature arising out of that infringement may be included in an accounting for profits and damages, although the parties are citizens of the same district, but where no infringement is found such feature may not be included. *Detroit Showcase Co. v. Kawneer Mfg. Co.*, (C. C. A. 6th Cir. 1918) 250 Fed. 234, 162 C. C. A. 370.

### Vol. IV, p. 1047, Jud. Code, sec. 24, par. eighth. [First ed., 1912 Supp., p. 139.]

An action to recover freight charges on an interstate shipment under a through bill of lading issued pursuant to the Carmack amendment to the Interstate Commerce Act is a federal question under this paragraph irrespective of the amount in controversy. *New York Cent. R. Co. v. Mutual Orange Distributors*, (C. C. A. 9th Cir. 1918) 251 Fed. 230, 163 C. C. A. 386.

An action for injury to live stock, brought under the Carmack amendment, is within the jurisdiction of the federal District Court irrespective of the amount in controversy. *Missouri, etc., R. Co. v. Miller*, (Tex. 1919) 211 S. W. 543.

### Vol. IV, p. 1048, Jud. Code, sec. 24, par. ninth. [First ed., 1912 Supp., p. 139.]

Penalty for violation of Harter Act.—While a District Court has no jurisdiction

in admiralty to collect by proceedings in personam the penalty prescribed by section 5 of the Harter Act (see vol. VI, p. 393) for refusal to give a clean bill of lading, nevertheless it has jurisdiction under this section of a qui tam action for the collection of the penalty, and where the libel is answered by the defendant it may be treated as the analogue of a complaint qui tam at common law and should not be dismissed for want of jurisdiction. In such case the answer is a concession of the admiralty jurisdiction of the court and a waiver of the right to a jury trial. *U. S. v. Elwell*, (C. C. A. 2d Cir. 1918) 250 Fed. 939, 163 C. C. A. 189.

**Vol. IV, p. 1051, Jud. Code, sec. 24, par. fourteenth.** [First ed., 1912 Supp., p. 140.]

**Interruption of employment as deprivation of property right.**—A person has no right of property in his employment, and he may not invoke jurisdiction of a District Court under this section to enjoin the adjutant-general and members of a local draft board from inducting him into military service under the provisions of the Selective Service Act (see vol. IX, p. 1136) on the ground that he would be deprived of a property right by the interruption of his employment. *Boniface v. Thompson*, (W. D. Wash. 1917) 252 Fed. 878.

**Vol. IV, p. 1054, Jud. Code, sec. 24, par. sixteenth.** [First ed., 1912 Supp., p. 140.]

**Suits by receivers and agents.**—To the same effect as the original annotation, see *Harriman Nat. Bank v. Seldomridge*, (1919) 249 U. S. 1, 39 S. Ct. 244, 63, *reversing on other grounds* (C. C. A. 2d Cir. 1917) 240 Fed. 111, 153 C. C. A. 147.

**Vol. IV, p. 1059, Jud. Code, sec. 24, par. twentieth.** [First ed., 1912 Supp., p. 140.]

**Claims sounding in tort are not within the purview of this paragraph of section 24.** Thus, an action against the United States to recover the value of property taken by the government in making a river improvement is not within the jurisdiction of the District Court under this paragraph where it appears that the improvement consisted in dredging submerged land adjoining a river to help navigation, and that while the claim of the plaintiff was that the land belonged to him the government claimed that it was a part of the bed of the de jure river. Such circumstances preclude any implied promise on the part of the government to compensate the owner for the property taken, and therefore no contract claim results. *Tempel v. U. S.*, (1918) 248 U. S. 121, 39 S. Ct. 56, 63 U. S. (L. ed.) —, *following* *Hill v. U. S.*, (1893)

149 U. S. 593), 13 S. Ct. 1011, 37 U. S. (L. ed.) 862, wherein the court said: "It is unnecessary to determine whether this claim of the government is well-founded. The mere fact that the government then claimed and now claims title in itself and that it denies title in the plaintiff, prevents the court from assuming jurisdiction of the controversy. The law cannot imply a promise by the government to pay for a right over, or interest in, land which right or interest the government claimed and claims it possessed before it utilized the same. If the government's claim is unfounded, a property right of plaintiff was violated; but the cause of action therefor, if any, is one sounding in tort, and for such the Tucker Act affords no remedy. *Hill v. United States*, 149 U. S. 593, which both in its pleadings and its facts bears a strong resemblance to the case at bar, is conclusive on this point. See also *Schillinger v. United States*, 155 U. S. 163. The case at bar is entirely unlike both the *Lynah Case* [188 U. S. 445] and the *Cress Case* [243 U. S. 316]. In neither of those cases does it appear that, at the time of taking, there was any claim by the government of a right to invade the property in question without the payment of compensation. Under such circumstances it must be assumed that the government intended to take and to make compensation for any property taken, so as to afford the basis for an implied promise. And when the implied promise to pay has once arisen, a later denial by the government (whether at the time of suit or otherwise) of its liability to make compensation does not destroy the right in contract and convert the act into a tort. In both of those cases the facts required the implication of a promise to pay. But here the government has contended since the beginning of the improvement that, at the time of the dredging in 1899 and in 1909, it possessed the right of navigation over the land in question; which right of navigation, if it existed, gave it the right to dredge further in order to improve navigation. The facts preclude implying a promise to pay. If the government is wrong in its contention, it has committed a tort. The United States has not conferred upon the District Court jurisdiction to determine such a controversy. See *Cramp & Sons v. Curtis Turbine Co.*, 246 U. S. 28, 40-41."

**Vol. V, p. 16, Jud. Code, sec. 28.**  
[First ed., 1912 Supp., p. 144.]

III. Right of removal in general.

1. Entirely statutory.
3. State legislation affecting right.
  - a. In general.

IV. Removal "suits."

6. Proceedings for taxation.
7. Probate and contest of wills.
10. Within original "jurisdiction by this title."
  - a. In general.

- V. Removal from and to what court.
  - 2. To what court.
- VII. Suits under Constitution, laws, or treaties.
  - 1. General rules as to removability.
  - 11. Removal cases.
    - d. Suit based on Carmack amendment.
    - j. Miscellaneous cases.
- VIII. Proviso excluding cases arising under Federal Employers' Liability Act.
- X. Diverse citizenship, alienage, or foreign state as ground for removal.
  - 3. Several parties plaintiff or defendant.
    - a. In general.
    - d. Proper, necessary or indispensable parties.
  - 4. Fraudulent joinder of defendants.
    - c. Joinder of master and servant.
  - 6. Suits by assignees.
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- XI. Separable controversy as ground of removal.
  - 3. Tests of separability.
    - a. In general.
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  - 35. Actions for tort, in general.
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- XII. Removal for prejudice or local influence.
  - 10. What constitutes required "prejudice or local influence."
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- XIII. Who may remove a suit.
  - 2. Only a defendant.
    - b. Claimant of funds held by trustee process.
- XIV. Federal jurisdiction to be shown in record on removal.
  - 1. In general.
- XV. Remand restoring state courts' jurisdiction.
  - 2. Conclusiveness of order of remand.

### III. RIGHT OF REMOVAL IN GENERAL

#### 1. Entirely Statutory (p. 31)

**Dependent on Act of Congress.**—To same effect as original annotation, see *Matarazzo v. Hustis*, (N. D. N. Y. 1919) 256 Fed. 882.

#### 3. State Legislation Affecting Right

##### a. In General (p. 34)

**Right not subject to abridgment.**—A state statute which designates a person as a plaintiff in a certain class of cases when he is in reality a defendant, does not thereby deprive him of the right of removing the case to a federal court. *Chicago, etc., R. Co. v. Drainage Dist. No. 8*, (S. D. Ia. 1917) 253 Fed. 491.

**Form of procedure for review as defeating right to removal.**—Where a suit is based on

attempted taxation by a state and involves the application of a federal statute, the removal of the cause to a federal court cannot be defeated because of the form of the procedure for review prescribed by the state. *Iowa Loan, etc., Co. v. Fairweather*, (S. D. Ia. 1918) 252 Fed. 605. Regarding the right of removal in such a case, the court said: "Parties have a legal and constitutional right to a trial in the courts of the United States in cases involving the construction or application of the Constitution or laws of the United States. It will not do to say that the plaintiff instituted this litigation. As in the *Ditch Cases*, the litigation has its foundation in an attempt on the part of the taxing authority of the state of Iowa to levy certain taxes which the plaintiff, under the law, would be compelled to pay. In other words, a proceeding was started to take away from the plaintiff certain money for certain purposes. The state prescribed the procedure by which, under the claim of defendants, this was to be done. It authorized an appeal from the board of review, and a trial in court—a judicial proceeding to have the rights of the plaintiff determined. If the plaintiff, asserting a right under the laws of the United States, cannot have that question tried in the courts of the United States, it is because the legislature, while giving the plaintiff the right to a trial in court, has so prescribed the conditions, or so named the parties, that this right has been denied.

"But the legislature has no such power; having given the plaintiff the right to a trial in court, it could not limit the jurisdiction of the courts of the United States, nor the right of the plaintiff to a trial in such courts, provided the jurisdictional facts exist."

### IV. REMOVAL "SUITS"

#### 6. Proceedings for Taxation (p. 47)

**Proceedings to assess inheritance taxes.**—Where under the constitution and laws of a state, a proceeding by a county to assess an inheritance tax against a decedent's estate, when it reaches the county court, becomes a contest inter partes, which that court, acting judicially, is empowered to hear and determine, it is a "suit" within the meaning of this section and removable. *Smith v. Douglas County*, (C. C. A. 8th Cir. 1918) 254 Fed. 244, 165 C. C. A. 532. See also (C. C. A. 8th Cir. 1917) 242 Fed. 894, 155 C. C. A. 482.

**Appeal from assessment.**—Where a state statute in establishing drainage districts and providing for the collection of taxes to pay for their construction, also makes provision for an appeal to the District Court of the state by any one dissatisfied with his assessment, such appeal is a "suit" within the meaning of this section. *Chicago, etc., R. Co. v. Drainage Dist. No. 8*, (S. D. Ia. 1917) 253 Fed. 491.

### 7. Probate and Contest of Wills (p. 48)

Proceedings for probate.—To same effect as original annotation, see *Meadow v. Nash*, (N. D. Ga. 1918) 250 Fed. 911.

### 10. Within Original "Jurisdiction by this Title"

#### a. In General (p. 52)

To same effect as original annotation, see *Poorman v. Cleveland, etc.*, R. Co., (E. D. Ill. 1918) 255 Fed. 987; *Georgia v. Southern R. Co.*, (N. D. Ga. 1918) 255 Fed. 369.

### V. REMOVAL FROM AND TO WHAT COURT

#### 2. To What Court (p. 61)

In general.—In *Matarazzo v. Hustis*, (N. D. N. Y. 1919) 256 Fed. 882, it was held that the "proper district" to which a suit might be removed from a state court, was the district within the territorial limits of which the suit was pending in the state court. In defining the term "proper district," the court said: "It is now settled that the words 'for the proper district,' used in section 28 of the Judicial Code, refer to the proper district" to which a cause may be removed as stated in section 53 of the Judicial Code, and not to the 'proper district' for bringing such a suit originally, if brought in the District Court of the United States in the first instance."

### VII. SUITS UNDER CONSTITUTION, LAWS, OR TREATIES

#### 1. General Rules as to Removability (p. 77)

"*Arising under.*"—In *Hartford F. Ins. Co. v. Kansas City, etc.*, R. Co., (N. D. Tex. 1918) 251 Fed. 332, the court said: "What is meant by the words 'arising under' the laws of the United States? It is contended here that the case cannot be removed from the state court to the federal court, unless the petition or complaint filed in the state court shows that there is a dispute or controversy as to the proper meaning or construction of a federal law; that this is the meaning of the term 'arising under' a federal law; that it is not enough that the federal law controls or regulates the right of recovery. Is it necessary, therefore, for there to be a dispute as to the construction of the statute in order to make a suit 'arise' thereunder? It does not seem so to me. It seems to me a suit arises under a law when it is brought to enforce the provisions of or liability thereby given, or is controlled as to the right of recovery by the provisions of such law. To say it does not arise under a law, unless there is a dispute as to the construction or meaning of the law, seems to me to be a misnomer; for, if it is held that the law does not apply to the facts set up, then such suit cannot arise under it, but must arise under some other law. Thus a case would be removed, not because it arose under a federal law, but to determine whether it did or did not so arise. The statute does not so read."

"It seems to me the contention defeats itself, because the right of removal would depend not upon whether the cause of action arose under a federal law, but would depend upon whether there was a dispute as to whether the federal law applied to the facts or did not apply to the facts. This would be an entirely different ground for removal from that named in the act. The act does not say a case may be removed if there be doubt as to whether the federal law controls; but, on the contrary, it is specific that there is a right to remove if the controversy arises under a federal law. If, therefore, the holding should be that the provisions of the law did apply and control, then certainly the suit does arise under it. Therefore it follows that, if its removability is to depend on whether there be a dispute as to the meaning of the law, then where the holding is that its terms do not apply this would also require a decision that the federal court has no jurisdiction, and such suit, though removed, must be dismissed. This result must necessarily follow, because the same term, 'arise' under the Constitution or laws of the United States, is used in both the statute conferring jurisdiction and that providing for removal, so that the court would have no jurisdiction to remove unless it would also have jurisdiction to try."

### 11. Removal Cases

#### d. Suit Based on Carmack Amendment (p. 85)

A suit for injury to livestock in transit, based on the Carmack Amendment, is removable. *Missouri, etc.*, R. Co. v. *Miller*, (Tex. 1919) 211 S. W. 543; *Hartford F. Ins. Co. v. Kansas City, etc.*, R. Co., (N. D. Tex. 1918) 251 Fed. 332.

#### j. Miscellaneous Cases (p. 88)

An action in a state court attacking a title to property acquired under a decree of a federal court, upon the ground that it is void, involves a federal question and is removable. *South Dakota Cent. R. Co. v. Continental, etc., Trust, etc., Bank*, (C. C. A. 8th Cir. 1919) 255 Fed. 941.

An action brought against the Emergency Fleet Corporation, organized under the Act of March 3, 1901, ch. 854, by a shipbuilding company on an alleged contract, is one arising under the Constitution and laws of the United States and may not be remanded by the District Court. *Union Timber Products Co. v. U. S. Shipping Board Emergency Fleet Corp.*, (W. D. Wash. 1918) 252 Fed. 320.

Failure of petition for removal to show federal question.—In *Georgia v. Southern R. Co.*, (N. D. Ga. 1918) 255 Fed. 369, it was held that the amendment of the petition for removal, set forth in the report of case at page 374, did not show a federal question either that the obligations of the defendant's contract were impaired or that it was de-



prived of its rights without due process of law.

**VIII. PROVISIO EXCLUDING CASES ARISING UNDER FEDERAL EMPLOYERS' LIABILITY ACT (p. 92)**

**Diversity of citizenship.**—An action arising under the federal Employers' Liability Act may not be removed to a federal court because of diversity of citizenship. *Givens v. Wight*, (N. D. Tex. 1918) 247 Fed. 233.

**Relief sought under state and federal acts.**—A case is not removable where relief is sought under the federal act though there is also a count based on a state statute. *Mitchell v. Southern R. Co.*, (W. D. Ga. 1917) 247 Fed. 879; *Givens v. Wight*, (N. D. Tex. 1918) 247 Fed. 233.

**Waiver.**—The proviso does not confer a mere privilege but is jurisdictional. *Mitchell v. Southern R. Co.*, (W. D. Ga. 1917) 247 Fed. 819.

**X. DIVERSE CITIZENSHIP, ALIENAGE, OR FOREIGN STATE AS GROUND FOR REMOVAL**

**3. Several Parties Plaintiff or Defendant**

**a. In General (p. 103)**

**All parties nonresident.**—Where a suit is brought in South Carolina for a tort occurring there and the parties are all nonresidents, the plaintiff residing in Virginia and the two defendants in North Carolina, the cause is not removable. *Powell v. Southern R. Co.*, (1918) 110 S. C. 70, 96 S. W. 292.

**Case not originally triable in federal court.**—A suit may be removed to a federal court because of diverse citizenship although, because of the venue provision of section 51 of the Judicial Code, it could not have been originally brought in the federal court. *James v. Amarillo City Light, etc., Co.*, (N. D. Tex. 1918) 251 Fed. 337.

**Foreign corporation, and negligent employee.**—Under the statutes of Florida it is proper to sue jointly a corporation and its employee for injuries caused by the negligence of the employee, and accordingly a state court has jurisdiction though the corporation is foreign. *Baker v. Jacksonville Traction Co.*, (S. D. Fla. 1917) 247 Fed. 718.

**d. Proper, Necessary or Indispensable Parties (p. 107)**

**Specific performance.**—In a suit brought in a state court for specific performance of a contract for the sale of land where the plaintiffs in their petition alleged that a bank, which was a resident of the same state as the plaintiffs, had a lien on the property, it was held that the defendant could not remove the case to the federal court. *Bryan v. Barriger*, (W. D. Ky. 1918) 251 Fed. 328, wherein the court said: "The defendant who made the contract is a citizen of New York, but the Trust Company, the defendant which has a lien created by Barriger, is, like the plaintiffs, a citizen of Kentucky, and the question upon which our decision of

the motion to remand must turn is whether the joinder of that defendant should prevent the removal. In this connection it may be remarked that the petition for removal makes no charge of fraudulent joinder, but claims that the controversy between the plaintiffs and the defendant Barriger is separable from that between the plaintiffs and the Trust Company, and that the Trust Company is not a necessary party to the controversy between the plaintiffs and Barriger. It is quite obvious, however, that plaintiffs have no controversy with the Trust Company, except through the lien created by Barriger, and which stands in the way of the latter in conveying an unincumbered title to the plaintiffs. It has become the established construction of removal statutes that:

'A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. *Smith v. Rines*, 2 Sumn. 338, Fed. Cas. No. 13,100. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.' *Louisville & Nashville R. R. Co. v. Ide*, 114 U. S. 52, 56, 5 Sup. Ct. 735, 29 L. Ed. 63. See, also, many other cases, notably *Powers v. Chesapeake & Ohio R. R. Co.*, 169 U. S. at page 97, 18 Sup. Ct. 264, 42 L. Ed. 673. In such a situation, and in view of the authorities cited, we must hold that the plaintiffs were entitled to sue in the state court for all the relief they seek, and in their one suit to set up their claim to have the amount of the Trust Company's lien ascertained, and provision made in any decree which might be entered either for the liquidation of that lien or for a reduction of the amount for which notes should be given—either one or both—as equity might demand, and therefore that the Trust Company is a proper, and indeed a necessary, party to the controversy between the plaintiffs and Barriger."

**4. Fraudulent Joinder of Defendants**

**c. Joinder of Master and Servant (p. 116)**

Where a state statute provides that in actions for injury to property occasioned by fire communicated by any locomotive engine the fact that the fire was so communicated shall be taken as prima facie evidence to charge with negligence the owners and lessees of the railroad and the person having the "care and management" of the engine, the engineer in charge of the locomotive may properly be joined in such an action as a defendant with the railroad company, and such joinder cannot be deemed fraudulent even though it prevents the removal of the action to a federal court on the ground of diversity of citizenship. *Poorman v. Cleveland, etc., R. Co.*, (E. D. Del. 1918) 255 Fed. 985.

### 6. *Suits by Assignees* (p. 119)

Where an assignee of a claim sues non-residents in a state court, the citizenship of his assignors controls on a removal of the case to a federal court and if they could not have originally maintained the suit in the district to which it is removed because some of them do not reside therein, the case will be remanded to the state court. *Guaranty Trust Co. v. McCabe*, (C. C. A. 2d. Cir. 1918) 250 Fed 699, 163 C. C. A. 31.

### 7. *Suits by and against Aliens* (p. 120)

To same effect as first paragraph of original annotation, see *Matarazzo v. Hustis*, (N. D. N. Y. 1919) 256 Fed. 882.

## XI. SEPARABLE CONTROVERSY AS GROUND OF REMOVAL

### 3. *Tests of Separability* (p. 123)

#### a. *In General* (p. 123)

"The test applied by the Supreme Court of the United States in many decisions seems to me: Does the declaration state a good case of joint liability under the state laws? If it does, the case is not separable." *Baker v. Jacksonville Traction Co.*, (S. D. Fla. 1917) 247 Fed. 718.

That plaintiff might have been sued by defendants jointly.—To the same effect as the original annotation, see *Bryan v. Barger*, (W. D. Ky. 1918) 251 Fed. 328.

### 14. *Several Plaintiffs* (p. 138)

Where neither all the plaintiffs nor the defendant are residents of the district where the suit is brought, the suit is not removable at the instance of a resident plaintiff, unless it involves a separable controversy between him and the defendant. *Webb v. Southern R. Co.*, (C. C. A. 5th Cir. 1918) 248 Fed. 618, 160 C. C. A. 518.

In an action by a state and the lessee of a state-owned railroad against another railroad, there is no separable controversy where it appears that both plaintiffs claim that the defendant has encroached upon the state-owned railroad and it further appears that the lessee derives its right through its lease from the state. *Georgia v. Southern R. Co.*, (N. D. Ga. 1918) 255 Fed. 369.

### 35. *Action for Tort in General* (p. 150)

**Action against master and third person.**—In *Fuckett v. Columbus Power Co.*, (N. D. Ga. 1918) 248 Fed. 353, an action by a telegraph line man against his employer and a power company whose wires came in contact with those of the employer, causing a personal injury, was held to present a separable controversy, the employer being a foreign corporation and the power company a domestic corporation. The court said: "Of course, the duty to an employee arising from the relation of master and servant is a duty which cannot be charged to any one except the employer. The right claimed here against

the Telegraph Company is that of being entitled to a safe place to work, and a claim for damages because he was injured by reason of the master's failure to provide him a safe place to work is an issue that could only arise between servant and master. The Power Company would not be liable in any way to the plaintiff for the duty which a master owes to his servant."

### **Action against railroad for damage by fire.**

—Where a resident of a state sues a non-resident railroad company for fire damage, suing for himself and for the use of several nonresident fire insurance companies, there is no separable controversy. *Webb v. Southern R. Co.*, (C. C. A. 5th Cir. 1918) 248 Fed 618, 160 C. C. A. 518.

### 36. *Action of Tort Against Master and Servant* (p. 153)

**Removal denied.**—In *Foorman v. Cleveland, etc., R. Co.*, (E. D. Ill. 1918) 255 Fed. 985, an action was brought in a state court against a nonresident railroad company and its resident engineer to recover damages occasioned to the plaintiff's property by fire being communicated to it from a locomotive engine of the railroad company. A state statute provided that in such actions the fact that the fire was so communicated should be taken as prima facie evidence of negligence on the part of the owners or lessees of the railroad and the person having care and management of the engine. It was held that the joinder of the engineer as a party defendant was proper and that there was no separable controversy authorizing removal by the company.

## XII. REMOVAL FOR PREJUDICE OR LOCAL INFLUENCE

### 10. *What Constitutes Required "Prejudice or Local Influence"*

#### c. *Prejudice of Judges* (p. 177)

**In general.**—To the same effect as the original annotation see *In re Sherwood*, (1918) 259 Pa. St. 254, 203 Atl. 42, L. R. A. 1918 D. 447.

## XIII. WHO MAY REMOVE A SUIT

### 2. *Only a Defendant*

### b. *Claimant of Funds Held by Trustee Process* (p. 186)

Persons summoned as trustees of the defendant have no interest in the main controversy but are merely stakeholders and their residence is immaterial upon the question of removal. *Dunbar v. Rosenbloom*, (1918) 230 Mass. 176, 119 N. E. 829.

## XIV. FEDERAL JURISDICTION TO BE SHOWN IN RECORD ON REMOVAL

### 1. *In General* (p. 213)

In *Dunbar v. Rosenbloom*, (1918) 230 Mass. 176, 119 N. E. 829, which was an appeal from an order of the superior court

accepting defendants' petition and bond for the removal of the cause, the court said: "The only question presented is whether as matter of law a case for removal is made out on the face of the record. If any issues of fact are raised, they must be heard and determined in the federal and not in the state court. *Long v. Quinn*, (1913) 215 Mass. 85, 102 N. E. 348. All the elements requisite to make out a case for removal on the face of the record are present. This is a civil action at law involving the requisite jurisdictional amount, between citizens of different states, the defendant not being a resident of this state and being the party petitioning for the removal to the federal court, and the petition for removal is in proper form."

#### XV. REMAND RESTORING STATE COURTS' JURISDICTION

##### 2. Conclusiveness of Order of Remand (p. 223)

The order of remand is conclusive and it cannot be reviewed in the state court. *Kansas City Southern R. Co. v. Wade*, (1918) 132 Ark. 551, 201 S. W. 787.

### Vol. V, p. 235, Jud. Code, sec. 29.

[First ed., 1912 Supp., p. 145.]

#### II. Time for filing petition and bond.

##### 7. Time to plead in various states.

j. In Massachusetts.

v. In Virginia [new].

##### 8. When time begins to run.

##### 10. Extension of time by order or stipulation.

##### 24. Waiver of objection for delay.

#### IV. Petition for removal.

##### 1. Necessity of petition.

a. In general — mere motion.

#### V. Bond for removal.

##### 5. Condition.

#### II. TIME FOR FILING PETITION AND BOND

##### 7. Time to Plead in Various States

j. In Massachusetts (p. 241)

In *Dunbar v. Rosenbloom*, (1918) 230 Mass. 176, 119 N. E. 829, the court said: "The petition for removal must be filed by the defendant, 'at the time or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff.' Judicial Code, § 29. Answers and like pleadings must be filed within twenty days from the return or entry day of the writ under our practice. Rule 7 of Superior Court Common-Law Rules 1915. It is a necessary implication of this rule that the twenty days do not begin to run until the time specified in a precept of the court served in some adequate form upon the defendant ordering him to appear. A defendant cannot be required to plead to an action at law until

he has first been summoned to court. *Windor v. McVeigh*, (1876) 93 U. S. 274, 279, 23 U. S. (L. ed.) 914. See *Herbert v. Bicknell*, 233 U. S. 70, 34 S. Ct. 562, 58 U. S. (L. ed.) 854. Special provision is made by our laws for service of a precept upon a nonresident defendant upon whom no personal or other adequate service has been made. R. L. c. 167, § 34; chapter 170, § 6. On this record no service has been made on the defendant. Therefore, the time for him to answer under the rule had not come. *Lewis v. Northern R. Co.*, (1885) 139 Mass. 294, 1 N. E. 546. It is of no consequence whether he had actual knowledge of the matter or not. He had not appeared voluntarily before filing the petition for removal. Cases like *Olds v. City Trust, etc., Co.*, (1901) 180 Mass. 1, 61 N. E. 223; *Morrison v. Underwood*, 5 Cush. (Mass.) 52, and *Cheshire Nat. Bank v. Jaynes*, (1916) 224 Mass. 14, 112 N. E. 500, relied upon by the plaintiff, have no relevancy in this connection. No discussion is required to demonstrate that the defendant might at his option appear at an earlier time than that limited by the rule, in order to file his petition for removal. Courts interpose no barrier to the voluntary appearance of defendants seeking an early adjudication of their rights."

v. In Virginia [new]

See *Williams v. Miller*, (W. D. Va. 1918) 249 Fed. 495.

##### 8. When Time Begins to Run (p. 242)

**Personal service superseding previous constructive service.**—F., a citizen of Oklahoma, commenced an action against D., a citizen of the state of Texas, causing a summons to be issued and served upon D. in the latter state, which required the defendant to answer the petition of the plaintiff on or before the 1st day of April, 1914. After the service of this summons, which by statute (section 4727, Rev. Laws 1910) was entitled to no other or greater force and effect than service by publication, the defendant voluntarily came within the jurisdiction of the trial court, whereupon personal summons was duly issued and served upon him, which required him to answer the petition of the plaintiff on or before the 6th day of March, 1914. It was held (1) that the latter personal summons superseded the former summons by publication, and that the answer day fixed therein was the time the defendant was required by the laws of the state to answer or plead to the petition of the plaintiff; (2) that a petition for the removal of said cause from the state to the federal court, which was not made and filed until after the expiration of said date, was made and filed too late to comply with the requirements of this section 29; (3) that the plaintiff is not estopped from complaining of the defendant's delay. *Dickinson v. Foot*, (Okla. 1918) 173 Pac. 522.

#### 10. Extension of Time by Order or Stipulation (p. 242)

**Under Act of 1887-1888 and Judicial Code.—Stipulation of parties.**—Where a state statute requires a defendant to answer within the time specified in the summons or "such further time as may have been granted" and an extension of time is granted by stipulation of counsel, the defendant may file a petition for removal at any time within the period of the extension. *Citizens' Trust, etc., Bank v. Hobbs*, (S. D. Cal. 1918) 253 Fed. 479.

**Order of court.**—The enlargement by order of court of the time to answer does not extend the time of filing a removal petition. *Malloy v. Marshall-Wells Hardware Co.*, (1918) 90 Ore. 303, 173 Pac. 267, 175 Pac. 659, 176 Pac. 589.

**Stipulation of parties.**—The enlargement by stipulation of the parties of the time to answer does not extend the time for filing a removal petition. *Malloy v. Marshall-Wells Hardware Co.*, (1918) 90 Ore. 303, 173 Pac. 267, 175 Pac. 659, 176 Pac. 589.

#### 24. Waiver of Objection for Delay (p. 265)

A petition for removal should be filed on the return day of the writ, but this requirement is in the nature of a limitation and may be waived. *Williams v. Miller*, (W. D. Va. 1918) 249 Fed. 495.

Where the defendant's attorney filed a petition for removal two days after the latest time for filing the petition, and several days thereafter an agreed order was entered by the plaintiff's and defendant's attorneys that the petition for removal should be treated as filed upon the first day of the term, and the same day an order filing the bond for removal was entered, it was held that the plaintiff was estopped from claiming that the petition for removal was not filed in time. *Bryan v. Barriger*, (W. D. Ky. 1918) 251 Fed. 328.

#### IV. PETITION FOR REMOVAL

##### 1. Necessity of Petition (p. 273)

###### a. In General—Mere Motion (p. 273)

**All parties sued for a joint tort must join in a petition for removal.** *Powell v. Southern R. Co.*, (1918) 110 S. C. 70, 96 S. E. 292, holding that an action for personal injuries against a railway company and a bridge company, if it is alleged that the transaction was one and that the defendants had concurrent parts therein, is for a joint tort, though the railway company was sued as employer under the federal employer's liability act and the bridge company at common law.

#### V. BOND FOR REMOVAL

##### 5. Condition (p. 319)

A bond conditioned for the filing of the record in the District Court of the district where the suit is pending or the District Court of another named state is insufficient. *Webb v. Southern R. Co.*, (C. C. A. 5th Cir. 1918) 248 Fed. 618, 160 C. C. A. 518.

#### Vol. V, p. 380, Jud. Code, sec. 33.

[First ed., 1912 Supp., p. 148.]

#### III. Right to remove.

##### 1. In general.

#### IV. Procedure for removal.

##### 1. Time for filing petition.

#### III. RIGHT TO REMOVE

##### 1. In General (p. 383)

**Suits by aliens.**—In a suit by an alien against an officer of the court brought in a state where the defendant does not reside, the question of its removability to a federal court is governed by this section rather than by section 34. *Matarazzo v. Hustis*, (N. D. N. Y. 1919) 256 Fed. 882.

**Receiver as "officer of court."**—A receiver of a railroad appointed by the District Court in the district where he resided, and later appointed as receiver in ancillary proceedings by the federal court in the district to which a suit brought by an alien against him as receiver is removed, is an "officer of the court" in the latter district within the meaning of this section. *Matarazzo v. Hustis*, (N. D. N. Y. 1919) 256 Fed. 882.

#### IV. PROCEDURE FOR REMOVAL

##### 1. Time for Filing Petition (p. 384)

A petition of an accused for the removal of a prosecution against him for grand larceny instituted in a state court, is sufficient under this section where it denies his guilt, alleges that he is a revenue officer and that the prosecution resulted from the transaction of his official duties. *State v. Peak*, (S. D. Ala. 1918) 252 Fed. 306. Regarding the denial of guilt by the accused, the court said: "It is true that the terms of the act as written give the right of removal when a suit or criminal prosecution is commenced against a revenue officer on account of any act done under color of his office. I do not, however, concede that the accused must necessarily admit the doing of the specified act in the terms as charged in the state indictment. I think that he has just as much right, if whatever act he did was under color of his office, to have the benefit of a trial of the facts in the federal court, as well as to try the question of the intent with which these acts were done. The accused might well deny that he is guilty of the specified acts with which he is charged, and yet concede that he did do certain acts at that time, but deny that he did the acts he is specifically charged with. The facts may be so charged in the indictment as to involve a confession, if conceded as charged. The officer may admit doing an act, but claim that the statement of facts in the indictment are incorrectly stated. The terms of the Removal Act provide that, when a criminal prosecution is commenced in a state court against any officer 'on account of any act done under color of his office or of any such law,' it may be removed.

Certainly the officer must admit the doing of some act under color of his office or of the law for which he is indicted, but he is not required to admit the doing of the acts as charged in the indictment."

**Vol. V, p. 398, Jud. Code, sec. 37.**  
[First ed., 1912 Supp., p. 150.]

**I. Dismissal of suit.**

4. Procedure for dismissal.
  - a. In general.

**II. Grounds for remand.**

1. Want of jurisdiction, in general.
2. Suit not within original federal jurisdiction in the particular district.

**III. Waiver or amendment of defects.**

1. Waiver of objection—estoppel to object.
3. Amendment of petition for removal.
  - a. In general.
  - c. As to alienage.

**IV. Issues of fact in removed cases.**

1. Necessity of issue.

**V. Procedure for remand.**

1. Remand on court's own motion.
  - a. For want of jurisdiction.
7. Sufficiency of motion.

**I. DISMISSAL OF SUIT**

**4. Procedure for Dismissal**

- a. In general (p. 403)

**Dismissal by court on its own motion.—**

Where it appears that a District Court has no jurisdiction over a controversy before it, the court on its own initiative should dismiss the suit, and if it fails to do so it is the duty of the Circuit Court of Appeals to dismiss it. *Cunard Steamship Co. v. Smith*, (C. C. A. 2d Cir. 1918) 255 Fed. 846.

**Costs.**—Where a suit is brought in the District Court against a foreign corporation and a citizen of the same state as the plaintiff impleaded as defendant, the purpose being to give the federal court jurisdiction of the latter defendant, the Circuit Court of Appeals in reversing the judgment of the District Court and dismissing the suit for lack of jurisdiction, may direct the lower court to enter judgment under this section against the plaintiff for costs in both courts. *Devost v. Twin State Gas, etc., Co.*, (C. C. A. 1st Cir. 1918) 252 Fed. 125, 164 C. C. A. 237.

**II. GROUNDS FOR REMAND**

**1. Want of Jurisdiction, in General (p. 407)**

**Amount in controversy.**—A case will not be remanded to the state court unless it is certain that the maximum limit of possible recovery at the date of commencing suit, and under any theory which plaintiff might have fairly entertained, was less than the jurisdictional amount. *Chesbrough v. Woodworth*,

(C. C. A. 6th Cir. 1918) 251 Fed. 881, 164 C. C. A. 97.

**2. Suit Not within Original Federal Jurisdiction in the Particular District (p. 408)**

To same effect as first paragraph of original annotation, see *Fitzhugh v. Reid*, (E. D. Ark. 1918) 252 Fed. 234.

Where an action removed to a federal court could not have originally been brought there, and the plaintiff objects and moves to remand, there is no waiver by him and the federal court is without jurisdiction. *Guaranty Trust Co. v. McCabe*, (C. C. A. 2d Cir. 1918) 250 Fed. 699, 163 C. C. A. 31.

**III. WAIVER OR AMENDMENT OF DEFECTS**

**1. Waiver of Objection—Estoppel to Object (p. 414)**

"If general federal jurisdiction exists, the want of local jurisdiction or venue in the particular federal court to which a cause has been removed, is waived, where the plaintiff, after the removal, without challenging such jurisdiction by motion to remand or otherwise, consents to and accepts such jurisdiction by affirmative acts in recognition thereof and submission thereto." *General Invest. Co. v. Lake Shore, etc., R. Co.*, (C. C. A. 6th Cir. 1918) 250 Fed. 160, 162 C. C. A. 296, *modifying* (N. D. Ohio 1915) 226 Fed. 976.

After removal of a case to a federal court, a special appearance and motion to remand by the plaintiff protects and preserves his rights in that regard, and his subsequent amendment of the complaint after a denial of the motion to remand is not a waiver of his rights. *Guaranty Trust Co. v. McCabe*, (C. C. A. 2d Cir. 1918) 250 Fed. 699, 163 C. C. A. 31.

**3. Amendment of Petition for Removal**

- a. In General (p. 417)

**Amendment after removal.**—In *Georgia v. Southern R. Co.*, (N. D. Ga. 1918) 255 Fed. 369, it was questioned, but not decided, whether the petition for removal was amendable in the federal court, after removal, by the addition of an allegation designed to show a federal question, as set forth in the report of the case at p. 374.

- c. As to Alienage (p. 420)

**Amendment of petition.**—Where a defendant in an action in a state court assumes, from the allegations of the complaint and the information at his disposal, that the plaintiff is a citizen of the United States and of the state in which the action is brought, and makes such allegations in his petition for removal, but subsequently on a motion to remand the plaintiff states he is an alien and citizen of Italy, the defendant will be permitted to amend his petition for removal to accord with the facts. *Matarazzo v. Hustis*, (N. D. N. Y. 1919) 256 Fed. 882.

## IV. ISSUES OF FACT IN REMOVED CASES

1. *Necessity of Issue* (p. 421)

**Failure to put in issue averments of petition for removal.**—The jurisdictional facts averred in the petition for removal constitute the basis of jurisdiction of the federal court, and where the plaintiff fails to put in issue the averments of the petition and to offer any evidence in support of the same, his petition to remand will be denied. *Woodall v. Clark*, (C. C. A. 4th Cir. 1918) 254 Fed. 526, 166 C. C. A. 84.

## V. PROCEDURE FOR REMAND

1. *Remand on Court's Own Motion*a. *For Want of Jurisdiction* (p. 429)

Where the venue in the District Court is not jurisdictional, in the sense that it cannot be waived, there being a diversity of citizenship, the court may not remand the cause of its own motion because of the fact that neither of the parties to the action is a citizen of the state and federal district from which the case is removed. *Fitzhugh v. Reid*, (E. D. Ark. 1918) 252 Fed. 234.

7. *Sufficiency of Motion* (p. 987)

A plea to the jurisdiction of a federal court, to which a case has been removed from a state court, should be treated as a motion to remand where it appears from the plea that the court has no jurisdiction of the case. *Poorman v. Cleveland, etc., R. Co.*, (E. D. Ill. 1918) 255 Fed 987.

## Vol. V, p. 446, Jud. Code, sec. 38.

[First ed., 1912 Supp., p. 150.]

## II. Validity of service of process in state courts.

5. *Service on foreign corporation.*8. *Conclusiveness of return of sheriff.*

## III. Procedure after removal.

1. *Status of proceedings had in state court.*

## II. VALIDITY OF SERVICE OF PROCESS IN STATE COURTS

5. *Service on Foreign Corporation* (p. 460)

As all jurisdictional objections may be made in a federal court after removal, a motion may be granted to set aside service of summons on a foreign corporation for want of jurisdiction on the ground that it was not doing business in the state in which the suit was originally brought. *Partola Mfg. Co. v. Norfolk, etc., R. Co.*, (S. D. N. Y. 1918) 250 Fed. 273.

8. *Conclusiveness of Return of Sheriff* (p. 461)

To same effect as original annotation, see *General Invest. Co. v. Lake Shore, etc., R. Co.*, (C. C. A. 6th Cir. 1918) 250 Fed. 160,

162 C. C. A. 296, *modifying* (N. D. Ohio 1915) 226 Fed. 976.

## III. PROCEDURE AFTER REMOVAL

1. *Status of Proceedings Had in State Court* (p. 462)

If a cause of action has no right to exist in the jurisdiction where suit is brought, the plaintiff cannot vitalize it by getting it transferred to another jurisdiction. Accordingly, where a suit, instituted in a territorial court and prohibited from being maintained there by a statute of the territory, is removed to a federal court, such court takes the case as it stood at the time of removal, subject to the legal status and rights of the parties as they were established at that time. *Utah Constr. Co. v. St. Louis Constr., etc., Co.*, (D. C. N. M. 1916) 254 Fed. 321.

## Vol. V, p. 478, Jud. Code, sec. 48.

[First ed., 1912 Supp., p. 153.]

## I. Construction and scope of provision.

## 4. "Regular and Established Place of Business."

## II. Jurisdiction.

## 1. Generally.

## I. CONSTRUCTION AND SCOPE OF PROVISION

## 4. "Regular and Established Place of Business" (p. 478)

"Place of business" as used in this section "is understood to mean, not a place at which any transactions having any reference to the foreign corporation are carried on, but a place at which it does such business as makes it 'found' within the district for the purpose of service; i. e., business carried on in such manner and to such an extent as will warrant the inference that it is present there through its agents." *American Electric Welding Co. v. Lalance, etc., Mfg. Co.*, (D. C. Mass. 1917) 256 Fed. 34.

**Office for soliciting business only.**—The maintenance of an office by a manufacturing corporation for the purpose of soliciting orders and forwarding them to the main office of the corporation in another state, does not constitute a "regular and established place of business" within the meaning of this section. *American Electric Welding Co. v. Lalance, etc., Mfg. Co.*, (D. C. Mass. 1917) 256 Fed. 34.

**Another corporation as agent.**—If an incorporated jobbing company solicits orders and forwards them to its principal, a corporation, at its home office in another state, and the goods are shipped direct by the principal, the sale is consummated in the latter jurisdiction and does not constitute an infringement of patent within the district in which the jobbing company is located so as to confer jurisdiction. *Stryker Deflector Co. v. Perrin Mfg. Co.*, (C. C. A. 2d Cir. 1919) 256 Fed. 656, 168 C. C. A. 50.

## II. JURISDICTION

## 1. Generally (p. 480)

**Diversity of citizenship unnecessary.**—So far as the suit is to recover from the defendant for the alleged infringement of the patent, and to restrain further infringement thereof, it is not denied that so much of the suit as so claims is within the jurisdiction of this court, irrespective of the citizenship of the parties thereto. *Shrauger v. Phillip Bernard Co.*, (N. D. Ia. 1917) 247 Fed. 547.

**Aliens.**—It seems to be settled law that aliens are not inhabitants of any district, and may be sued in any district within which process can be served on them. *Sandusky Foundry, etc., Co. v. DeLavaud*, (N. D. Ohio 1918) 251 Fed. 631.

**Waiver of objections as to venue.**—In *Stryker Deflector Co. v. Perrin Mfg. Co.*, (C. C. A. 2d Cir. 1919) 256 Fed. 656, 168 C. C. A. 50, it was held that where the question of jurisdiction was raised on preliminary motion and denied, an answer reserving objections previously taken to the court's jurisdiction did not waive an objection as to venue.

**Waiver of objections to jurisdiction.**—“The proper rule is that section 48 should have the same construction as section 51 of the Judicial Code; that is to say, it does not take away the jurisdiction of the District Court in patent cases, but prescribes merely the district in which such a suit may be brought, and is a privilege conferred upon a defendant, which he may waive. In other words, in suits arising under the patent laws, a defendant has a right to insist on the privilege of being sued in a district of which he is an inhabitant, or in a district where he shall have committed acts of infringement and have a regular and established place of business; in other causes of action, the defendant is entitled to insist that he shall be sued in the district of which he is an inhabitant, or, if jurisdiction is invoked only because of diversity of citizenship, in the district of which either the plaintiff or defendant is a resident. This, however, is a personal privilege respecting only the forum within which the action may be maintained. It is a privilege upon which the defendant only may insist, and which he may waive. He will be held to have waived it if he does not, prior to entering a general appearance to the action, take objection in proper form to the jurisdiction of the court over him.” *Sandusky Foundry, etc., Co. v. De Lavaud*, (N. D. Ohio 1918) 251 Fed. 631, wherein the court further said: “In this case, as appears from the facts above stated, the two individual defendants appeared generally to the action and answered to the merits before the motion to dismiss was made. From this it follows that the objection that the defendants are sued in a district in which they are not inhabitants, or in a district in which they did not infringe and did not have an established place of business, is waived. It is open

to complainant to prove infringement anywhere within the United States.”

**Vol. V, p. 482, Jud. Code, sec. 50.**  
[First ed., 1912 Supp., p. 153.]

## IV. PARTIES (p. 483)

**The doctrine is well established.**—To same effect as original annotation, see *Brown v. Crawford*, (D. C. Ore. 1918) 252 Fed. 248.

**Provision declaratory of former equity rule.**—To same effect as original annotation, see *Brown v. Crawford*, (D. C. Ore. 1918) 252 Fed. 248.

**State laws and practice.**—Where state statutes provide for judgments against a firm by the service of process on one partner and give the holder of a written obligation signed by two or more persons the right to proceed against the survivors in case of the death of one of them, a District Court in such state has jurisdiction under this section of an action against a partnership for breach of contract, although only one of the partners is a resident of the district. *Calder v. Rosenthal*, (S. D. Ga. 1918) 250 Fed. 507.

**Action by minority stockholders against corporation and directors.**—Where minority stockholders bring suit against the corporation in a federal court of the state in which it is incorporated and has its property and business, and join as a party defendant the managing director, who is a citizen and resident of the state, alleging in the bill that the directors, they being also the principal stockholders, defrauded the corporation for their individual benefit by certain transactions, the court should not dismiss the suit on the defendant's motion because the other directors, who are not indispensable parties, are not joined as defendants, if by reason of their being absent from the state they cannot be served or because their joinder would oust the court's jurisdiction, but under this section and equity rule 39 should proceed without them and grant such necessary relief as is within its jurisdiction. *Krouse v. Brevard Tannin Co.*, (C. C. A. 4th Cir. 1918) 249 Fed. 538, 161 C. C. A. 464.

**Vol. V, p. 486, Jud. Code, sec. 51.**  
[First ed., 1912 Supp., p. 153.]

## II. Construction.

## IV. Jurisdiction.

3. Objection to jurisdiction.
4. Change of citizenship or residence and effect of.
5. Where parties are joined.
  - b. Plaintiffs.
  - c. Defendants.

## V. Applicability.

4. Corporations.
  - b. Effect of doing business in state.
5. Action or proceeding and subject matter.

## VI. Waiver.

1. Generally.
2. Appearance and pleading to the merits.
  - a. Generally.
  - b. General appearance.
  - c. Special appearance.
4. Removal.
5. Acceptance of service.

## II. CONSTRUCTION (p. 487)

**District of residence of plaintiff.**—The jurisdiction of the District Court for the district of the plaintiff's residence may be invoked by a nonresident defendant. *Dunbar v. Rosenbloom*, (1918) 230 Mass. 176, 119 N. E. 829.

## IV. JURISDICTION

3. *Objections to Jurisdiction* (p. 494)

**Objections to venue of suit.**—Where there is requisite diversity of citizenship in a suit in a federal court and the court's jurisdiction is founded solely on that fact, an objection that the suit should have been brought in the district of the defendant's residence rather than in that of the plaintiff's residence, is one regarding venue rather than jurisdiction and is not well taken. *Tate v. Baugh*, (W. D. Tenn. 1918) 252 Fed. 317.

**The Postmaster General cannot be sued over his objection in a federal court in a district in which he is not a resident, for the purpose of enjoining him, as administrator of a telegraph and telephone system under federal control, from enforcing rates which he has established, on the ground that such action violates the joint resolution of Congress authorizing such federal control.** *Railroad Commissioners v. Burleson*, (N. D. Fla. 1919) 255 Fed. 604.

4. *Change of Citizenship or Residence and Effect of* (p. 495)

**Fraudulent change of residence — burden of proof.**—The defendant in a suit for damages in a federal court has the burden of proving that the plaintiff has fraudulently changed his residence and removed from one district to another for the purpose of bringing suit in the latter district. *Davis v. Baltimore, etc., R. Co.*, (D. C. Mass. 1919) 256 Fed. 407.

5. *Where Parties Are Joined*b. *Plaintiffs* (p. 496)

See to the same effect as the original annotation, *James v. Amarillo City Light, etc., Co.*, (N. D. Tex. 1918) 251 Fed. 337.

c. *Defendants* (p. 496)

**Defendants living in different states.**—The limitation of the jurisdiction of federal district courts to the district of the residence "of either the plaintiff or the defendant," which is made by this section, where jurisdiction is rested solely on diversity of citizenship, must, if there are several defendants, be construed to confine jurisdiction to

the district of the plaintiff's residence, or that in which all of the defendants reside, notwithstanding the provision of section 50 that if there are several defendants and one or more of them are neither inhabitants of nor found within the district and do not voluntarily appear, the court may entertain jurisdiction and proceed to trial between the parties who are properly before it. The only exceptions to the rule laid down in section 51 is the one made by section 52, which provides that if there are two or more defendants residing in different districts of the same state, suit may be brought in either district. *Camp v. Gress*, (1919) 250 U. S. 308, 39 S. Ct. 478, 63 U. S. (L. ed.) —, reversing in part and affirming in part (C. C. A. 4th Cir. 1917) 244 Fed. 121, 156 C. C. A. 549.

The diversity of citizenship requisite to federal jurisdiction exists where the defendants, though not citizens of the same state, are all citizens of states other than that of the plaintiff. *Camp v. Gress*, (1919) 250 U. S. 308, 39 S. Ct. 478, 63 U. S. (L. ed.) —, reversing in part and affirming in part (C. C. A. 4th Cir. 1917) 244 Fed. 121, 156 C. C. A. 549.

**One defendant improperly joined.**—Where it is apparent from the pleadings that a codefendant is not responsible for the alleged injurious acts and it appears that the other defendant may be sued in the district in which he is a resident, the suit will be dismissed as to the defendant who has been improperly joined. *Railroad Commissioners v. Burleson*, (N. D. Fla. 1919) 255 Fed. 604.

**Who may object.**—A resident defendant cannot avail himself of the objection that, under this section, his nonresident codefendant was not suable within the district. This is an exemption from suit personal to the nonresident of the district. *Camp v. Gress*, (1919) 250 U. S. 308, 39 S. Ct. 478, 63 U. S. (L. ed.) —, reversing in part and affirming in part (C. C. A. 4th Cir. 1917) 244 Fed. 121, 156 C. C. A. 549.

**Error in retaining jurisdiction of a nonresident codefendant, contrary to this section, in an action upon a joint contract, does not require that a judgment for plaintiff be set aside as against the resident defendants unless the latter were prejudiced thereby, since, if the trial court had sustained the nonresident's plea to the jurisdiction, the suit might, under section 50, have proceeded to judgment as against the resident defendants.** *Camp v. Gress*, (1919) 250 U. S. 308, 39 S. Ct. 478, 63 U. S. (L. ed.) —, reversing in part and affirming in part (C. C. A. 4th Cir. 1917) 244 Fed. 121, 156 C. C. A. 549.

## V. APPLICABILITY

4. *Corporations*b. *Effect of Doing Business in State* (p. 502)

**Maintenance of office force in state.**—A foreign railroad corporation will be regarded



as doing business in a state so as to subject it to a suit for damages because of injury to a passenger, where it maintains an office and office force in such state in charge of an agent, known as its New England agent, through which office it solicits passenger and freight business for its lines. *Walsh v. Atlantic Coast Line R. Co.*, (D. C. Mass. 1916) 256 Fed. 47. But the contrary was held on a similar state of facts in *Davis v. Baltimore, etc., R. Co.*, (D. C. Mass. 1919) 256 Fed. 407, wherein it was said: "On the question whether a defendant corporation was doing business in any given district to such an extent that it can be said to have been corporately present there, the cases shade into one another. In *St. Louis Southwestern Ry. Co. v. Alexander*, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B 77; *Reynolds v. M., K. & T. Ry. Co.*, 228 Mass. 584, 117 N. E. 913, and *Walsh v. Atlantic Coast Line Ry.*, 256 Fed. 47, D. C. Mass., Feb. 19, 1916, the corporation was held to be present. In *Green v. C., B. & Q. R. R. Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, and in *American Electric Welding Co. v. Lalanc & Grosjean Co.*, 256 Fed. 34, D. C. Mass., July 31, 1917, it was held not to be present. This case seems to me to be distinguishable from the *Walsh Case*, and to fall within the latter class of cases rather than in the former." To same effect, see *Graustein v. Rutland R. Co.*, (D. C. Mass. 1919) 256 Fed. 409.

**Section 53 not applicable.**—The venue of an action against a foreign corporation doing business in a state is governed by section 51 of the Judicial Code permitting action in the district of the residence of the plaintiff and not by section 53 requiring action in the district where the defendant resides, where the district is one having more than one division. *McCullough v. United Grocers' Corp.*, (N. D. Ohio 1918) 247 Fed. 880.

#### 5. Action or Proceeding and Subject Matter (p. 506)

**Personal injury and death.**—An action based upon a state statute providing for the maintenance of an action for death by wrongful act, neglect or default, where the deceased might have maintained an action for damages if death had not ensued, is of a transitory and remedial nature and may be brought in a District Court sitting in a state having a similar statute. *Lauria v. Du Pont De Nemours*, (C. C. A. 2d Cir. 1918) 250 Fed. 353, 162 C. C. A. 423.

**Suits for violation of Sherman and Clayton Acts.**—Although a bill charging a violation of the Sherman Act (see vol. IX, p. 644) and the Clayton Act (see vol. IX, p. 730), presents a federal question justiciable in a District Court under section 24 of the Judicial Code, yet under this section the suit cannot be brought by original process in any other district than that in which the defendant resides, as none of the venue provisions of the Sherman or Clayton Acts is applicable.

*Venner v. Pennsylvania Steel Co.*, (D. C. N. J. 1918) 250 Fed. 292.

#### VI. WAIVER

##### 1. Generally (p. 511)

**Right a personal one which may be waived.**—To same effect as original annotation, see *Matarazzo v. Hustis*, (N. D. N. Y. 1919) 256 Fed. 882.

The limitation in section 48 as to the district of residence of defendant or of place of business and acts of infringement relates merely to the place of suit and may be waived. *Champion Spark Plug Co. v. Champion Ignition Co.*, (E. D. Mich. 1917) 247 Fed. 200.

##### 2. Appearance and Pleading to the Merits a. Generally (p. 513)

**Filing of answer with reservations.**—Where the court has allowed a substitution of plaintiffs over the defendant's objection, the filing of an answer with reservation of all objections previously made to the court's jurisdiction is not a waiver of the right to object to the jurisdiction. *Lchigh Valley Coal Co. v. Lazusaskine*, (C. C. A. 2d Cir. 1919) 256 Fed. 93.

**Request for costs.**—An inadvertent request for costs is not a waiver of the right to object to the maintenance of the action itself. *Budris v. Consolidation Coal Co.*, (E. D. N. Y. 1918) 251 Fed. 673.

##### b. General Appearance (p. 514)

**Action by alien against domestic corporation.**—It has been settled that a waiver by any act equivalent to a general appearance will confer jurisdiction upon a District Court of the United States to hear an action brought by an alien against a domestic corporation, in a district other than that in which the corporation was organized and of which it is a citizen. *Budris v. Consolidation Coal Co.*, (E. D. N. Y. 1918) 251 Fed. 673.

**Appointment of receiver.**—A foreign corporation by voluntarily appearing and filing its answer to a petition for the appointment of a receiver, filed in the District Court in the state in which it is doing its principal business, waives any objections to the court's lack of jurisdiction of it. *Scattergood v. American Pipe, etc., Co.*, (C. C. A. 3d Cir. 1918) 249 Fed. 23, 161 C. C. A. 83.

##### c. Special Appearance (p. 515)

**Special appearance coupled with application for extension of time to answer.**—It has now been settled that a defendant does not consent to jurisdiction by a special appearance, even when coupled with an application for extension of time to answer, if the plea be overruled. *Budris v. Consolidation Coal Co.*, (E. D. N. Y. 1918) 251 Fed. 673, wherein the court said: "A special appearance for the

purpose of dismissing the particular action for lack of jurisdiction over the defendant, and not on the merits, would not be waived by the mere exercise of the jurisdiction, with the consent of the defendant, necessary to hear the motion. . . . An incidental suggestion to the court that a plea in bar, on the ground of prior adjudication, could also be interposed, added nothing, and was not a consent for the exercise of jurisdiction in the particular case, unless interposed before the making of the special plea, or as a waiver thereof, if made subsequently."

#### 4. Removal (p. 517)

**Objections as to venue.**—In a case where jurisdiction depends upon diversity of citizenship under this section, the plaintiff, in case of removal, has the right to insist upon or to waive his objection to the venue of the suit. *Guaranty Trust Co. v. McCabe*, (C. C. A. 2d Cir. 1918) 250 Fed. 699, 163 C. C. A. 31.

#### 5. Acceptance of Service (p. 517)

**Effect of acceptance.**—The exemption of a nonresident defendant, under this section, from suit in a federal court in a district other than that of the residence of plaintiff or defendant, where jurisdiction is based solely on diversity of citizenship, cannot be said to have been waived by an acknowledgment of service on the summons, if such defendant properly asserted his privilege by plea to the jurisdiction. *Camp v. Gress*, (1919) 250 U. S. 308, 39 S. Ct. 478, 63 U. S. (L. ed.) —, reversing in part and affirming in part (C. C. A. 4th Cir. 1917) 244 Fed. 121, 156 C. C. A. 549.

### Vol. V, p. 518, Jud. Code, sec. 52.

[First ed., 1912 Supp., p. 153.]

**Waiver of proper venue.**—"In suits not of a local nature, if there be but one defendant, he may waive being sued in the wrong district, or consent to being sued anywhere; but when there are two or more defendants, residing in different districts of the state, then to reach the defendants not residing in the district where the suit is brought it must be brought as the statute directs, unless the other defendants waive or consent." *Primos Chemical Co. v. Fulton Steel Corp.*, (N. D. N. Y. 1918) 254 Fed. 454.

### Vol. V, p. 520, Jud. Code, sec. 53.

[First ed., 1912 Supp., p. 154.]

- II. Jurisdiction.
- III. Applicability.

#### II. JURISDICTION (p. 521)

"If the plaintiff sues in the state court outside the jurisdiction in which he must have brought suit had he sued in the United States District Court, he cannot thereby defeat removal pursuant to section 53 of the

Judicial Code, for 'in all cases of the removal of suits from the courts of a state to the District Court of the United States such removal shall be to the United States District Court in the division in which the county is situated from which the removal is made.' In this case the removal was made from the state court in Saratoga county in the Northern District of New York, in which county the plaintiff resided and in which county he laid the venue and commenced his action to the United States District Court of the Northern District of New York, and this was done pursuant to and in strict accordance with the provisions of section 53, Judicial Code. The right of removal was absolute even if the plaintiff could not have sued in that district. *M. Hohenberg & Co. v. Mobile Liners*, (D. C.) 245 Fed. 109. In that case plaintiff sued defendant in the state court in a state of which defendant was not a resident. The defendant removed it to the United States District Court of the district in which the county in which the suit was brought was situated. The plaintiff moved to remand the cause. Held, he could not contest the removal on the ground that he could not have brought the suit in the District Court of the United States of that district over the defendant's objection. Where an alien sues a citizen in a state court in which state such defendant does not reside, the defendant may remove the case into the United States court, and it will not be remanded. *H. J. Decker, Jr., & Co. v. Southern Ry. Co.*, (C. C.) 189 Fed. 224. Having there brought his suit, and defendant not objecting, the plaintiff cannot then complain that he could not have sued defendant in such district, and that hence the cause was improperly removed. *H. J. Decker & Co. v. Southern Ry. Co.*, supra. In *Rones v. Katalla Co.*, (C. C.) 182 Fed. 946, it was held that an action brought by an alien in a state court against a nonresident of such state in which the suit was brought may be removed to the United States District Court. *O'Connor v. Texas*, 202 U. S. 501, 26 Sup. Ct. 726, 50 L. Ed. 1120, is not a decision to the contrary. There the state of Texas sued an alien, Thos. O'Connor, domiciled in the republic of Mexico, in the state courts of Texas, to recover the possession of a large tract of land in said state. No constitutional question was involved, nor any question under any treaty or law of the United States. The alien was defendant, and of course was not a citizen of the United States, nor was he a resident of or domiciled in the United States. The action was local in its nature and character, and the United States courts had no jurisdiction of the case, as it was not one between citizens, or a citizen of a state and a foreign state, or a citizen or a subject of a foreign state. The plaintiff was the state of Texas, not a citizen of Texas, nor of any state, and hence the case was not within section 24 of the Judicial Code." *Matarazzo v. Hustis*, (N. D. N. Y. 1919) 256 Fed. 882.

## III. APPLICABILITY (p. 522)

**Action against foreign corporation.**—The venue of an action against a foreign corporation doing business in the state is governed by section 51 of the Judicial Code permitting action in the district of the residence of the plaintiff and not by section 53 requiring action in the district where the defendant resides, where the district is one having more than one division. *McCullough v. United Grocers' Corp.*, (N. D. Ohio 1918) 247 Fed. 880.

## Vol. V, p. 523, Jud. Code, sec. 55.

[First ed., 1912 Supp., p. 155.]

**Bank deposit as property "of a fixed character."**—Although a corporation admits the jurisdiction of a District Court in a district other than that in which it has its domicile and principal place of business, such court is without jurisdiction under this section where the only property of the corporation in the district is a bank deposit, for the deposit is not "property of a fixed character," the money becoming the property of the bank and the relation of debtor and creditor existing between the depositor and the bank. *Primos Chemical Co. v. Fulton Steel Corp.*, (N. D. N. Y. 1918) 254 Fed. 454.

**Lease as property "of a fixed character."** *A lease of real property for a term of years* is personal property and not property "of a fixed character" within the meaning of this section. *Primos Chemical Co. v. Fulton Steel Corp.*, (N. D. N. Y. 1918) 254 Fed. 454. See a case involving the same parties in (S. D. N. Y. 1918) 255 Fed. 427.

**Suit to protect assets for receivership.**—Under section 54, a suit to protect the assets of a corporation and to appoint a receiver is one of a local nature and not maintainable under this section in a district where the corporation has no property of a fixed character. *Primos Chemical Co. v. Fulton Steel Corp.*, (N. D. N. Y. 1918) 254 Fed. 454.

**Waiver of jurisdiction.**—In actions of a local nature jurisdiction can be waived neither by consent of the parties nor assumption of jurisdiction by the court, nor by both together. *Matarazzo v. Hustis*, (N. D. N. Y. 1919) 256 Fed. 882.

## Vol. V, p. 524, Jud. Code, sec. 56.

[First ed., 1912 Supp., p. 155.]

**Petition by receiver to prevent interference by public utilities commissions.**—A federal District Court which, having acquired jurisdiction and complete control of the property of a natural gas company operating as a unit in three states, turned over the property in one state to a state receiver upon grounds of priority of action, and subsequently appointed the same person as receiver of the property in the other two states, in

order that the property could be operated under a single management, has jurisdiction of a suit by such receiver to enjoin alleged confiscatory rates fixed by state commissions. *Public Utilities Commission v. Landon*, (1919) 249 U. S. 236, 39 S. Ct. 268, 63 U. S. (L. ed.) —, *reversing* on other grounds (D. C. Kan. 1917) 234 Fed. 152, (D. C. Kan. 1917) 242 Fed. 658, (D. C. Kan. 1917) 245 Fed. 950.

## Vol. V, p. 525, Jud. Code, sec. 57.

[First ed., 1912 Supp., p. 155.]

II. Applicability to particular matters, suits and proceedings.  
VII. Judgment or decree.

## II. APPLICABILITY TO PARTICULAR MATTERS, SUITS AND PROCEEDINGS (p. 529)

**Corporate matters.**—Where a railroad leases all its property to another railroad, the lessee agreeing to pay the rental in dividends directly to the lessor's stockholders, and it is adjudged that the rental constitutes net income of the lessor which is subject to the federal corporation tax, nonresident stockholders, who are indispensable parties to a suit by the lessor to have the taxes declared an equitable lien on the dividends in the hands of the lessee, may be brought in by publication under this section. *Renselaer, etc., R. Co. v. Irwin*, (N. D. N. Y. 1918) 252 Fed. 921.

**Action to set aside fraudulent conveyance.**—An action by a judgment creditor to set aside a fraudulent conveyance is not a suit to remove a cloud on title or to enforce a lien. *Bank of Commerce, etc. v. McArthur*, (S. D. Fla. 1918) 248 Fed. 138.

**Other particular suits.**—Suits by a state and by the lessee of a state-owned railroad against another railroad for encroachment, which have been removed to a federal court, will be remanded to the state court, where it appears that under a state statute it is doubtful whether the state can be regarded as an unnecessary party, and its lessee as the sole necessary party, so as to give the federal court jurisdiction under this section on the ground that the property is within its jurisdiction. *Georgia v. Southern R. Co.*, (N. D. Ga. 1918) 255 Fed. 369.

## VII. JUDGMENT OR DECREE (p. 537)

**Decree pro confesso.**—Where, on a bill to quiet title brought in a Circuit Court, a necessary party defendant, resident of another state, defaults, after being served with process and being thereby required to meet the allegations that the land is situated in the state where the suit is brought, he admits by such default that the land is in that state and brings himself within the provisions of this section, under which the court may enter judgment against him. *Ferguson v. Babcock Lumber, etc., Co.*, (C. C. A. 4th Cir. 1918) 252 Fed. 705, 164 C. C. A. 545.

**Vol. V, p. 540, Jud. Code, sec. 65.**

[First ed., 1912 Supp., p. 159.]

**Duty of receiver to comply with state law.**

—To same effect as original annotation, see *Westinghouse Electric, etc., Co. v. Binghamton R. Co.*, (N. D. N. Y. 1919) 255 Fed. 378.

**Vol. V, p. 541, Jud. Code, sec. 66.**

[First ed., 1912 Supp., p. 159.]

II. Jurisdiction and powers of federal and state courts.

2. State courts.

III. Applicability.

3. Leave to sue.

II. JURISDICTION AND POWERS OF FEDERAL AND STATE COURTS

2. State Courts (p. 543)

**Rendition of judgment.**—A state court may render a judgment for personal injuries against a railroad operating under a federal receivership. *Bush v. Southern Grocery Co.*, (Ark. 1918) 208 S. W. 299.

**Effect of sale by receiver.**—Since no leave of court is necessary to give to a state court jurisdiction of an action against a receiver of railroad property appointed in a federal court, a subsequent sale of the property by the receiver and a decree therefor do not oust that jurisdiction. *Hawkins v. St. Louis, etc., R. Co.*, (Mo. App. 1918) 202 S. W. 1060.

III. APPLICABILITY

3. Leave to Sue (p. 544)

**Withdrawal of permission.**—Where a District Court, which, through its receivers, is in complete possession of all of the property of a railroad company, grants leave to sue the receiver in a state court, it may thereafter recall its leave to sue there and take jurisdiction of the subject matter of the suit. *Investment Registry v. Chicago, etc., R. Co.*, (C. C. A. 7th Cir. 1918) 251 Fed. 510, 163 C. C. A. 504, wherein the court said: "The prime end to be served is the due and proper conservation of the property in the hands of the court, in order that there may be prompt and proper administration thereof for the benefit of all having any interest therein. If at any stage of the proceedings the court deems it proper and advisable that any demand or question be litigated elsewhere than in the federal court, it can authorize such litigation to be elsewhere instituted. But neither on principle nor authority does it follow that the court granting the leave to sue may not recall it, if before adjudication in such other tribunal the court granting the leave shall consider, either because of facts subsequently arising, or of new light coming to it as to then existing conditions, it would best subserve the due administration of the estate to recall the granted leave."

"Under such circumstances there is involved no question of comity between different courts, but only that of the best interest of the estate which the court is administering."

**Vol. V, p. 550, Jud. Code, sec. 69.**

[First ed., 1912 Supp., p. 160.]

**Jurisdiction of District Courts.**—Under the provisions of sections 69-115 of the Judicial Code, the jurisdiction of each of the various District Courts is coextensive with the boundaries of the judicial district in and for which it is established or created, and extends no further, except in those cases where Congress has expressly extended it. *Primos Chemical Co. v. Fulton Steel Corp.*, (N. D. N. Y. 1918) 254 Fed. 454.

**Vol. V, p. 600, Jud. Code, sec. 117.**

[First ed., 1912 Supp., p. 191.]

A quorum of judges is not present when a cause comes on for hearing before three judges, one of whom is unwilling and another disqualified to sit in its determination. *Cincinnati, etc., R. Co. v. McKeen*, (1893) 149 U. S. 259, 13 S. Ct. 840, 37 U. S. (L. ed.) 725.

**Vol. V, p. 607, Jud. Code, sec. 128.**

[First ed., 1912 Supp., p. 195.]

II. "Appellate jurisdiction to review by appeal or writ of error."

III. "Final decisions."

2. Definition and nature.

6. Bankruptcy.

14. Mortgage foreclosure proceedings.

18. Miscellaneous.

V. "Cases" reviewable.

2. Admiralty.

VI. Cases which "may be taken direct to the Supreme Court."

VIII. Finality of judgment and decree of Circuit Court of Appeals.

3. "Opposite parties . . . citizens of different states."

4. Federal question alone involved.

6. Trademark cases.

II. "APPELLATE JURISDICTION TO REVIEW BY APPEAL OR WRIT OF ERROR" (p. 609)

**In general.**—Where an appeal does not present solely the question of the jurisdiction of the District Court, it may properly be taken to the Circuit Court of Appeals. *Hume v. New York*, (C. C. A. 2d Cir. 1918) 255 Fed. 488, 166 C. C. A. 564.

III. "FINAL DECISIONS"

2. Definition and Nature (p. 611)

A decision which completely deprives a party in a pending proceeding who is not

jointly liable with others of a substantial right or equity is a final decision, and reviewable by appeal or writ of error under this section. *Bankers' Trust Co. v. Missouri, etc., R. Co.*, (C. C. A. 8th Cir. 1918) 251 Fed. 789, 164 C. C. A. 23.

#### 6. *Bankruptcy* (p. 614)

**What are "bankruptcy proceedings."**—A petition by a trustee to have a deed by the bankrupt declared to be a mortgage and the land sold subject thereto is not a "bankruptcy proceeding" but is appealable under the general appellate jurisdiction of the Circuit Court of Appeals. *Sauve v. M. L. More Invest. Co.*, (C. C. A. 8th Cir. 1918) 248 Fed. 642, 160 C. C. A. 542.

#### 14. *Mortgage Foreclosure Proceedings* (p. 615)

An order in a railroad trust mortgage foreclosure suit which adjudged that "the acceptance of the benefit of the consolidation or of the extension of the receivership, by this order, shall be deemed a consent to all administrative orders heretofore made in the consolidated or constituent causes," was held to be a final decision and appealable. *Bankers' Trust Co. v. Missouri, etc., R. Co.*, (C. C. A. 8th Cir. 1918) 251 Fed. 789, 164 C. C. A. 23.

#### 18. *Miscellaneous* (p. 616)

An order sustaining a demurrer to a declaration in an action at law and one denying leave to the plaintiff in the case to file an amended declaration, are not "final decisions" within the meaning of this section. *J. W. Darling Lumber Co. v. Porter*, (C. C. A. 5th Cir. 1919) 256 Fed. 455.

Denial of a motion to set aside a verdict is not reviewable on writ of error. *American Trading Co. v. North Alaska Salmon Co.*, (C. C. A. 9th Cir. 1918) 248 Fed. 665, 160 C. C. A. 565.

### V. "CASES" REVIEWABLE

#### 2. *Admiralty* (p. 618)

**Matters of law and fact.**—The Circuit Court of Appeals now has the same appellate jurisdiction in admiralty, both as to matters of law and fact, that the Supreme Court had before the Act of Feb. 16, 1875, ch. 77 (see vol. 6, p. 130). *The Kia Ora*, (C. C. A. 4th Cir. 1918) 252 Fed. 507, 164 C. C. A. 423.

**Finality of District Court's decree.**—Where the owner of a sunken vessel, after making a contract to have it salvaged, files a petition to limit his liability and the salvor intervenes and files a petition for a preferred lien, which is denied, the decree is final as to the salvor and appealable to the Circuit Court of Appeals. *Great Lakes Towing Co. v. St. Joseph-Chicago Steamship Co.*, (C. C. A. 7th Cir. 1918) 253 Fed. 635, 165 C. C. A. 261.

**Considering case de novo.**—An appeal in an admiralty case gives the appellate court ju-

risdiction to consider the case de novo. *The John Twohy*, (C. C. A. 3d Cir. 1919) 256 Fed. 224.

**Withdrawal of appeal.**—Where an appeal in an admiralty case is taken by one party only, the appellee is not entitled to a review of the case, and hence the court is not prevented from exercising its discretion to permit a withdrawal of the appeal. *The John Twohy*, (C. C. A. 3d Cir. 1919) 256 Fed. 224.

### VI. CASES WHICH "MAY BE TAKEN DIRECT TO THE SUPREME COURT" (p. 622)

**Review of a question of jurisdiction.**—If the jurisdiction of the District Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error to the Supreme Court. This rule, however, does not apply where the District Court dismisses an action in ejectment because of the objection that the lands which are the subject of the suit are not within its territorial jurisdiction, as such an objection is not one to the jurisdiction of the District Court as a federal court. *Davis v. Anderson-Tully Co.*, (C. C. A. 8th Cir. 1918) 252 Fed. 681, 164 C. C. A. 521.

### VIII. FINALITY OF JUDGMENT AND DECREE OF CIRCUIT COURT OF APPEALS

#### 3. "Opposite Parties . . . Citizens of Different States" (p. 623)

**Removal cases.**—*Southern Pac. Co. v. Stewart*, (1917) 245 U. S. 359, 562, 38 S. Ct. 130, 203, 62 U. S. (L. ed.) 345, 472, as set forth in 1918 Supp. at p. 1118, was followed in *Southern Pac. Co. v. Stewart*, (1919) 248 U. S. 446, 39 S. Ct. 139, 63 U. S. (L. ed.) —, holding that the Supreme Court had jurisdiction.

#### 4. *Federal Question Alone Involved* (p. 627)

A federal Circuit Court of Appeals may not entertain appellate jurisdiction in a suit in which the jurisdiction of the District Court was based solely upon the ground that it was one arising under the Constitution and laws of the United States. The decree of the District Court is, under this section and 238, reviewable only by direct appeal to the federal Supreme Court. *Raton Water Works Co. v. Raton*, (1919) 249 U. S. 552, 39 S. Ct. 384, 63 U. S. (L. ed.) —, wherein the court on a certificate from the Circuit Court of Appeals said: "The certificate states that in a cause pending before it on appeal from the district court, the jurisdiction of the court below to entertain the cause on appeal was questioned on the ground that the judgment of the district court was exclusively susceptible of being reviewed by direct appeal to this court. The certificate further states that the parties to the cause in the district court were both corporations of New Mexico and the jurisdiction of the district court to entertain the suit was based solely upon the

ground that it was one arising under the Constitution of the United States.

"Resulting from these conditions the question which the certificate propounds is this: 'Has this court [the Circuit Court of Appeals] jurisdiction of the appeal?' The solution of the question is free from difficulty, since whatever at one time may have been the basis for hesitancy concerning the question the necessity for a negative answer is now conclusively manifest as the result of a line of decisions determining that, under the circumstances as stated, the Circuit Court of Appeals was without jurisdiction of the appeal, as the exclusive power to review was vested in this court. Judicial Code, §§ 128, 238; *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277-281; *Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U. S. 290, 295; *Union, etc., Bank v. Memphis*, 189 U. S. 71, 73; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 458; *Carolina Glass Co. v. South Carolina*, 240 U. S. 305, 318. A negative answer to the question propounded is therefore directed."

#### 6. Trademark Cases (p. 627)

Since this section as amended makes trademark decisions in the Circuit Court of Appeals final, an appeal does not lie to the Supreme Court but the only remedy is by certiorari. *United Drug Co. v. Theodore Rectanus Co.*, (1918) 248 U. S. 90, 39 S. Ct. 48, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 6th Cir. 1915) 226 Fed. 545, 141 C. C. A. 301.

### Vol. V, p. 629, Jud. Code, sec. 129.

[First ed., 1912 Supp., p. 195.]

#### IV. "Interlocutory order or decree."

XII. Scope of review.

XIII. Effect of appeal.

#### IV. "INTERLOCUTORY ORDER OR DECREE" (p. 632)

Whether the District Court has jurisdiction may be determined by the Circuit Court of Appeals on an appeal under this section from an interlocutory decree. *Soler v. Scoville*, (C. C. A. 1st Cir. 1918) 253 Fed. 932, 166 C. C. A. 32.

#### XII. SCOPE OF REVIEW (p. 639)

**Appeal from an order granting, etc., injunction.**—"The appellate court will overrule or reverse an order granting a preliminary injunction only when satisfied that there was error of law in the action of the trial court, or that, upon the facts, there was no reasonable field for discretionary action." *Louisville, etc., R. Co. v. Western Union Tel. Co.*, (C. C. A. 6th Cir. 1918) 252 Fed. 29, 164 C. C. A. 141.

The granting of a temporary injunction pending a final hearing is within the discretion of the court and not subject to review

if abuse is not shown. *Amarillo v. Southwestern Tel., etc., Co.*, (C. C. A. 5th Cir. 1918) 253 Fed. 638, 165 C. C. A. 264.

#### XIII. EFFECT OF APPEAL (p. 642)

**Appeal from interlocutory order.**—Where a defendant appeals from an interlocutory order of a District Court adjudging certain claims of a patent to be infringed, the District Court cannot enter a final decree as to all the issues in the case, as its proceedings are stayed in respect to the issue to be reviewed by the appellate court. Accordingly, where the court attempts to enter such a decree, it is not final and no appeal lies therefrom. *Draper Corp. v. Stafford Co.*, (C. C. A. 1st Cir. 1918) 255 Fed. 554, 166 C. C. A. 622.

### Vol. V, p. 644, Jud. Code, sec. 134.

[First ed., 1912 Supp., p. 197.]

**Finality of judgment of Circuit Court of Appeals.**—Congress in enacting the Judicial Code contemplated no change as to the finality of the judgments of the Circuit Court of Appeals for the Ninth Circuit in cases taken to that court from the District Court of Alaska. And where a case involving issues relating to the Constitution and also issues not relating to the Constitution goes to the Circuit Court of Appeals on a writ of error to the District Court the judgment of the Circuit Court of Appeals is by the terms of this section final and a writ of error will not lie to it from the Supreme Court. *Alaska Pac. Fisheries v. Alaska*, (1919) 249 U. S. 53, 39 S. Ct. 208, 63 U. S. (L. ed.) — (*dismissing* writ of error to review (C. C. A. 9th Cir. 1916) 236 Fed. 52, 70, 149 C. C. A. 262, and *followed* in *Alaska Salmon Co. v. Alaska*, (1919) 249 U. S. 62, 39 S. Ct. 210, 63 U. S. (L. ed.) —), wherein the court set out in the opinion sections 504 and 505 of the Alaska Civil Code as they stood before the enactment of the Judicial Code and then said: "A reading of these sections shows that two classes of cases were provided for: (1) Prize cases, and cases involving the Constitution and treaties; (2) other cases wherein the amount involved exceeds five hundred dollars. In the first class of cases appeal or writ of error was to this court direct. In the second class of cases the writ of error or appeal was to the United States Circuit Court of Appeals for the Ninth Circuit. Under § 505 the judgments of the Circuit Court of Appeals were made final in all cases coming to it from the district court, with the provision that the Circuit Court of Appeals might certify propositions of law to this court in any cases pending before it upon writs of error or appeals. The like provision as to the finality in the Circuit Court of Appeals was, we think, carried into the Judicial Code in § 134 thereof, and a writ of error or appeal to this court was allowed where the Federal

Constitution was involved, under the provisions of § 247. In § 134, as in the Alaska Code from which we have quoted, the judgment of the Circuit Court of Appeals was made final 'in all such cases,' that is, in cases in which the section permitted appeals or writs of error to the Circuit Court of Appeals. . . .

"The plaintiff in error might have taken a writ of error from this court to the District Court. (§ 247.) It did not choose to do so, and as the cases involved issues other than those relating to the Constitution, sued out a writ of error from the Circuit Court of Appeals. By the terms of § 134 the judgment of that court is made final.

"The contention that the effect of this construction is to make the Circuit Court of Appeals a court of final jurisdiction in cases involving questions of the construction and application of the Constitution is met by the suggestion that this court has ample power under the Judicial Code to review judgments of the Circuit Court of Appeals, made final in that court, by writs of certiorari. (§ 240.)"

**Vol. V, p. 650, Jud. Code, sec. 145, par. first.** [First ed., 1912 Supp., p. 200.]

**II. JURISDICTION**

**4. Claims Founded upon Law of Congress** (p. 653)

**Refund of excess payment made under Public Land Laws.**—The jurisdiction of the Court of Claims under this section of claims founded upon any law of Congress extends to a claim based on the refusal of the Secretary of the Interior to grant a refund in a case in which the facts were not in dispute, under the Act of March 26, 1908, § 2 (see vol. 8, p. 528), providing "that in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the Public Land Laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives." U. S. v. Laughlin, (1919) 249 U. S. 440, 39 S. Ct. 340, 63 U. S. (L. ed.) —, *affirming* (1917) 52 Ct. Cl. 292.

**Vol. V, p. 662, Jud. Code, sec. 148.**  
[First ed., 1912 Supp., p. 201.]

**Matters referable.**—The language of sections 148 and 149 of the Judicial Code contemplates the reference by a head of a department of a matter in which there is a claimant, to which the United States are defendants, and in which there is a money demand. *In re Proposed Reference by Secretary of Navy*, (1918) 53 Ct. Cl. 370.

**Advisory opinions.**—A claim or matter pending in a department which involves any controverted questions of fact or law in order to be transmitted to this court under the provisions of section 148, Judicial Code, must be one for the "guidance and action" of said department, and not one that is to be merely advisory. *In re Proposed Reference by the Secretary of Navy*, (1918) 53 Ct. Cl. 370.

**Vol. V, p. 664, Jud. Code, sec. 149.**  
[First ed., 1912 Supp., p. 202.]

**Finality of judgment.**—Where a claim has been finally disposed of by this court under its general jurisdiction the same cannot be reopened upon the application of the claimant or indirectly presented again for consideration upon the application of someone else; the matter is *res judicata*. *In re Proposed Reference by the Secretary of Navy*, (1918) 53 Ct. Cl. 370.

**Vol. V, p. 668, Jud. Code, sec. 156.**  
[First ed., 1912 Supp., p. 204.]

**IV. COMPUTATION OF TIME (p. 670)**

**Suit for unrepaid residue of succession tax.**—A suit against the United States in the Court of Claims for the unrepaid residue of a succession tax collected contrary to the terms of the Act of June 27, 1902, § 3 (see vol. 4, p. 232), under the War Revenue Act of June 13, 1898 (30 Stat. 448, ch. 448, § 29, is in time, under the six years' limitation prescribed by this section for suits in the Court of Claims, if begun within six years from January 1, 1914, where a claim for a refund was presented to the Commissioner of Internal Revenue not later than that date, since, under the Act of July 27, 1912 (see vol. 4, p. 236), provision is made for the presentation of claims on or before January 1, 1914, for taxes so erroneously collected, and repayment is directed in section 2 to such claimants as have presented or shall hereafter so present their claims and establish them. *Sage v. U. S.*, (1919) 250 U. S. 33, 39 S. Ct. 415, 63 U. S. (L. ed.) —, *reversing* (1918) 53 Ct. Cl. 628.

**Vol. V, p. 673, Jud. Code, sec. 162.**  
[First ed., 1912 Supp., p. 205.]

**Property taken under Abandoned and Captured Property Act.**—Money legally exacted by a government agent conformably to the Act of July 2, 1864 (13 Stat. 375, ch. 225), § 8, from persons availing themselves of the privilege conferred by that Act of bringing in cotton grown in insurrectionary districts to a market opened by the United States forces, conditioned upon the turning over to the government of one-fourth of the cotton or its money equivalent, to become immediately the property of the United States, cannot be deemed to have been prop-

erty taken under the Abandoned and Captured Property Act of March 12, 1863 (12 Stat. 820, ch. 120), and acts amendatory thereof, within the meaning of this section, conferring jurisdiction on the court to hear and determine the claims of those whose property was so taken and sold, and the net proceeds thereof placed in the Treasury of the United States, since the Act of 1864 deals with a different subject-matter and expressly states that it is an act "in addition" to the "several acts concerning commercial intercourse between loyal and insurrectionary states, and to provide for the collection of captured and abandoned property and the prevention of frauds in states declared to be in insurrection," and therefore cannot be considered as an amendment to the preceding legislation. *O'Pry v. U. S.*, (1919) 249 U. S. 323, 39 S. Ct. 305, 63 U. S. (L. ed.) —, *affirming* (1916 51 Ct. Cl. 111).

### Vol. V, p. 689, Jud. Code, sec. 195.

[First ed., 1916 Supp., p. 132.]

A writ of certiorari to the Court of Customs Appeals was granted and hearing and decision had thereon in *Nicholas v. U. S.*, (1916) 242 U. S. 641, 37 S. Ct. 113, 61 U. S. (L. ed.) 541, (1919) 249 U. S. 34, 39 S. Ct. 218, 63 U. S. (L. ed.) —; *Shaw v. U. S.*, (1916) 242 U. S. 641, 37 S. Ct. 113, 61 U. S. (L. ed.) 541, (1919) 249 U. S. 34, 39 S. Ct. 218, 63 U. S. (L. ed.) —.

On writ of certiorari, the judgment in *Vitelli v. U. S.*, (1916) 7 U. S. Court App. 243, was *reversed* in (1919) 250 U. S. 355, 39 S. Ct. 544, 63 U. S. (L. ed.) —.

### Vol. V, p. 691, Jud. Code, sec. 198.

[First ed., 1912 Supp., p. 214.]

**Service of copy of assignment of error.**—The requirement of this section that, upon appeal to the United States Court of Customs Appeals, a copy of the assignment of error "shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be," is not jurisdictional; and, if omitted or unreasonably delayed, the United States Court of Customs Appeals has ample power to direct its issue. Its delay for more than the 60 days prescribed by the statute is not ground for a motion to dismiss the appeal. *Germania Importing Co. v. U. S.*, (1917) 8 U. S. Cust. App. 97.

### Vol. V, p. 708, Jud. Code, sec. 233.

[First ed., 1912 Supp., p. 229.]

#### 4. State Against State (n. 710)

"The many cases in which such controversies between states have been decided" by the Supreme Court "in the exercise of original jurisdiction" are cited by Mr. Chief Justice White in a foot-note in *Virginia v. West Virginia*. (1918) 246 U. S. 565, 38 S. Ct. 400, 62 U. S. (L. ed.) 883, citing fifty-three cases.

### Vol. V, p. 723, Jud. Code, sec. 237.

[First ed., 1912 Supp., p. 230.]

#### I. Introductory.

#### II. General considerations affecting review of judgments of state courts.

##### 7. State practice as determining whether federal question is raised.

#### III. "Final judgment or decree."

#### V. "Highest court of a state."

#### VI. Questions reviewable by Supreme Court.

##### 1. Federal questions.

###### a. Necessity.

###### b. Nonfederal question in case in addition to federal question.

###### c. Fictitious, frivolous, or moot federal questions.

##### 2. Questions of fact.

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#### VII. Validity of treaty or statute of, or authority exercised under United States "drawn in question."

#### IX. Validity of statute of, or authority exercised under, state "drawn in question."

##### 1. "Statute of state."

#### X. "Repugnant to Constitution, treaties or laws of United States."

##### 4. Due process of law.

#### XIX. Review on writ of certiorari.

#### I. INTRODUCTORY (p. 725)

Construction of this section as amended, see *infra*, p. 655.

#### II. GENERAL CONSIDERATIONS AFFECTING REVIEW OF JUDGMENTS OF STATE COURTS

##### 7. State Practice as Determining Whether Federal Question is Raised (p. 727)

Where a state court decides as a matter of state practice that a federal question presented to it comes too late to be considered, the question will not be considered on writ of error to the United States Supreme Court. *Missouri, etc., R. Co. v. Sealy*, (1919) 248 U. S. 363, 36 S. Ct. 97, 63 U. S. (L. ed.) —, *dismissing* writ of error to review, (1916) 98 Kan. 225, 158 Pac. 62.

#### III. "FINAL JUDGMENT OR DECREE" (p. 727)

**Discretionary power to review.**—The fact that the power of an appellate court to review a judgment is discretionary and not imperative or obligatory does not make the judgment a final one so long as that discretion to review exists. *Andrews v. Virginian R. Co.*, (1919) 248 U. S. 272, 39 S. Ct. 101, 63 U. S. (L. ed.) —.

**Rehearing.**—A judgment of a state court becomes final for purposes of review in the federal Supreme Court by writ of error or certiorari in a case in which a petition for rehearing is entertained, upon the date of the denial or other disposition of such petition.



Citizens' Bank v. Opperman, (1919) 249 U. S. 448, 39 S. Ct. 330, 63 U. S. (L. ed.) —, *dismissing* writ of error to review, (Ind. 1917) 115 N. E. 55.

"It is only a judgment marking the conclusion of the course of litigation in the courts of the state that is subjected to our review. Hence, whatever its form of finality, if a judgment be in fact subject to reconsideration and review by the state court of last resort through the medium of a petition for rehearing, and such a petition is presented to and entertained and considered by that court, we must take it that by the practice prevailing in the state the litigation is not brought to a conclusion until this petition is disposed of, and until then the judgment previously rendered cannot be regarded as a final judgment within the meaning of the act of Congress. We said recently in an analogous case: 'If it were not so, a judgment of a state court susceptible of being reviewed by this court would, notwithstanding that duty, be open at the same time to the power of a state court to review and reverse.' Andrews v. Virginian R. Co., (1919) 248 U. S. 272, 39 S. Ct. 101, 63 U. S. (L. ed.) —." Chicago Great Western R. Co. v. Basham, (1919) 249 U. S. 164, 39 S. Ct. 213, 63 U. S. (L. ed.) —, *dismissing* writ of error to review, (1916) 178 Ia. 998, 154 N. W. 1019, 157 N. W. 192.

#### V. "HIGHEST COURT OF A STATE" (p. 730)

"**Highest**" court — *In general*.—Two writs of error directed respectively to the Supreme Court of a state and to the state trial court are not essential where the former court has reversed a decree of the trial court, with a direction to dismiss the complaint, and such direction has been followed. One writ is sufficient. Denver, etc., R. Co. v. Denver, (1919) 250 U. S. 241, 39 S. Ct. 450, 63 U. S. (L. ed.) —.

An intermediate appellate court is, with respect to a case wherein its jurisdiction is exclusive, the highest court of the state. Mitchell v. Joplin Nat. Bank, (1918) 200 Mo. App. 243, 204 S. W. 1125.

#### VI. QUESTIONS REVIEWABLE BY SUPREME COURT

##### 1. Federal Questions

###### a. Necessity (p. 733)

To the same effect as the first paragraph, see Palmer v. Ohio, (1918) 248 U. S. 32, 39 S. Ct. 16, 63 U. S. (L. ed.) —, *dismissing* on writ of error to review (1917) 96 Ohio St. 513, 118 N. E. 102.

Where a case presents no substantial federal question a writ of error will be dismissed. Chicago, etc., R. Co. v. Maucher, (1919) 248 U. S. 359, 36 S. Ct. 108, 63 U. S. (L. ed.) —, *dismissing* writ of error to review (1916) 100 Neb. 237, 159 N. W. 422.

Where a motion to dismiss is made in the Supreme Court on the ground that the fed-

eral questions raised were not passed upon by the courts of the state, but it appears from the motion that the courts rested their decision on a disputed proposition of fact affecting the merits of the case, the Supreme Court will not grant the motion. American F. Ins. Co. v. King Lumber, etc., Co., (1919) 250 U. S. 2, 39 S. Ct. 431, 63 U. S. (L. ed.) —, *affirming* on other grounds 74 Fla. 130.

The Supreme Court will not assume in advance that a state court will so construe a state Employers' Liability Act as to render it obnoxious to the Federal Constitution. Arizona Employers' Liability Cases, (1919) 250 U. S. 400, 39 S. Ct. 553, 63 U. S. (L. ed.) —, *affirming* (1919) 19 Ariz. 151, 182, 166 Pac. 278, 1183, 165 Pac. 1101, 1185.

###### b. Nonfederal Question in Case in Addition to Federal Question (p. 733)

The general rule.—To the same effect as the original annotation, see Petrie v. Nampa, etc., Irrigation Dist., (1918) 248 U. S. 154, 39 S. Ct. 25, 63 U. S. (L. ed.) —, *dismissing* writ of error to review (1915) 28 Idaho 227, 153 Pac. 425; Farson v. Bird, (1919) 248 U. S. 268, 39 S. Ct. 111, 63 U. S. (L. ed.) —, *dismissing* writ of error to review (1916) 197 Ala. 384, 72 So. 550.

###### c. Fictitious, Frivolous or Moot Federal Questions (p. 737)

**Moot question**.—The moot character of the controversy prevents the federal Supreme Court from deciding, on the merits, appeals from decrees presenting the question as to the right of the Postmaster General or his representatives to interfere with the control, by cable companies, of their property taken over by the President under the authority of the Joint Resolution of July 16, 1918, where, pending the decision of the appeals, such property was all turned back to the cable companies. Commercial Cable Co. v. Burleson, (1919) 250 U. S. 360, 39 S. Ct. 512, 63 U. S. (L. ed.) —, *reversing* (S. D. N. Y. 1919) 255 Fed. 99.

An appeal from a decree refusing to enjoin a state auditor and a county sheriff from enforcing a tax levied under the state law on the ground of the repugnancy of such tax to the Federal Constitution must be dismissed where the terms of office of the defendant officials have expired and their successors have qualified, and there is no law of the state authorizing a revival or continuance of the cause of action against such successors. Shaffer v. Howard, (1919) 249 U. S. 200, 39 S. Ct. 255, 63 U. S. (L. ed.) —, *reversing* (E. D. Okla. 1918) 250 Fed. 873.

**Denial of due process and equal protection of law**.—The contention of a carrier that an order of a state commission requiring it to transport a carnival show equipment between two points in the state at a specified reasonable rate deprived such carrier of its right to make or refuse to make a contract

as a private carrier for the transportation of traveling shows, and thereby denied due process of law and the equal protection of the laws, is too clearly without merit to require consideration by the federal Supreme Court on writ of error to a state court, where it had been the carrier's practice to transport such shows on application under special contract, and the commission's order permitted the carrier to make the special terms for transportation which had been customary with it in like cases. *Southern Pac. R. Co. v. Arizona*, (1919) 249 U. S. 472, 39 S. Ct. 313, 63 U. S. (L. ed.) —, *affirming* (1917) 19 Ariz. 20, 165 Pac. 303.

## 2. Questions of Fact (p. 739)

In general.—To the same effect as first paragraph of the original annotation, see *Watters v. Michigan*, (1918) 248 U. S. 65, 39 S. Ct. 29, 63 U. S. (L. ed.) —, *affirming* on other grounds (1916) 192 Mich. 462, 158 N. W. 865.

To the same effect as the second paragraph of the original annotation, see *King v. Putnam Invest. Co.*, (1918) 248 U. S. 23, 39 S. Ct. 15, 63 U. S. (L. ed.) — (*dismissing* writ of error to review (1915) 96 Kan. 109), 150 Pac. 559, wherein the court said: "Having previously considered this case (82 Kansas 216; 87 Kansas 842) the court awarded relief because of the violation of a contract of employment to procure the sale of real estate. 96 Kansas 109.

"The case is here in reliance upon a federal question based upon the assumption that the authority to sell included land belonging to the United States covered by an inchoate homestead entry. But the court below expressly found that such land was not included in the contract, hence the sole basis for the asserted federal question disappears. And this result is not changed by considering, to the extent that it is our duty to do so, the question of fact upon which the existence of the alleged federal question depends. *Northern Pac. Ry. Co. v. North Dakota*, 236 U. S. 585, 593; *Creswill v. Knights of Pythias*, 225 U. S. 246, 261; *Kansas City Southern Ry. Co. v. Albers Commission Co.*, 223 U. S. 573, 591. We so conclude because the result of discharging that duty leaves us convinced that the finding below was adequately sustained; indeed, that the record makes it clear that the alleged ground for the federal question was a mere afterthought. The case, therefore, must be and is dismissed for want of jurisdiction."

## 3. Local and General Law (p. 742)

Rule stated.—To the same effect as the first paragraph of the original annotation, see *Detroit, etc., R. Co. v. Fletcher Paper Co.*, (1918) 248 U. S. 30, 39 S. Ct. 13, 63 U. S. (L. ed.) —, *affirming* on other grounds (1917) 198 Mich. 469, 164 N. W. 528; *Palmer v. Ohio*, (1918) 248 U. S. 32, 39 S. Ct. 16, 63

U. S. (L. ed.) —, *dismissing* writ of error to review (1917) 96 Ohio St. 513, 118 N. E. 102.

Legislative discretion.—The states are left with a wide range of legislative discretion, notwithstanding the provisions of the Fourteenth Amendment to the Federal Constitution, and their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts. *Arizona Employers' Liability Cases*, (1919) 250 U. S. 400, 39 S. Ct. 553, 63 U. S. (L. ed.) —, *affirming* (1919) 19 Ariz. 151, 182, 166 Pac. 278, 1183, 165 Pac. 1101, 1185.

Railroad commission's power.—A controversy as to which of two existing agencies or arms of a state government, a municipality or a state corporation commission, is authorized for the time being to exercise in the public interest the power of rate regulation of a public utility, subject to which power the franchise confessedly was granted, involves no question under the contract clause of the Federal Constitution, but only a question of local law, the decision of which by the highest court of the state is final. *Pawhuska v. Pawhuska Oil, etc., Co.*, (1919) 250 U. S. 394, 39 S. Ct. 526, 63 U. S. (L. ed.) —, *dismissing* writ of error to review (Okla. 1917) 166 Pac. 1058, wherein the court said: "In *Dartmouth College v. Woodward*, (1819) 4 Wheat. 518 [4 U. S. (L. ed.) 629], it was distinctly recognized that as respects grants of political or governmental authority to cities, towns, counties and the like the legislative power of the states is not restrained by the contract clause of the Constitution, pp. 629-630, 659-664, 668, 694; and in *East Hartford v. Hartford Bridge Co.*, (1850) 10 How. 511 [13 U. S. (L. ed.) 518], where was involved the validity of a state statute recalling a grant to a city, theretofore made and long in use, of power to operate and maintain a ferry over a river, it was said, p. 533, that the parties to the grant did not stand 'in the attitude towards each other of making a contract by it, such as is contemplated in the Constitution, and as could not be modified by subsequent legislation. The legislature was acting here on the one part, and public municipal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the legislature as to this ferry must be considered rather as public laws than as contracts. They related to public interest. They changed as those interests demanded. The grantees, likewise, the towns being mere organizations for public purposes, were liable to have their public powers, rights, and duties modified or abolished at any moment by the legislature. . . . Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact, and subject to

all the legislative conditions just named, and therefore to be considered as not violated by subsequent legislative changes.”

#### 4. State Procedure (p. 747)

**Federal question first raised in amended motion for new trial.**—A federal question first raised in an amended motion for a new trial, and refused consideration by the highest court of the state, in accordance with the state practice, because the trial judge had denied the motion and declined to approve any of the grounds on which it was based, is not before the federal Supreme Court for review on writ of error to the state court. *Barbour v. Georgia*, (1919) 249 U. S. 454, 39 S. Ct. 316, 63 U. S. (L. ed.) —, *affirming* on other grounds (1917) 146 Ga. 667, 92 S. E. 70, 3 A. L. R. 1095.

**The question as to the full faith and credit** which should be given by the Missouri courts to the judgment of a Connecticut court was not so presented or ruled upon by the highest court of the former state as to sustain a writ of certiorari from the federal Supreme Court to that court, where the latter court refused to consider the question because the judgment of the trial court having been rendered before the Connecticut judgment was entered, the federal right was first asserted in the highest Missouri court, and there is no suggestion that the decision was framed to evade consideration of the question. *Hartford L. Ins. Co. v. Johnson*, (1919) 249 U. S. 490, 39 S. Ct. 336, 63 U. S. (L. ed.) — (*dismissing* writ of certiorari to review (1917) 271 Mo. 562, 197 S. W. 132), wherein the court said: “The jurisdiction of this court to review the final judgment or decree of the highest court of a state, in such a case as we have here, is defined in § 237 of the Judicial Code, as amended September 6, 1916, c. 448, 39 Stat. 726, which provides that it shall be competent for this court by certiorari to require any such cause to be certified to it for review when there is claimed in it any title, right, privilege or immunity under the Constitution of the United States and ‘the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution.’ It is the settled law that this provision means ‘that the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice, . . . and upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right.’ *Atlantic Coast Line R. Co. v. Mims*, (1917) 242 U. S. 532, 535 [37 S. Ct. 188, 61 U. S. (L. ed.) 476, 478]; *Gasquet v. Lapeyre*, (1917) 242 U. S. 367, 371 [37 S. Ct. 165, 61 U. S. (L. ed.) 367, 370], and cases

cited. No suggestion is or could be made, that the Missouri state Supreme Court’s holding in this case was framed to evade the consideration of the federal right now asserted, for it had long been the established law of that state that under its system of practice the construction of either the federal or state constitution would not be treated as involved in a case, in a jurisdictional sense, unless it appeared that such question was raised and ruled on in the trial court, and also that constitutional questions could not be injected into a case for the first time in an appellate court by argument or brief of counsel for the purpose of giving jurisdiction. *Miller v. Connor*, (1913) 250 Mo. 677, 684 [157 S. W. 81]. It has further been uniformly held by that court since 1836 that it will not take judicial notice of the laws of other states, but that they must be proved, as other facts, by evidence introduced at the trial. *Southern Illinois, etc., Bridge Co. v. Stone*, (1903) 174 Mo. 1, 33 [73 S. W. 453, 63 L. R. A. 301].”

#### 8. Presumptions (p. 750)

**A regulation of a state board of health**, in effect sustained by a decree of the highest court of the state, must be assumed, on writ of error from the federal Supreme Court to the state court, to have been within the authority conferred upon the board by the state law. *Corn Products Refining Co. v. Eddy*, (1919) 249 U. S. 427, 39 S. Ct. 325, 63 U. S. (L. ed.) —, *affirming* (1916) 99 Kan. 63, 163 Pac. 615.

### VII. VALIDITY OF TREATY OR STATUTE OF, OR AUTHORITY, EXERCISED UNDER UNITED STATES “DRAWN IN QUESTION” (p. 750)

**Validity of a treaty** is not involved in the assertion of a right based only on construction of the treaty. *Erie R. Co. v. Hamilton*, (1919) 248 U. S. 369, 39 S. Ct. 95, 63 U. S. (L. ed.) —.

### IX. VALIDITY OF STATUTE OF, OR AUTHORITY EXERCISED UNDER, STATE “DRAWN IN QUESTION”

#### 1. “Statute of State” (p. 752)

**Following construction of state statute.**—The ruling of the highest court of a state that the pole fees imposed by a municipal telegraph franchise ordinance were not an agreed compensation for the franchise, but amount to a license tax, concludes the Federal Supreme Court on writ of error. *Mackay Tel., etc., Co. v. Little Rock*, (1919) 250 U. S. 94, 39 S. Ct. 428, 63 U. S. (L. ed.) —, *affirming* (1917) 131 Ark. 306, 199 S. W. 90.

The Federal Supreme Court accepts as conclusive, where no question is raised under the contract clause of the Federal Constitution, the decision of the highest court of a state that a municipal telegraph franchise ordi-

nance imposed a pole tax with respect to poles standing upon a railway right of way and poles which, at the time of the acceptance of the ordinance, were without the limits of the city, but which were later brought within such limits by extension of the municipal boundaries. *Mackay Tel., etc., Co. v. Little Rock*, (1919) 250 U. S. 94, 39 S. Ct. 428, 63 U. S. (L. ed.) —, *affirming* (1917) 131 Ark. 306, 199 S. W. 90.

Following construction of state statute.—While the Supreme Court follows the decision of the highest state court as to the meaning of a state statute which is asserted to violate the Federal Constitution, the name given to the statute is not conclusive. It must be judged by its necessary effect, and if that is to violate the Constitution of the United States the law must be declared void. *Standard Oil Co. v. Graves*, (1919) 249 U. S. 389, 39 S. Ct. 320, 63 U. S. (L. ed.) —, *reversing on other grounds* (1917) 94 Wash. 291, 162 Pac. 558.

In reviewing the judgment of a state court in a case in which it was unsuccessfully contended that a state law deprived a party of rights secured by the Federal Constitution, the Federal Supreme Court is concerned not with the characterization or construction of the state law by the state court, nor even with the question whether it has in terms been construed, but solely with the effect and operation of the law as put in force by the state. *Corn Products Refining Co. v. Eddy*, (1919) 249 U. S. 427, 39 S. Ct. 325, 63 U. S. (L. ed.) — *affirming* (1916) 99 Kan. 63, 163 Pac. 615.

An order of a state Public Utilities Commission, upheld by the highest court of the state, requiring the restoration of a sidetrack by a railway company, being legislative in its nature, and made by an instrumentality of the state, is a state law within the meaning of the Federal Constitution and the laws of Congress regulating the appellate jurisdiction of the Federal Supreme Court over state courts. *Lake Erie, etc., R. Co. v. State Public Utilities Commission*, (1919) 249 U. S. 422, 39 S. Ct. 345, 63 U. S. (L. ed.) —, *affirming* (1917) 277 Ill. 574, 215 N. E. 519.

#### X. "REPUGNANT TO CONSTITUTION, TREATIES OR LAWS OF UNITED STATES"

##### 4. Due Process of Law (p. 754)

**Pollution of oyster beds.**—A judgment of the highest court of a state which affirmed the dismissal below of the bill in a suit to enjoin a municipality from discharging its sewage in such a way as to pollute and ruin plaintiff's oysters, upon his beds under tidal waters, is reviewable in the Federal Supreme Court, where the bill alleges that if the applicable state statutes purport to authorize the destruction of the plaintiff's oysters they are contrary to the Constitution of the United States, and, specifically, to the 14th amendment, and in the assignment of errors to the

highest state court the statutes are said also to violate the contract clause of such Constitution. *Darling v. Newport News*, (1919) 249 U. S. 540, 39 S. Ct. 371, 63 U. S. (L. ed.) —, *affirming* (1918) 123 Va. 14, 96 S. E. 307.

#### XIX. REVIEW ON WRIT OF CERTIORARI (p. 794)

See notes to 1918 Supp. p. 411, sec. 2 [Act Sept. 6, 1916].

### Vol. V, p. 794, Jud. Code, sec. 238. [First ed., 1912 Supp., p. 231.]

#### I. Scope of statute and general matters.

##### 8. Frivolous grounds and moot questions.

#### III. Final judgments.

#### IV. "Jurisdiction of court in issue."

##### 2. Separate appeals and right of election between Supreme Court and Circuit Court of Appeals. b. Jurisdiction sole question in issue.

##### 5. When jurisdiction is in issue.

##### 6. Certificate.

##### a. Necessity.

##### 9. Scope of review.

##### c. Questions of fact and findings.

#### VI. Constitutional questions in issue.

##### 1. "Construction or application of Constitution of United States" involved.

##### a. General matters.

##### 3. "Constitution or law of state claimed to be in contravention of Constitution of United States."

##### e. Illustrations.

##### 7. Scope of review.

#### VII. "Validity or construction of any treaty drawn in question."

#### I. SCOPE OF STATUTE AND GENERAL MATTERS

##### 8. Frivolous Grounds and Moot Questions (p. 799)

**Frivolous grounds.**—The contention that if the provisions of R. S. sec. 828 (see vol. 4, p. 657) allowing clerks of the district courts a fee of 1 per cent for receiving, keeping, and paying out money in pursuance of any statute or order of court, be construed to be applicable where cash is voluntarily deposited in lieu of bail for the appearance of one charged with crime, and is paid back on request, it conflicts with the due process, privileges and immunities, and excessive bail clauses of the Federal Constitution,—is too lacking in merit to support the jurisdiction of the Federal Supreme Court of a writ of error to a district court to review the refusal to direct the clerk to return such fee as having been unlawfully retained. *Berkman v. U. S.*, (1919) 250 U. S. 114, 39 S. Ct. 411, 63 U. S. (L. ed.) —.

## III. FINAL JUDGMENTS (p. 800)

A supplementary decree of a district court in a subordinate proceeding which was not merely ancillary to the main cause, in which federal jurisdiction was invoked solely on the ground of the presence of a federal question, but was in effect a part of the main cause, taken for the purpose of carrying into effect a decree of the Federal Supreme Court reversing the final decree in the main cause, and also for the purpose of giving effect to a reservation of jurisdiction by the court below as contained in such final decree, must be treated as itself presenting a federal question so as to justify, under the Judicial Code, sec. 238, a direct appeal to the Supreme Court. *Arkadelphia Milling Co. v. St. Louis, etc., R. Co.*, (1919) 249 U. S. 134, 39 S. Ct. 237, 63 U. S. (L. ed.) —.

## IV. "JURISDICTION OF COURT IN ISSUE."

2. *Separate Appeals and Right of Election Between Supreme Court and Circuit Court of Appeals.*

## b. Jurisdiction Sole Question in Issue (p. 805)

To same effect as third paragraph of original annotation, see *Great Northern R. Co. v. Blaine County*, (C. C. A. 8th Cir. 1918) 252 Fed. 548, 164 C. C. A. 464.

5. *When Jurisdiction Is in Issue* (p. 806)

Whether a District Court or a state court has priority of possession of, or control over, property which is the subject-matter of a suit, is not a question involving the jurisdiction of the District Court and hence is not directly appealable to the Supreme Court under this section. *Central Dist. Printing, etc., Co. v. Farmers', Etc., Nat. Bank*, (C. C. A. 4th Cir. 1918) 255 Fed. 59, 166 C. C. A. 387.

**Proper District Court.**—An appeal from an order dismissing a bill for infringement of a patent, brought under Judicial Code, section 48 (see vol. 5, p. 478), and denying a preliminary injunction, because of the non-residence of the defendant and his not having a regular place of business in the district where the suit is brought, involves a question of jurisdiction of which the Supreme Court has exclusive jurisdiction under this section, and cannot be taken to the Circuit Court of Appeals under Judicial Code, section 128 (see vol. 5, p. 607). *American Electric Welding Co. v. Lalance, etc., Mfg. Co.*, (C. C. A. 1st Cir. 1918) 249 Fed. 968, 162 C. C. A. 166.

**Admiralty.**—A direct appeal lies under this section where the question is whether the cause was within the admiralty jurisdiction of a District Court of the United States. *North. Pac. Steamboat Co. v. Hall Bros. Marine R., etc., Co.*, (1919) 249 U. S. 119, 39 S. Ct. 221, 63 U. S. (L. ed.) —.

The Circuit Court of Appeals has no jurisdiction to entertain an appeal to consider

whether a court of admiralty possesses jurisdictional power to grant costs when dismissing a libel for lack of jurisdiction over the subject-matter. Such a question is one of jurisdiction and directly reviewable by the Supreme Court under this section. *The Ada*, (C. C. A. 2d Cir. 1918) 25 Fed. 50, 166 C. C. A. 378.

**Question of loss of jurisdiction.**—Where the question was not whether jurisdiction originally existed, but whether it had been lost by bringing in a defendant whose citizenship was the same as the plaintiffs' the Circuit Court of Appeals decided the question instead of dismissing the appeal. *Fatterson v. Delaware, etc., Co.*, (C. C. A. 3d Cir. 1918) 251 Fed. 255, 163 C. C. A. 411.

**Other illustrations.**—"The 6 S.", (1919) 250 U. S. 269, 39 S. Ct. 452, 63 U. S. (L. ed.) —, as to jurisdiction of libel in rem against a scow for pecuniary penalties under Act of June 29, 1888, ch. 496, 25 Stat. L. 209, as amended.

*Odell v. F. C. Farnsworth Co.*, (1919) 250 U. S. 501, 39 S. Ct. 516, 63 U. S. (L. ed.) —, affirming decree dismissing suit as not arising under the patent laws.

*Collett v. Adams*, (1919) 249 U. S. 545, 39 S. Ct. 372, 63 U. S. (L. ed.) —, as to jurisdiction of the District Court of a suit by a trustee in bankruptcy to set aside a voidable preference.

*Matters v. Ryan*, (1919) 249 U. S. 375, 39 S. Ct. 375, 63 U. S. (L. ed.) —, holding that petition for habeas corpus involved no federal question adequate to sustain the jurisdiction.

*North. Pac. Steamship Co. v. Hall*, (1919) 249 U. S. 119, 39 S. Ct. 221, 63 U. S. (L. ed.) —, a question of admiralty jurisdiction.

*Brainerd, etc., Quarry Co. v. Brice*, (1919) 250 U. S. 229, 39 S. Ct. 458, 63 U. S. (L. ed.) —, holding that the plaintiff was an assignee disabled by Judicial Code, sec. 24 (vol. 4, p. 839) from suing in a federal court.

*Public Service Co. v. Carbov*, (1919) 250 U. S. 153, 39 S. Ct. 440, 63 U. S. (L. ed.) —, as to jurisdiction to enjoin a state officer from executing a state law, in connection with Judicial Code, sec. 265.

6. *Certificate*a. *Necessity* (p. 820)

*In Columbus, etc., Power Co. v. Columbus*, 249 U. S. 399, 39 S. Ct. 349, 63 U. S. (L. ed.) —, affirming on other grounds (S. D. Ohio 1918) 253 Fed. 499, the court said: "As to the jurisdiction of the court. If the court had decided the case upon the question of jurisdiction alone, that question should have been certified here, and none other would have been presented upon such appeal."

9. *Scope of Review.*c. *Questions of Fact and Findings* (p. 827)

**Concurrent findings of the two courts below on the facts are ordinarily accepted by the Supreme Court.** *Southern Pac. Co. v. Bogart*,

(1919) 250 U. S. 483, 38 S. Ct. 533, 63 U. S. (L. ed.) —.

#### VII. CONSTITUTIONAL QUESTIONS IN ISSUE

##### 1. "Construction or Application of Constitution of United States," Involved

###### a. General Matters (p. 828)

To the same effect as the original annotation, see *Raton Water Works v. Raton*, (1919) 249 U. S. 552, 39 S. Ct. 384, 63 U. S. (L. ed.) —.

**Substantial constitutional question.**—The Federal Supreme Court will not review a judgment of a district court in a criminal case on the ground that the construction or application of the Federal Constitution was drawn in question unless the writ of error presents a constitutional question substantial in character and properly raised below. Mere reference to a provision of the Federal Constitution, or the mere assertion of a claim under it, does not suffice. No substantial constitutional question of the character necessary to support a direct writ of error from the Federal Supreme Court to a district court in a criminal case is involved in the refusal of the trial court to give requested instructions concerning the constitutional freedom of speech, where a passage in the court's charge to the jury clearly embodied the substance of the instructions requested, since the judge was not obliged to adopt the exact language of the requests, nor to repeat instructions already given in substance. *Sugarman v. U. S.*, (1919) 249 U. S. 182, 39 S. Ct. 191, 63 U. S. (L. ed.) —, *dismissing* writ of error to review, (D. C. Minn. 1917) 245 Fed. 604.

##### 3. "Constitution or Law of State Claimed to Be in Contravention of Constitution of United States"

###### e. Illustrations (p. 832)

**Orders of a state railroad commission fixing rates by virtue of authority conferred by the legislature are state laws and a direct appeal lies to the Supreme Court where they are claimed to conflict with the United States Constitution.** *Arkadelphia Milling Co. v. St. Louis, etc., R. Co.*, (1919) 249 U. S. 134, 39 S. Ct. 237, 63 U. S. (L. ed.) —.

###### 7. Scope of Review (p. 836)

**Whole case.**—Where a constitutional question is involved an appeal to the Supreme Court takes the whole case there. *Columbus, etc., Power Co. v. Columbus*, (1919) 249 U. S. 399, 39 S. Ct. 349, 63 U. S. (L. ed.) —, *affirming* on other grounds (S. D. Ohio 1918) 253 Fed. 499.

#### VII. "VALIDITY OR CONSTRUCTION OF ANY TREATY DRAWN IN QUESTION" (p. 837)

In *Cordova v. Grant*, (1919) 248 U. S. 413, 39 S. Ct. 138, 63 U. S. (L. ed.) —, a writ of error to a District Court was dismissed, it appearing that the only color of right to take the case to the Supreme Court

by direct appeal consisted in a suggestion that the construction of a treaty was involved.

#### Vol. V, p. 838, Jud. Code, sec. 239.

[First ed., 1912 Supp., p. 232.]

##### I. Power and discretion to certify.

###### 2. Character of questions.

###### 3. Certifying entire case.

##### II. Procedure.

###### 2. Form and frame of certificate.

##### III. Table of cases where questions were certified.

##### IV. "Whole record and cause" brought up.

#### I. POWER AND DISCRETION TO CERTIFY

##### 2. Character of Questions (p. 840)

**Certificates dismissed as insufficient.**—In *Cleveland-Cliffs Iron Co. v. Arctic Iron Co.*, (1918) 248 U. S. 178, 39 S. Ct. 91, 63 U. S. (L. ed.) —, a certificate was dismissed because of the admixture of law and fact, and because it failed to distinguish between facts which were merely evidential and those which were ultimate. The court said: "The certificate upon which this case is before us contains what are denominated findings of fact grouped under eighteen paragraphs covering eight pages of the record. Upon these findings we are asked to instruct as to six propositions of law, really amounting to twelve since each is two-fold, that is, stated in the alternative. But we are of opinion that we may not instruct as to these propositions for the following reasons:

"In the first place, because we think it is clear that the statements which are declared in the certificate to be findings of fact are in no true sense entitled to that characterization, since the statements amount but to a narrative of facts mixed with questions of law so interblended, the one with the other, as to cause it to be impossible to conclude as to either the law or the facts without a separation of the two, a duty which we may not be called upon to perform in giving instructions upon questions of law propounded under the statute controlling that subject.

"In the second place, because even if the admixture of law and fact which inheres in the recitals in the certificate be overlooked, the recitals nevertheless, in and of themselves, fail to distinguish between facts which are merely evidential and those which are ultimate and which for that reason would be susceptible of furnishing support for the legal propositions as to which instructions are asked.

"It is true, indeed, that the statute gives us the discretion, when a case is certified, to direct the sending up of the whole record, but obviously the exercise of that discretionary power is not called for by a case where the certificate is of such a character as not to be embraced by the statute.

"It must be, therefore, that this case affords no ground for directing the sending up of the whole record since here the certificate is inadequate to sustain the right to answer the questions stated. To hold to the contrary would be to cause a mistaken exercise of the right to certify specific questions to become the instrument by which the division of powers made by the statute would be disregarded."

#### Exclusion of Chinese by Secretary of Labor.

— Where there are conflicting decisions by several of the Circuit Courts of Appeal regarding the Secretary of Labor's right to deport Chinese found in this country in violation of the Chinese Exclusion Act, and the Supreme Court has not passed upon the question, a Circuit Court of Appeals may properly certify the question to the Supreme Court for instructions. *U. S. v. Woo Jan*, (C. C. A. 6th Cir. 1917) 250 Fed. 595, 162 C. C. A. 611.

#### 3. Certifying Entire Case (p. 843)

Were the entire case to be certified a decision by the Supreme Court would be an exercise of original jurisdiction not given to the Supreme Court by the Constitution. Hence the provision in the Expedition Act of Feb. 11, 1903, ch. 544, sec. 1, 32 Stat. L. 823, 6 Fed. Stat. Ann. (2d ed.) 137, note, permitting the judges of the Circuit Court in certain suits, in case of a division of opinion, to certify "the case" to the Supreme Court "for review in like manner as if taken there by appeal," was invalid. *Baltimore, etc., R. Co. v. Interstate Commerce Commission*, (1909) 215 U. S. 216, 30 S. Ct. 86, 54 U. S. (L. ed.) 164.

### II. PROCEDURE

#### 2. Form and Frame of Certificate (p. 846)

A certificate which fails to contain a proper statement of the facts on which the questions of law arise as required by rule 37 will be dismissed even though the certificate concludes: "For information as to the facts of case copies of the transcript and briefs are herewith transmitted." *Dillon v. Strathearn Steamship Co.*, (1918) 248 U. S. 182, 39 S. Ct. 83, 63 U. S. (L. ed.) wherein the court said: "Counsel argue the case by reference to the transcript of the record in the Circuit Court of Appeals, and it is apparent that a proper consideration of the case requires such reference. This transcript is no part of our record. This court alone has authority to have it sent up. The briefs in the Circuit Court of Appeals are no part of the record here. The certificate is required to state the pertinent facts in order that this court may answer the questions of law certified with reference to such facts, and not by searching the records and briefs of the Circuit Court of Appeals itself."

Statements of fact mixed with questions of law so interblended, the one with the other,

as to cause it to be impossible to conclude as to either the law or the facts without a separation of the two, are fatal to the certificate. *Cleveland-Cliffs Iron Co. v. Arctic Iron Co.*, (1918) 248 U. S. 178, 39 S. Ct. 91, 63 U. S. (L. ed.) —, dismissing a certificate.

### III. TABLE OF CASES WHERE QUESTIONS WERE CERTIFIED (p. 848)

*DeGanay v. Lederer*, (1919) 250 U. S. 376, 39 S. Ct. 524, 63 U. S. (L. ed.) —, as to taxability of certain income under Income Tax Law of 1913.

*Louisville, etc., Bridge Co. v. U. S.*, (1919) 249 U. S. 534, 39 S. Ct. 355, 63 U. S. (L. ed.) —, as to construction and application of the Safety Appliance Act of Congress.

*Webb v. U. S.*, (1919) 249 U. S. 96, 39 S. Ct. 217, 63 U. S. (L. ed.) —, constitutional and other questions in a criminal case.

*Raton Waterworks Co. v. Raton*, (1919) 249 U. S. 552, 39 S. Ct. 384, 63 U. S. (L. ed.) —, as to jurisdiction of the Circuit Court of Appeals in the instant case.

*Allanwilde Transport Corp. v. Vacuum Oil Co.*, (1919) 248 U. S. 377, 39 S. Ct. 147, 63 U. S. (L. ed.) —; *Standard Varnish Works v. The "Bris"*, (1919) 248 U. S. 392, 39 S. Ct. 67 mem., 63 U. S. (L. ed.) —, as to right of recovery on a libel for prepaid freight under charter party and bill of lading, the carriage having been prevented by action of the government.

### IV. "WHOLE RECORD AND CAUSE" BROUGHT UP (p. 853)

If a certificate is insufficient to sustain the right to answer the questions stated, the Supreme Court is without power to direct the sending up of the whole record. *Cleveland-Cliffs Iron Co. v. Arctic Iron Co.*, (1918) 248 U. S. 178, 39 S. Ct. 91, 63 U. S. (L. ed.) —.

### Vol. V, p. 854, Jud. Code, sec. 240. [First ed., 1912 Supp., p. 232.]

#### II. Discretion in exercise of power.

##### 3. Before final decree in Circuit Court of Appeals.

#### III. Procedure for obtaining writ.

##### 6. Petition for certiorari united with appeal or writ of error.

#### V. Hearing and examination, determination, and remand.

#### VI. Table of certiorari cases.

##### 2. Cases or questions of importance.

##### 3. Division of opinion in Circuit Court of Appeals.

##### 4. Conflicting decisions of Circuit Courts of Appeals.

##### 8. Patent cases.

##### 12. Miscellaneous cases.

##### c. Other cases.

## II. DISCRETION IN EXERCISE OF POWER

### 3. *Before Final Decree in Circuit Court of Appeals* (p. 857)

**Decree on appeal from interlocutory injunction.**—*International News Service v. Associated Press*, (1918) 248 U. S. 215, 39 S. Ct. 68, 63 U. S. (L. ed.) —, was a decision on a writ of certiorari to review a decree in such a case.

## III. PROCEDURE FOR OBTAINING WRIT

### 6. *Petition for Certiorari United with Appeal or Writ of Error* (p. 860)

In *United Drug Co. v. Theodore Rectanus Co.*, (1918) 248 U. S. 90, 39 S. Ct. 48, 63 U. S. (L. ed.) —, where an appeal was taken and afterward a writ of certiorari allowed, the former was dismissed and the cause determined on the latter.

## V. HEARING AND EXAMINATION, DETERMINATION, AND REMAND (p. 862)

**Disposition of case.**—“This court . . . has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require. . . . And in determining what justice now requires the court must consider the changes in fact and in law which have supervened since the decree was entered below. . . . Since the certiorari was granted the relation of the parties to the court has radically changed.” *Watts v. Unione Austriaca*, etc., (1918) 248 U. S. 9, 21, 39 S. Ct. 1, 63 U. S. (L. ed.) —.

**Jurisdiction based on diverse citizenship.**—The whole case is up for review in the Supreme Court on writ of certiorari to a circuit court of appeals in a case in which the jurisdiction of the district court was based solely upon diverse citizenship. *Camp v. Gress*, (1919) 250 U. S. 308, 39 S. Ct. 478, 63 U. S. (L. ed.) —, reversing in part and affirming in part (C. C. A. 4th Cir. 1917) 244 Fed. 121, 156 C. C. A. 549.

**A writ of certiorari was dismissed on motion for want of jurisdiction in Hartford Life Ins. Co. v. Johnson, (1919) 249 U. S. 490, 39 S. Ct. 336, 63 U. S. (L. ed.) —.**

## VI. TABLE OF CERTIORARI CASES

### 2. *Cases or Questions of Importance* (p. 866)

*Toledo Newspaper Co. v. U. S.*, (1918) 247 U. S. 402, 39 S. Ct. 560, 62 U. S. (L. ed.) 1186, to review conviction for criminal although summary contempt—“questions of such importance as to justify our intervention.”

*Fillippon v. Albion Vein Slate Co.*, (1919) 250 U. S. 76, 39 S. Ct. 435, 63 U. S. (L. ed.) —, “involves an important question of trial practice.”

### 3. *Division of Opinion in Circuit Court of Appeals* (p. 867)

*International Paper Co. v. The Gracie D. Chambers*, (1919) 248 U. S. 387, 39 S.

Ct. 435, 63 U. S. (L. ed.) —, as to right to recover prepaid freight, on a libel in admiralty under a certain bill of lading.

*Richmond v. Bird*, (1919) 249 U. S. 174, 39 S. Ct. 186, 63 U. S. (L. ed.) —, a bankruptcy case.

*U. S. v. Reynolds*, (1919) 250 U. S. 104, 39 S. Ct. 409, 63 U. S. (L. ed.) —, as to the trust period in a patent to an Indian allottee.

### 4. *Conflicting Decisions of Circuit Courts of Appeals* (p. 869)

*T. H. Symington Co. v. National Malleable Castings Co.*, (1919) 250 U. S. 383, 39 S. Ct. 542, 63 U. S. (L. ed.) —, a patent case where validity of a patent had been variously decided in several Circuit Courts of Appeals and “these conflicting decisions led to the allowance of the present writs of certiorari.”

### 8. *Patent Cases* (p. 870)

*Minerals Separation v. Butte*, etc., Min. Co., (1919) 250 U. S. 336, 39 S. Ct. 496, 63 U. S. (L. ed.) —, involving construction by Circuit Court of Appeals of opinion of Supreme Court in prior case sustaining validity of patent in suit.

*T. H. Symington Co. v. National Malleable Castings Co.*, (1919) 250 U. S. 383, 39 S. Ct. 542, 63 U. S. (L. ed.) —, conflicting decisions of Circuit Courts of Appeals.

*Werk v. Parker*, (1919) 249 U. S. 130, 39 S. Ct. 197, 63 U. S. (L. ed.) —, validity; “mere mechanical adaptation.”

### 12. *Miscellaneous Cases*.

#### c. *Other Cases* (p. 872)

*Barrett v. Virginian R. Co.*, (1919) 250 U. S. 473, 39 S. Ct. 540, 63 U. S. (L. ed.) —, reversing judgment for refusal to permit voluntary nonsuit, pursuant to the state statute.

*Southern Pac. Co. v. Bogert*, (1919) 250 U. S. 483, 39 S. Ct. 492, 63 U. S. (L. ed.) —, question of laches.

*Schlitz Brewing Co. v. Houston Ice*, etc., Co., (1919) 250 U. S. 28, 39 S. Ct. 401, 63 U. S. (L. ed.) —, a trademark case.

*Ball Engineering Co. v. White*, (1919) 250 U. S. 46, 39 S. Ct. 393, 63 U. S. (L. ed.) —, construction, etc., of a construction contract with the government.

*L. A. Westermann Co. v. Dispatch Printing Co.*, (1919) 249 U. S. 100, 39 S. Ct. 194, 63 U. S. (L. ed.) —, a copyright case.

*Crocker v. Malley*, (1919) 249 U. S. 223, 39 S. Ct. 270, 63 U. S. (L. ed.) —, action to recover taxes paid under protest to the collector of internal revenue; construction of the Income Tax Act.

*U. S. v. Brooklyn Eastern Dist. Terminal*, (1919) 249 U. S. 296, 39 S. Ct. 283, 63 U. S. (L. ed.) —, where the question was whether the terminal is within the scope of the federal Hours of Service Act.



Capitol Transp. Co. v. Cambria Steel Co., (1919) 240 U. S. 334, 39 S. Ct. 292, 63 U. S. (L. ed.) —, petition to limit liability for loss of cargo on a ship.

Watts v. Unione Austriaca, (1918) 248 U. S. 9, 39 S. Ct. 1, 63 U. S. (L. ed.) —, as to jurisdiction and proper disposition of libel *in personam* in admiralty by co-belligerent of this country against a common enemy.

Gulf Oil Corp. v. Lewellyn, (1918) 248 U. S. 71, 39 S. Ct. 35, 63 U. S. (L. ed.) —, as to whether certain dividends were income under the Income Tax Act.

Sterrett v. Cincinnati Second Nat. Bank, (1918) 248 U. S. 73, 39 S. Ct. 27, 63 U. S. (L. ed.) —, as to whether a receiver appointed in a state court was authorized to sue in a federal court of another state to recover property.

United Drug Co. v. Theodore Rectanus Co., (1918) 248 U. S. 90, 39 S. Ct. 48, 63 U. S. (L. ed.) —, suit to restrain infringement of trademark and unfair competition.

Luckenbach v. W. J. McCahan Sugar Refining Co., (1918) 248 U. S. 139, 39 S. Ct. 53, 63 U. S. (L. ed.) —, libel in admiralty on bills of lading for damages alleged to be due to unseaworthiness.

Union Fish Co. v. Erickson, (1919) 248 U. S. 308, 39 S. Ct. 112, 63 U. S. (L. ed.) —, as to whether a maritime contract for services was governed by the state statute of frauds.

Guerim Stone Co. v. P. J. Carlin Constr. Co., (1919) 248 U. S. 334, 39 S. Ct. 102, 63 U. S. (L. ed.) —, action on building contract involving questions in the law of contracts.

Sandberg v. McDonald, (1918) 248 U. S. 185, 39 S. Ct. 84, 63 U. S. (L. ed.) —, as to application of sec. 11 of the Seaman's Act of 1915, ch. 153, 38 Stat. L. 1164, to advancements made to alien seamen shipping abroad on a foreign vessel.

Neilson v. Rhine Shipping Co., (1918) 248 U. S. 205, 39 S. Ct. 89, 63 U. S. (L. ed.) —, as to application of the section mentioned in the last preceding paragraph to advances made by the master of an American vessel in a foreign port.

## Vol. V, p. 877, Jud. Code, sec. 241.

[First ed., 1912 Supp., p. 232.]

### II. MODE AND SCOPE OF REVIEW (p. 878)

The ground of jurisdiction in the District Court and ultimately in the Supreme Court on appeal from the Circuit Court of Appeals is the statement of the suing party of his cause of suit. And there must be substance in it, not mere verbal assertion or the anticipation of defenses. *Butte, etc., Copper Co. v. Clark-Montana Realty Co.*, (1919) 249 U. S. 12, 39 S. Ct. 231, 63 U. S. (L. ed.) —, *affirming* on other grounds (C. C. A. 9th Cir. 1918) 248 U. S. 609, 160 C. C. A. 509.

## Vol. V, p. 890, Jud. Code, sec. 243.

[First ed., 1912 Supp., p. 232.]

**Findings of fact.**—Findings of the Court of Claims are to be treated as the verdict of a jury, and the Federal Supreme Court on appeal is not at liberty to refer to the evidence any more than to the opinion for the purpose of eking out, controlling, or modifying the scope of such findings. *Brothers v. U. S.*, (1919) 250 U. S. 88, 39 S. Ct. 426, 63 U. S. (L. ed.) —, *affirming* (1917) 52 Ct. Cl. 462.

A finding of the Court of Claims that there was no unreasonable delay on the part of the federal government in approving a contract for a public work is a finding of an ultimate fact by which the Federal Supreme Court is bound, unless such finding was made without supporting evidence, or is inconsistent with other facts found. *Hathaway v. U. S.*, (1919) 249 U. S. 460, 39 S. Ct. 346, 63 U. S. (L. ed.) —, *affirming* (1917) 52 Ct. Cl. 267.

## Vol. V, p. 900, Jud. Code, sec. 246.

[First ed., 1912 Supp., p. 233.]

**Provisions of this section as to Porto Rico** adopted by reference, see sec. 43 of the Act of March 2, 1917, ch. 145, 39 Stat. L. 966, in title *PORTO RICO*, 1918 Supp. p. 627.

**Certiorari to Porto Rico Supreme Court** was denied in *Porto Rico v. Wye*, (1917) 245 U. S. 665, 38 S. Ct. 62, 62 U. S. (L. ed.) 537; *Porto Rico v. Berrios*, (1917) 245 U. S. 665, 38 S. Ct. 63, 62 U. S. (L. ed.) 537; *Ramirez v. Porto Rico*, (1917) 245 U. S. 665, 38 S. Ct. 63, 62 U. S. (L. ed.) 537.

## Vol. V, p. 907, Jud. Code, sec. 248.

[First ed., 1912 Supp., p. 234.]

**Judgments and decrees subject to review—Cases involving a treaty.**—A decision of the Philippine Supreme Court holding that the name "Isabella" which appellee was charged with using was a geographical and descriptive term and incapable of registration as a trademark either under the Philippine Act No. 666, or the law as it existed under the Spanish regime, does not involve the provisions of the treaty of Paris of 1898. *Campania General, etc., v. Alhambra Cigar, etc., Mfg. Co.*, (1919) 249 U. S. 72, 39 S. Ct. 224, 63 U. S. (L. ed.) — (*dismissing* appeal to review 33 Phil. 485), wherein the court said: "By the treaty of Paris of 1898, Spain ceded to the United States the archipelago known as the Philippine Islands. In Article VIII of the treaty it is provided that the relinquishment or cession, as the case may be, 'cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any

other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be.' Article XIII provides that 'The rights of property secured by copyrights and patents acquired by Spaniards in the Island of Cuba and in Porto Rico, the Philippines and other ceded territories, at the time of the exchange of the ratifications of this treaty, shall continue to be respected.' Treaties in Force, 194, pp. 722, 725, 726, [30 Stat. 1754.]

"It is the evident purpose of these provisions, in view of the cession of territory made by Spain to the United States, to preserve private rights of property, and to provide that the change of sovereignty should work no impairment of such rights. . . .

"Certainly the treaty, in providing that property rights of this class should be respected, did not intend to prevent the consideration by the courts of the nature and extent of the rights granted, or prohibit the application of laws for the enforcement and regulation of such property rights when not in derogation thereof."

**Salvage cases.**—Unless there has been some violation of principle or clear mistake an appeal in a salvage case concerning the amount of an allowance is not encouraged. *Oelwerke Teutonia v. Erlanger*, (1919) 248 U. S. 521, 39 S. Ct. 180, 63 U. S. (L. ed.) —.

**Street railway franchise ordinance.**—The contention that the construction by the Philippine Supreme Court of a street railway franchise ordinance requiring free transportation of members of the police department wearing official badges as not embracing detectives whose badges are concealed upon their persons, and its consequent ruling that the duty does not rest upon the street railway company to give the free transportation to such persons which the board of public utility commissioners had ordered, involves the Constitution or any statute, treaty, title, or privilege of the United States, within the meaning of this section, governing the appellate jurisdiction of the Federal Supreme Court over the Philippine Supreme Court, is too unsubstantial, not to say frivolous, to afford any basis for the exercise of such jurisdiction. *Board of Public Utility Com'rs v. Manila Electric R., etc., Light Co.*, (1919) 249 U. S. 262, 39 S. Ct. 272, 63 U. S. (L. ed.) (dismissing writ of error and appeal to review 30 Phil. 387) wherein the court said: "As the action of the court complained of was taken before the Act of September 6, 1916, [see 1918 Supp. p. 422] and the appellate jurisdiction of this court was invoked before that Act went into effect, our power to review is governed by § 248 of the Judicial Code."

**Amount in controversy—In general.**—To the same effect as the original annotation see *Board of Public Utility Com'rs v. Manila Electric R., etc., Light Co.*, (1919) 249 U. S.

262, 39 S. Ct. 272, 63 U. S. (L. ed.) —, dismissing writ of error and appeal to review 30 Phil. 387.

**Scope of review—Review of questions to fact.**—Questions of fact are not open for review on writ of error from the Federal Supreme Court to the Supreme Court of the Philippine Islands. *Tayabas Land Co. v. Manila R. Co.*, (1919) 250 U. S. 22, 39 S. Ct. 420, 63 U. S. (L. ed.) —, affirming 32 Phil. 286.

**Failure to make return of writ of error and citation in time.**—An appeal from and writ of error to the Supreme Court of the Philippine Islands will not be dismissed on the ground that the writ of error and citation were not made returnable in time, where plaintiff in error and appellant had color of authority from that court and a judge of that court. *Beaumont v. Prieto*, (1919) 249 U. S. 554, 39 S. Ct. 383, 63 U. S. (L. ed.) —.

**Weight given decision of Philippine Supreme Court.**—A decision of the Supreme Court of the Philippine Islands to the effect that an offer to sell real property was not accepted will not be disturbed by the Federal Supreme Court unless clearly erroneous. *Beaumont v. Prieto*, (1919) 249 U. S. 554, 39 S. Ct. 383, 63 U. S. (L. ed.) —.

See further *infra* this title, notes to 1918 Supp. p. 422, sec. 5.

## Vol. V, p. 913, Jud. Code, sec. 250.

[First ed., 1912 Supp., p. 235.]

**Scope of review.**—In a case of which the Supreme Court has jurisdiction under any of the paragraphs of this section following the first, it acquires jurisdiction of the entire case and of all questions involved in it. *Smoot v. Heyl*, (1913) 227 U. S. 518, 33 S. Ct. 336, 57 U. S. (L. ed.) 621.

## Vol. V, p. 917, Jud. Code, sec. 251.

[First ed., 1912 Supp., p. 236.]

**A writ of certiorari was granted in Beckwith v. Commission of Patents.** (1918) 248 U. S. 556, 39 S. Ct. 19, 63 U. S. (L. ed.) —.

**A writ of certiorari was denied in King v. Rhodes.** (1918) 248 U. S. 560, 39 S. Ct. 7, 63 U. S. (L. ed.) —; *Walker v. Gish*, (1918) 248 U. S. 565, 39 S. Ct. 9, 63 U. S. (L. ed.) —; *De Prevost v. Young*, (1918) 248 U. S. 570, 39 S. Ct. 10, 63 U. S. (L. ed.) —; *Brennan Constr. Co. v. Newbold*, (1918) 248 U. S. 579, 39 S. Ct. 21, 63 U. S. (L. ed.) —; *Grand Lodge, etc., v. Groves*, (1919) 248 U. S. 587, 39 S. Ct. 184, 63 U. S. (L. ed.) —; *House v. Lwellen*, (1919) 249 U. S. 608, 39 S. Ct. 290, 63 U. S. (L. ed.) —; *U. S. v. Lane*, (1919) 249 U. S. 613, 39 S. Ct. 388, 63 U. S. (L. ed.) —; *Snow v. Snow*, (1919) 250 U. S. IX, 39 S. Ct. 492, 63 U. S. (L. ed.) —; *Foster v. Goldsoll*, (1919) 250 U. S. xv, 39 S. Ct. 495, 63 U. S. (L. ed.) —.

**Vol. V, p. 928, Jud. Code, sec. 262.**

[First ed., 1912 Supp., p. 241.]

- I. Scire facias.
  1. Nature of writ.
  2. Power to issue.
- II. "All writs not specifically provided for by statute."
  9. Mandamus.
    - a. Jurisdiction in general.
    - b. Controlling judicial action or discretion.
    - c. Not as substitute for appeal or writ of error.
  11. Prohibition.

**I. SCIRE FACIAS****1. Nature of Writ (p. 929)**

A scire facias is a judicial writ used to enforce execution of some matter of record on which it is usually founded; but, though a judicial writ or writ of execution, it is so far original that the defendant may plead to it. As it discloses the facts on which it is founded, and requires an answer from the defendant, it is in the nature of a declaration and the plea is properly to the writ. Writs of scire facias are of two kinds: (1) The continuation of a previous action such as a scire facias to revive a judgment and to have execution on it. (2) A scire facias which is in the nature of a new suit, such as a writ to review that which has happened, to recover upon recognizance or bail bond, etc. A writ of the latter class is original only in the sense that once obtained the resultant procedure is the same as any action at law entitling a defendant to answer and to a jury trial. *Universal Transp. Co. v. National Surety Co.*, (S. D. N. Y. 1918) 252 Fed. 293.

**2. Power to Issue (p. 929)**

A District Court may issue a writ of scire facias under the provisions of this section even though the state in which the federal forum is situated has abolished the writ. *Universal Transp. Co. v. National Surety Co.*, (S. D. N. Y. 1918) 252 Fed. 293.

**II. "ALL WRITS NOT SPECIFICALLY PROVIDED FOR BY STATUTE"****9. Mandamus****a. Jurisdiction in General (p. 934)**

**Nature of remedy.**—This court has lately said that while mandamus is classed as a legal remedy, it is a remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion and upon equitable principles. *Duncan Tounsite Co. v. Lane*, 245 U. S. 308. It is an extraordinary remedy, which will not be allowed in cases of doubtful right, *L. Ins. Co. v. Wilson*, 8 Pet. 291, 302; and it is generally regarded as not embraced within statutes of limitation applicable to ordinary actions, but as subject to the equitable doctrine of laches, *Chapman v. Douglas County* (1882) 107 U.

S. 348, 355; *Duke v. Turner*, 204 U. S. 623, 628; *Grant v. Lane*, (1919) 249 U. S. 367, 39 S. Ct. 293, 63 U. S. (L. ed.) —, *affirming* (1918) 47 App. Cas. (D. C.) 336.

**Power of United States Supreme Court.**—Mandamus will not be granted to stay an accounting in a patent and copyright infringement and unfair competition suit pending in a federal District Court until the decision of the federal Supreme Court upon a writ of certiorari bringing up for review a decision of the Circuit Court of Appeals in another circuit, reversing a temporary injunction decree in a similar suit, where the District Court was called upon to determine judicially the scope of the decision of such Circuit Court of Appeals and to decide whether or not that decision was in conflict with a decision by the Circuit Court of Appeals of its own circuit and to forecast as best it might what the scope and effect of the decision of the Federal Supreme Court would be upon the rights of the parties as determined in the case at bar, and, having regard to the rights of the plaintiff and the conduct of the defendant, to decide whether, after four years of strenuous litigation, the accounting should be further delayed by the prospect that the decision of the Federal Supreme Court might render the results of it valueless. *Ex p. Wagner*, (1919) 249 U. S. 465, 39 S. Ct. 317, 63 U. S. (L. ed.) —.

**Power of Circuit Court of Appeals.**—It is a conclusive answer to the prayer for a writ of mandamus to a Circuit Court of Appeals and the judges thereof, to direct the entry of a stay of proceedings, that the case was not, when the stay was refused, and is not now, pending in that court. *Ex p. Wagner*, (1919) 249 U. S. 465, 39 S. Ct. 317, 63 U. S. (L. ed.) —.

**Limitation on power to issue.**—The Supreme Court and Circuit Courts of Appeals may issue writs of mandamus and prohibition under this section only when necessary to their appellate jurisdiction. *Muir v. Chatfield*, (C. C. A. 2d Cir. 1918) 255 Fed. 24, 166 C. C. A. 352.

**Conformity with state practice.**—Under this section, R. S. sec. 918, and equity rule 13, a district court may issue a writ of mandamus as ancillary to a judgment previously rendered by it, and need not conform to the state practice notwithstanding the provisions of R. S. sec. 914. *Evans v. Yost*, (C. C. A. 8th Cir. 1919) 255 Fed. 726.

**b. Controlling Judicial Action or Discretion (p. 937)**

**Minor orders.**—Mandamus may not be resorted to for the purpose of controlling minor orders made in the conduct of judicial proceedings, and the fact that the result of litigation may possibly be such that interlocutory proceedings taken may not prove of value is not a sufficient reason for calling the writ into use for the purpose of forbidding

such proceedings, even though the cost of them cannot be recovered from the opposing party, or even though the order cannot be reversed on error or appeal. *Ex p. Wagner*, (1919) 249 U. S. 465, 39 S. Ct. 317, 63 U. S. (L. ed.) —.

The signing of a bill of exceptions may be compelled by mandamus where signing is refused under a mistaken view that the bill was not presented in time. *In re Federal Life Ins. Co.*, (C. C. A. 7th Cir. 1918) 248 Fed. 908, 161 C. C. A. 26.

c. Not as Substitute for Appeal or Writ of Error (p. 942)

Generally.—To same effect as original annotation, see *In re Duncan*, (C. C. A. 4th Cir. 1918) 249 Fed. 155, 161 C. C. A. 207.

#### 11. Prohibition (p. 948)

To same effect as third paragraph of the original annotation, see *Muir v. Chatfield*, (C. C. A. 2d Cir. 1918) 255 Fed. 24, 166 C. C. A. 352.

### Vol. V, p. 954, Jud. Code, sec. 264.

[First ed., 1912 Supp., p. 241.]

#### I. POWER TO ISSUE GENERALLY (p. 954)

Issuance in one circuit as affecting right in another circuit.—An injunction decree granted in one circuit, forbidding a railway company to interrupt a telegraph company in the use of its wires upon the railway right of way, the declared purpose being to preserve the *status quo* for a certain time, or until condemnation may be carried out, precludes, while it stands, contrary action in another circuit. *Louisville, etc., R. Co. v. Western Union Tel. Co.*, (1919) 250 U. S. 363, 39 S. Ct. 513, 63 U. S. (L. ed.) —, affirming (C. C. A. 5th Cir. 1916) 233 Fed. 82, 147 C. C. A. 152, (1914) 107 Miss. 626, 65 So. 650.

### Vol. V, p. 959, Jud. Code, sec. 265.

[First ed., 1912 Supp., p. 242.]

#### I. Construction and application.

##### 1. Generally.

#### II. Jurisdiction.

##### 2. Court first acquiring jurisdiction retains it.

#### III. Protection of federal jurisdiction.

##### 2. General principles as to protecting jurisdiction.

#### IV. Proceedings under state statute.

##### 1. Generally.

#### V. Other particular matters and proceedings.

#### I. CONSTRUCTION AND APPLICATION

##### 1. Generally (p. 959)

Stay of suits against bankrupts, see notes to section 11a of the Bankruptcy Act, *supra*, p. 419.

#### II. JURISDICTION

##### 2. Court First Acquiring Jurisdiction Retains It (p. 962)

To the same effect as the original annotation, see *Amusement Syndicate Co. v. El Paso Land Imp. Co.*, (W. D. Tex. 1918) 251 Fed. 345.

#### III. PROTECTION OF FEDERAL JURISDICTION

##### 2. General Principles as to Protecting Jurisdiction (p. 964)

Rule stated.—To same effect as third paragraph of original annotation, see *St. Louis-San Francisco R. Co. v. McElvain*, (E. D. Mo. 1918) 253 Fed. 123.

#### IV. PROCEEDING UNDER STATE STATUTE

##### 1. Generally (p. 971)

Power of federal courts to enjoin.—A state officer acting under color of his official authority may be enjoined from carrying into effect a state law asserted to be repugnant to the Constitution of the United States, even though such injunction may cause the state law to remain inoperative until the constitutional question is judicially determined. *Public Service Co. v. Corboy*, (1919) 250 U. S. 153, 39 S. Ct. 440, 63 U. S. (L. ed.) —.

#### V. OTHER PARTICULAR MATTERS AND PROCEEDINGS (p. 976)

Drainage proceedings.—The prohibition of this section against enjoining proceedings in a state court, does not preclude a suit against a drainage commissioner whom a state court, after having established a drainage district and authorized the construction of a ditch, has appointed to do the work, to enjoin the execution of the same on the ground that the effect of the ditch will be to draw off from an interstate stream such a quantity of water as seriously to diminish the flow in that stream and thereby practically cripple, if not destroy, the capacity of petitioner to continue to operate a plant for the production of electrical energy, established and owned by it on the banks of such stream in another state. *Public Service Co. v. Corboy*, (1919) 250 U. S. 153, 39 S. Ct. 440, 63 U. S. (L. ed.) —, wherein the court said: "Although a state may not be sued without its consent, nevertheless a state officer acting under color of his official authority may be enjoined from carrying into effect a state law asserted to be repugnant to the Constitution of the United States even though such injunction may cause the state law to remain inoperative until the constitutional question is judicially determined. . . . There was jurisdiction therefore in the court below as a federal court to afford appropriate relief unless the want of power resulted from the prohibition of sec. 265 of the Judicial Code. . . . In *Prentiss v. Atlantic Coast Line Co.*, (1908) 211 U. S. 210, 29 S. Ct. 67, 53 U. S. (L. ed.) 150, the facts, briefly stated, were these: By the constitution and laws of Virginia the Corporation Commission of that

state was constituted a court and was authorized in that capacity to establish railroad rates and to enforce them. The authority thus conferred was exerted and the jurisdiction of a court of the United States was invoked to enjoin the commission from enforcing the rates so fixed on the ground that to put them in operation would amount to a confiscation of the property of the railroad and hence would be repugnant to the Constitution of the United States. The power to afford relief was challenged on the ground that as the Corporation Commission was a court under the constitution and law of the state, its proceedings could not be stayed by a court of the United States because of the prohibition of section 265 of the Judicial Code. It was held, however, that as the power to fix rates was legislative and not judicial, the prohibition had no application and the injunction prayed was granted. . . . It is certain that the prohibitions which the statute imposes secure only the right of state courts to exert their judicial power; that is, a power called into play alone between parties to a controversy, and the operation of which power when exerted was, from the very fact that it was judicial, confined to the parties, their duties, interests and property, in other words, to a power falling within the general limitation of things judicial as demarked by the great distinction between legislative, executive and judicial power upon which the Constitution was framed. This is the necessary result of the ruling in the *Prentiss Case*, by which it is made certain that although a state may have power to confer upon its courts such authority as may be deemed appropriate, it cannot by the exertion of such right draw into the judicial sphere powers which are intrinsically legislative and executive or both, and thus bring the exercise of such powers within the scope of the prohibition of the statute, with the result of depriving the courts of the United States to that extent of their omnipresent authority to enforce the Constitution."

**Execution of state process.**—A federal District Court has jurisdiction of a suit by the director general of railroads to enjoin the sale of land, belonging to a railroad under federal control, under execution issued on a state court's judgment, for the special statutory exemption from process, created by Act of March 21, 1918 (1918 Supp. Fed. Stat. Ann. 757), must be construed, in connection with this section, as modifying its language, and creating another exception, under which the attempted enforcement of the same and final process from a state court may be restrained in proper cases. *U. S. Railroad Administration v. Burch*, (E. D. S. C. 1918) 254 Fed. 140.

**Injunction proceedings.**—Where a state court, in a proceeding to obtain a mandatory injunction to compel the defendants to remove certain balconies, rooms, etc., from certain land, issued a temporary injunction

restraining the plaintiff from interfering with such improvements, the federal court, in an action in which the parties and the subject matter were substantially the same, refused to issue an injunction which would, in effect, restrain the injunction of the state court. *Amusement Syndicate Co. v. El Paso Land Imp. Co.*, (W. D. Tex. 1918) 251 Fed. 345.

**Judgment of state courts.**—"United States courts, by virtue of their general equity powers, have jurisdiction to enjoin the enforcement of a judgment in a state court upon the usual principles under which courts of equity will enjoin the enforcement of a judgment." *U. S. Railroad Administration v. Burch*, (E. D. S. C. 1918) 254 Fed. 140.

A federal court has no jurisdiction under this section to grant an injunction staying an action in a state court for want of service on the defendant, if no final judgment has been rendered in such action. *Essanay Film Mfg. Co. v. Kane*, (D. O. N. J. 1919) 256 Fed. 271.

## Vol. V, p. 983, Jud. Code, sec. 266.

[First ed., 1912 Supp., p. 242.]

**State as including Porto Rico.**—The term "state" does not as used in this section include Porto Rico. *Benedicto v. West India, etc., Co.*, (C. C. A. 1st Cir. 1919) 256 Fed. 417.

## Vol. V, p. 989, Jud. Code, sec. 267.

[First ed., 1912 Supp., p. 243.]

### III. Effect of state rule.

#### 3. State statutes.

### VI. Application of rules in particular matters and proceedings.

#### 11. Damages generally.

#### 14. Judgments.

#### 21. Specific performance.

### III. EFFECT OF STATE RULE

#### 3. State Statutes (p. 993)

That the facts authorize a bill in equity under a state statute does not preclude a transfer to the law courts because an adequate remedy at law exists. *John A. Roebling's Sons Co. v. Kinnicutt*, (S. D. N. Y. 1917) 248 Fed. 596.

### VI. APPLICATION OF RULES IN PARTICULAR MATTERS AND PROCEEDINGS

#### 11. Damages Generally (p. 1004)

**After denial of injunction.**—After denying an injunction a suit in equity should not be retained to award damages. *American Falls Milling Co. v. Standard Brokerage, etc., Co.*, (C. C. A. 8th Cir. 1918) 248 Fed. 487, 160 C. C. A. 497.

#### 14. Judgments (p. 1005)

**Cancellation of release of judgment.**—Notwithstanding the provisions of this section, a federal court has equitable jurisdiction

of a suit to cancel a release of a judgment of a state court, for a law court in setting aside such a release exercises an equitable power and no jury trial may be demanded, and therefore equitable jurisdiction may not be denied on the ground that there is an adequate remedy at law in the state court. *Williams v. Miller*, (W. D. Va. 1918) 249 Fed. 495.

#### 21. *Specific Performance* (p. 1007)

**Contract to sell coal.**—A suit for specific performance of a contract to sell and deliver coal to a railroad company is not within the jurisdiction of a federal court of equity, where no allegation of the defendant's insolvency or of the plaintiff's inability to procure coal from other persons is made, for the plaintiff has an adequate remedy at law by an action for breach of contract. *Consolidated Fuel Co. v. St. Louis Southwestern R. Co.*, (C. C. A. 8th Cir. 1918) 250 Fed. 395, 162 C. C. A. 465.

### Vol. V, p. 1009, Jud. Code, sec. 268.

[First ed., 1912 Supp., p. 243.]

#### III. Power to punish for contempt generally.

##### 1. Inherent power in courts.

#### IV. Particular acts or conduct as contempts.

##### 5. Injunction violations.

#### 24. Warrant of commitment of prisoner violated.

##### 25. Witnesses' acts.

#### 28. Affidavit for change of venue [new].

#### VII. Proceedings to punish for contempt.

##### 3. Mode of procedure.

##### c. Setting out the offense.

##### 6. Purging by oath.

#### XI. Review.

### III. POWER TO PUNISH FOR CONTEMPT GENERALLY

#### 1. *Inherent Power in Courts* (p. 1015)

To the same effect as the original annotation, see *Sweepston v. U. S.*, (C. C. A. 6th Cir. 1918) 251 Fed. 205, 163 C. C. A. 361.

### V. PARTICULAR ACTS OR CONDUCT AS CONTEMPTS

#### 5. *Injunction Violations* (p. 1020)

**Violation by strikers or members of labor union of injunction.**—A final decree in a strike suit enjoining the defendants therein and all other persons having notice of the decree from interfering by threats, violence, or intimidation with employees of the complainant, binds persons who have notice of the decree and who are in privity with the defendants, but such persons are not amenable to the decree because ten years after its issuance they, as members of the same union, take part in another, unrelated strike. *Tosh v. West Kentucky Coal Co.*, (C. C. A. 6th Cir. 1918) 252 Fed. 44, 164 C. C. A. 156.

#### 24. *Warrant of Commitment of Prisoner Violated* (p. 1028)

To same effect as the original annotation, see *Sweepston v. U. S.*, (C. C. A. 6th Cir. 1918) 251 Fed. 205, 163 C. C. A. 361.

#### 25. *Witnesses' Acts* (p. 1028)

**By testimony given.**—A federal court may not punish a witness for contempt solely because of the opinion of the court that he is committing perjury, without reference to any circumstance or condition giving to such perjury an obstructive effect. *Ex p. Hudgings*, (1919) 249 U. S. 378, 39 S. Ct. 337, 63 U. S. (L. ed.) —, wherein the court said: "That the contumacious refusal of a witness to testify may so directly obstruct a court in the performance of its duty as to justify punishment for contempt is so well settled as to need only statement. Despite some confusion caused by certain ambiguous forms of expression used by the court below in dealing with the subject, it is indisputable that the punishment for contempt was imposed solely because of the opinion of the court that the witness was wilfully refusing to testify truthfully, that is, was committing perjury."

"Whether, then, power to punish for contempt exists in every case where a court is of the opinion that a witness is committing perjury, is the test we must here apply. Because perjury is a crime defined by law and one committing it may be tried and punished does not necessarily establish that when committed in the presence of a court it may not, when exceptional conditions so justify, be the subject-matter of a punishment for contempt. For an application of this doctrine to perjury, see *Berkson v. People*, 154 Illinois 81; *In re Rosenberg*, 90 Wisconsin 581; *Stockham v. French*, 1 Bing. 365; and see *In re Schulman*, 177 Fed. Rep. 191; *In re Steiner*, 195 Fed. Rep. 299; *In re Ulmer*, 208 Fed. Rep. 461; *United States v. Appel*, 211 Fed. Rep. 495. This being true, we must ascertain what is the essential ingredient in addition to the elements constituting perjury under the general law which must be found in perjury when committed in the presence of a court to bring about the exceptional conditions justifying punishment under both.

"Existing within the limits of and sanctioned by the Constitution, the power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the rights of the citizen. This, however, expresses no purpose to exempt judicial authority from constitutional limitations, since its great and only purpose is to secure judicial authority from obstruction in the performance of its duties to the end that means appropriate for the preservation and enforcement of the Constitution may be secured. *Toledo Newspaper Co. v.*

United States, 247 U. S. 402; *Marshall v. Gordon*, 243 U. S. 521.

"An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted—a principle which, applied to the subject in hand, exacts that in order to punish perjury in the presence of the court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty. As illustrative of this, see *United States v. Appel*, 211 Fed. Rep. 495. It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled."

#### 28. *Affidavit for Change of Venue* [New]

##### **Affidavit for change of venue as contempt.**

—An attorney may in a proper case, in a respectful manner, as, for example, on an application for change of venue, allege that the judge is prejudiced against his client, and unless the act is done with reckless disregard of truth, or with the express intention to reflect upon the honor and integrity of the judge, it is not a contempt. The fact that no statute authorizes an application on such ground is immaterial. *Tjosevig v. U. S.*, (C. C. A. 9th Cir. 1919) 255 Fed. 5, following *Le Hane v. State*, 48 Neb. 105, 60 N. W. 1017.

#### VII. PROCEEDINGS TO PUNISH FOR CONTEMPT

##### 3. *Mode of Procedure*

###### c. *Setting Out the Offense* (p. 1035)

**Sufficiency of charge.**—Under a charge of contempt against a sheriff and his jailer for conspiring to permit the escape of a prisoner they may be convicted for permitting the escape although the conspiracy alleged was not proved. *Sweepston v. U. S.*, (C. C. A. 6th Cir. 1918) 251 Fed. 205, 163 C. C. A. 361.

#### 6. *Purging by Oath* (p. 1039)

**Common-law rule not in effect.**—The common-law rule in certain classes of contempt cases permitted the accused to purge himself through answer under oath; but the common-law rule of purgation does not prevail in the federal courts; indeed the settled rule now is that disavowal by sworn answer or otherwise is not conclusive, and that the whole matter is for the court upon the evidence. *Sweepston v. U. S.*, (C. C. A. 6th Cir. 1918) 251 Fed. 205, 163 C. C. A. 361.

#### XI. REVIEW (p. 1045)

**Review of findings of fact.**—Although the Circuit Court of Appeals is limited in contempt cases to a review of questions of law, it will reverse the lower court's findings on the fact if unsupported by competent evidence. *Tjosevig v. U. S.*, (C. C. A. 9th Cir. 1919) 255 Fed. 5, 166 C. C. A. 333.

**Conclusiveness of lower court's findings.**—On appeal in a proceeding for criminal contempt, the finding of the lower court has the conclusiveness of a verdict of a jury, if it is sustained by substantial evidence. *Kelly v. U. S.*, (C. C. A. 9th Cir. 1918) 250 Fed. 947, 163 C. C. A. 197.

#### Vol. V, p. 1047, Jud. Code, sec. 269. [First ed., 1912 Supp., p. 243.]

- II. Power of court.
- III. Grounds for granting new trial.
  - 1. In general.
  - 5. Inadequate verdict.
  - 8. Newly discovered evidence.

#### II. POWER OF COURT (p. 1048)

**Discretion of court.**—To same effect as original annotation, see *Chicago, etc., R. Co. v. Chamberlain*, (C. C. A. 9th Cir. 1918) 253 Fed. 429, 165 C. C. A. 171; *Farrell v. Philadelphia First Nat. Bank*, (C. C. A. 3d Cir. 1919) 254 Fed. 801, 166 C. C. A. 247; *Royal Ins. Co. v. Taylor*, (C. C. A. 4th Cir. 1918) 254 Fed. 805, 166 C. C. A. 251.

To same effect as *Higgins v. U. S.*, (C. C. A. 6th Cir. 1911) 185 Fed. 710, 108 C. C. A. 48, in original annotation, see *United Press Assoc. v. National Newspapers Assoc.*, (C. C. A. 8th Cir. 1918) 254 Fed. 284, 165 C. C. A. 572.

#### III. GROUNDS FOR GRANTING NEW TRIAL

##### 1. *In General* (p. 1050)

The fact that voluntary admissions of a defendant are erroneously admitted in evidence is not ground for granting a new trial where the fact admitted was not in real controversy and was independently proven. *U. S. v. Stilson*, (E. D. Pa. 1918) 254 Fed. 120.

##### 5. *Inadequate Verdict* (p. 1052)

Where the jury has returned a verdict in favor of the plaintiff but has failed to award

him damages, to which the undisputed evidence shows him to be entitled, the court has discretion to grant a new trial as to that single issue for the purpose of assessing the amount of damages. *Original Sixteen to One Mine v. Twenty-One Min. Co.*, (N. D. Cal. 1918) 254 Fed. 630.

#### 8. *Newly Discovered Evidence* (p. 1055)

Newly discovered evidence which is merely cumulative or which merely contradicts a witness is not ordinarily ground for a new trial. Such evidence must be so conclusive as to raise a reasonable presumption that the result of a new trial would be different from the first, or it is insufficient as ground for a new trial. *Shelton v. Southern R. Co.*, (E. D. Tenn. 1918) 255 Fed. 182.

### Vol. V, p. 1059, Jud. Code, sec. 274a.

[First ed., 1916 Supp., p. 137.]

**Amendment after expiration of term of court.**—The right of a party to amend his pleadings under this section "at any stage of the cause," includes the right to make a motion therefor under a mandate from an appellate court directing further proceedings, although the term of court during which the mandate was filed has expired. *District of Columbia v. Washington Terminal Co.*, (1918) 47 App. Cas. (D. C.) 570.

**Adequate remedy at law.**—Where a bill for partition is dismissed on the ground that there is a disputed question of title involved and that the plaintiffs have an adequate remedy at law, an appellate court, in view of the provisions of this section, may entertain an appeal by the plaintiff from the decree of dismissal, the record showing there was no disputed question of fact involved. *Staub v. Staub*, (1918) 47 App. Cas. (D. C.) 180.

**Equitable defense to action on mortgage note.**—A mortgagee cannot urge, in an action against him on the mortgage note, as an equitable defense under this section, that because of an extension of time of payment granted by the mortgagee to his grantee, who assumed the debt, and the consequent failure of the mortgagee to foreclose when the note became due by its original terms, he was damaged, and is entitled to have his damages considered in determining the amount due upon the note; since he did not become a surety as to the mortgagee by the assumption of the debt by his grantee. *Wolfe v. Murphy*, (1918) 47 App. Cas. (D. C.) 296.

**Erroneous transfer.**—Where, in an action at law for breach of a building contract, the defendant pleads a general denial and sets up a counterclaim, but no accounting is necessary, it is error to transfer the case from the law to the equity side of the court. *Special School Dist. v. Jones*, (C. C. A. 8th Cir. 1918) 250 Fed. 440, 162 C. C. A. 510.

**Waiver of right of transfer.**—Failure to make a motion to transfer a bill from the equity to the law side of the court because there is an adequate remedy at law, and

proceeding to a hearing, is a waiver of the right to make such an objection. *Fay v. Hill*, (C. C. A. 8th Cir. 1918) 249 Fed. 415, 161 C. C. A. 389.

### Vol. V, p. 1061, Jud. Code, sec. 274b.

[First ed., 1916 Supp., p. 138.]

**Abolition of distinctions between proceedings at law and in equity.**—The provisions of this section do not abolish all distinctions between actions at common law and suits in equity and establish one form of civil action for all cases. Full effect may be given to the provision that an equitable defense may be interposed by replication, by construing "replication" as a special replication setting up a defense to an answer interposing an equitable defense and asking affirmative relief. Hence, where an answer sets up a purely legal defense, this section does not permit a replication interposing an equitable defense. *Keatley v. U. S. Trust Co.*, (C. C. A. 2d Cir. 1918) 249 Fed. 296, 161 C. C. A. 304.

**Effect as precluding ancillary suit.**—The remedy provided by section 274b is confined to the original parties, and accordingly does not prevent a suit in equity to enjoin the prosecution of an action at law where the interpleader of additional parties is necessary. *Sherman Nat. Bank v. Shubert Theatrical Co.*, (C. C. A. 2d Cir. 1917) 247 Fed. 256, 159 C. C. A. 350.

**Appeal treated as writ of error.**—Since this amendment, a case brought to the Circuit Court of Appeals by appeal, in an action at law, will be treated as though it had been brought up by writ of error. *Ana Maria Sugar Co. v. Quinones*, (C. C. A. 1st Cir. 1918) 251 Fed. 499, 163 C. C. A. 493.

**Defense of reformation of instruments.**—Under this section, the defendant, in an action for breach of contract, may, by answer in the nature of a cross-petition, ask for reformation of the contract upon the ground of mutual mistake. *Upson Nut Co. v. American Shipbuilding Co.*, (N. D. Ohio 1918) 251 Fed. 707.

### Vol. V, p. 1073, Jud. Code, sec. 280.

[First ed., 1912 Supp., p. 246.]

**Disqualification of marshal by prejudice.**—"When a marshal, without authority of law or instructions from competent authority, hires a private individual to detect suspected violations of a particular law and pays such person out of his own private funds, and upon the information furnished by such person, who admits that he also participated in the offense under investigation, prosecution is instituted against certain persons, and the principal evidence relied on is to come from such employed detective, a situation is presented where, if on the trial a jury panel is exhausted, and it becomes necessary to draw jurymen from the bystanders, a defendant may well object to the drawing of



such jurymen by the marshal or his deputies, upon the ground that he is not an indifferent person, and, if there be no denial of the facts and circumstances shown, the duty of the court is to specially appoint a fit person as provided by the statute. The question is not whether there is a personal malice or ill will on the part of the marshal, but whether his acts and the surrounding circumstances have been such that they impel the belief that he is no longer indifferent in his official attitude as between the United States and the persons on trial, and for that reason is not a fit person to be intrusted with the power to return jurymen from bystanders to complete the panel for the immediate case. We are keeping in mind the presumption that the marshal will do his duty without favor; but, lest he may not do so, the particular statute quoted interposes, with the object of insuring that absolute fairness of procedure which can best be had by not allowing one who is not indifferent to select jurors from bystanders." *Johnson v. U. S.*, (C. C. A. 9th Cir. 1917) 247 Fed. 92, 159 C. C. A. 310.

**Effect of local statute.**—The fact that a local statute in Alaska provides for the summoning of talesmen and makes no provision for disqualification of the marshal does not prevent the application of the federal statute. *Johnson v. U. S.*, (C. C. A. 9th Cir. 1917) 247 Fed. 92, 159 C. C. A. 310, wherein it was said: "Certainly this statute must control as a rule. But if it should come about that a showing is made of the manifest unfitness of the marshal to summon jurors, in the absence of local legislation directing how to proceed, the general law of the United States becomes wholly applicable and controlling. If this were not so, we would find that the guaranty that one accused shall have the right to trial by an impartial jury would mean less in Alaska than in the states. We are unable to assent to such a proposition."

**Vol. V, p. 1097, sec. 8.** [First ed., 1914 Supp., p. 376.]

**Transitory action arising in Panama.**—An action for damages to an automobile resulting from a collision with an electric car, being of a transitory nature, is within the jurisdiction of the District Court of the Canal Zone, if the defendant may be served with process within the Zone, regardless of the citizenship of the parties and although the collision occurred in Panama. *Panama Electric R. Co. v. Moyers*, (C. C. A. 5th Cir. 1918) 249 Fed. 19, 161 C. C. A. 79.

**Vol. V, p. 1098, sec. 9.** [First ed., 1914 Supp., p. 377.]

**Jurisdiction on appeal.**—*Amount in controversy.*—To same effect as original annotation, see *Pacific Mail Steamship Co. v. Beneby*, (C. C. A. 5th Cir. 1918) 250 Fed. 444, 162 C. C. A. 514.

**Application to procedure on appeal.**—The provision of this section that appellate jurisdiction "may be exercised by said Circuit Court of Appeals in the same manner, under the same regulations, and by the same procedure as nearly as practicable as is done in reviewing the final judgments and decrees of the District Courts of the United States," shows that the provision, appearing in the earlier part of this section, that "all existing laws in the Canal Zone governing practice and procedure in existing courts shall be applicable and adapted to the practice in the new courts," does not include the manner of bringing cases from the District Court of the Canal Zone to the Circuit Court of Appeals, and that existing laws of the Canal Zone were not intended to be made applicable to anything done after judgment looking to a review by the Circuit Court of Appeals. *Panama R. Co. v. Curran*, (C. C. A. 5th Cir. 1919) 256 Fed. 768, 168 C. C. A. 114. To same effect see *Panama R. Co. v. Robert*, (C. C. A. 5th Cir. 1919) 256 Fed. 773, 168 C. C. A. 119.

**Vol. V, p. 1103, sec. 4.** [First ed., 1909 Supp., p. 296.]

**Controversies arising in China between United States citizens** are within the jurisdiction of the United States Court for China. *Swayne v. Everett*, (C. C. A. 9th Cir. 1919) 255 Fed. 71, 166 C. C. A. 399.

**Vol. V, p. 1108.** [*Procedure, etc.*] [First ed., 1914 Supp., p. 230.]

**"Parties upon whose petition order was made."**—A suit to enjoin the enforcement of an order of the Interstate Commerce Commission authorizing an increase in westbound transcontinental freight rates in order to remove a discrimination against intermountain territory may be brought in any federal District Court in which is the residence of one of the carriers, made a party defendant, who originally made application to the Commission, under the Act of February 4, 1887, as amended by the Act of June 18, 1910, § 8 (see vol. 4, p. 396), for relief from the long-and-short-haul clause of that section in respect to certain westbound transcontinental rates, although the order complained of was made after the proceedings were reopened upon application in behalf of shippers, since the carriers who made the original applications must be deemed to be "the parties upon whose petition the order was made," within the meaning of the provision of the Act of October 22, 1913 (38 Stat. at L. 219, ch. 32), that "the venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the

parties upon whose petition the order was made." *Skinner, etc., Corp. v. U. S.*, (1919) 249 U. S. 557, 39 S. Ct. 375, 63 U. S. (L. ed.) —.

### Vol. V, p. 1110, Jud. Code, sec. 208.

[First ed., 1912 Supp., p. 221.]

#### Statutory powers exceeded by commission.

—A federal District Court has jurisdiction of a suit to enjoin the enforcement of an order of the Interstate Commerce Commission authorizing an increase in westbound trans-continental freight rates in order to remove a discrimination against intermountain territory, the invalidity of which is asserted, not on the ground that the new rate is unreasonably high, or that it is discriminatory, or that there is mere error in the action of the commission, but on the ground that the commission, in making the order, exceeded its statutory powers; and plaintiff is not first required to attempt to secure redress in a proceeding before the commission. *Skinner, etc., Corp. v. U. S.* (1919) 249 U. S. 557, 39 S. Ct. 375, 63 U. S. (L. ed.) —, wherein the court said: "The defendants contend that the District Court did not have jurisdiction of the subject-matter of this suit; because orders entered in a fourth section proceeding cannot be assailed in the courts; at least, not until after a remedy has been sought under §§ 13 and 15 of the Act to regulate commerce. This contention proceeds apparently upon a misapprehension of plaintiff's position. If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, the remedy must have been sought primarily by proceedings before the commission, *Loomis v. Lehigh Valley R. R. Co.*, 240 U. S. 43, 50; *Texas & Pacific Ry. Co. v. American Tie & Timber Co.*, 234 U. S. 138, 146; *The Minnesota Rate Cases*, 230 U. S. 352, 419; *Robinson v. Baltimore & Ohio R. R. Co.*, 222 U. S. 506; *Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481; and the finding thereon would have been conclusive, unless there was lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law, *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 482; *Pennsylvania Co. v. United States*, 236 U. S. 351, 361; *Los Angeles Switching Case*, 234 U. S. 294, 311; *Kansas City Southern Ry. Co. v. United States*, 231 U. S. 423, 440; *Procter & Gamble Co. v. United States*, 225 U. S. 282, 297-298; *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U. S. 541. But plaintiff does not contend that 75 cents is an unreasonably high rate or that it is discriminatory or that there was mere error in the action of the commission. The contention is that the commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not at-

tempted to secure redress in a proceeding before the commission. *Interstate Commerce Commission v. Diefenbaugh*, 222 U. S. 42, 49; *Louisiana & Pacific Ry. Co. v. United States*, 209 Fed. Rep. 244, 251; *Atlantic Coast Line R. R. Co. v. Interstate Commerce Commission*, 194 Fed. Rep. 449, 451. The *Sacramento Case*, *supra*, was a case of this character. Compare *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 92; *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433. The District Court properly assumed jurisdiction of this suit."

### Vol. V, p. 1117, sec. 4. [First ed., vol. II, p. 84.]

**Review.**—A judgment of a District Court in a suit against the United States is only reviewable in the Supreme Court. The Circuit Court of Appeals has no jurisdiction to review such a judgment. *J. Homer Fritch v. U. S.*, (1919) 248 U. S. 458, 39 S. Ct. 158, 63 U. S. (L. ed.) —, *reversing* (*C. C. A. 9th Cir. 1916*) 234 Fed. 608, 148 C. C. A. 374, (*C. C. A. 9th Cir. 1916*) 236 Fed. 133, 149 C. C. A. 343, and *overruling* *Ogden v. U. S.*, (1893) 148 U. S. 390, 13 S. Ct. 602, 37 U. S. (L. ed.) 493, wherein the court said: "Liability of the United States for the hire of a ship for two charter periods was asserted. The trial court allowed recovery for one period and rejected it for the other and the court below affirmed its action. The case is here because of alleged error committed in not allowing for both. The government insists that we have no jurisdiction because the judgment of the trial court was exclusively susceptible of being reviewed directly by this court; hence, that the court below had no jurisdiction and we must reverse and remand with directions to dismiss for want of jurisdiction. The contention is well founded, and we might content ourselves with referring to the authorities by which its correctness is conclusively established. As, however, some contrariety of opinion on the question is manifested in the decisions of the lower federal courts resulting either from a misconception of the governing principle upon which the right of direct review rests, or, it may be, caused by previous decisions of this court which if unexplained may continue to be the source of misconception, we briefly review and dispose of the subject from an original point of view. When the United States made claims against it justiciable by conferring authority upon the Court of Claims to entertain and decide them, the grant was accompanied by a provision giving this court direct and exclusive jurisdiction to review the judgments of the Court of Claims rendered in the exercise of the new power given. When by the Tucker Act (Act of March 3, 1887, c. 359, 24 Stat. 505) authority was conferred upon the circuit and district courts of the United States to exert,

concurrently with the Court of Claims, the power to decide claims against the United States, the question arose whether the judgments of those courts rendered in the exercise of such jurisdiction were reviewable exclusively and directly by this court.

"Determining the principle by which the question was to be solved, it was decided that in the absence of express provision or necessary implication to the contrary, the judgments of courts of the United States rendered as the result of the new power would be subject to be reviewed only by the exclusive method theretofore provided for the Court of Claims. Applying the principle of interpretation thus announced to the Tucker Act, it was held that judgments of the courts of the United States in suits against the United States under that act were reviewable only directly by this court. *United States v. Davis*, 131 U. S. 36."

**Vol. V, p. 1123, sec. 721.** [First ed., vol. IV, p. 517.]

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- a. In general.
  - i. Levy and collection of taxes generally.
  - k. Special or local assessments.

**40. Title and incidents of realty generally.**

- a. Rule stated.

**41. Wills.**

- c. State statute relating to wills.

**42. Receivers (new).**

**I. GENERAL RULES AND PRINCIPLES**

**1. General Scope and Effect of Section**  
(p. 1125)

The jurisdiction of the federal court given to nonresidents against citizens of the local state, is to insure an impartial trial, not to create rights of action which citizens of the state, in like condition, do not have. *Paterlini v. Memorial Hospital Ass'n*, (C. C. A. 3d Cir. 1918) 247 Fed. 639, 160 C. C. A. 49.

**2. Federal Questions** (p. 1126)

The decision of a state court as to whether a state statute infringes the Federal Constitution is not conclusive. *Webb v. Southern R. Co.*, (C. C. A. 5th Cir. 1918) 248 Fed. 618, 160 C. C. A. 518.

**3. Suits in Equity** (p. 1126)

**Specific performance.**—A federal court is not bound to follow the rule laid down by a state court for granting specific performance of a contract and, hence, may specifically enforce a contract which lacks mutuality even though the rule in the state court is otherwise. *Union Bag, etc., Corp. v. Bischoff*, (E. D. N. Y. 1918) 255 Fed. 187.

**4. Criminal Cases** (p. 1128)

To same effect as first paragraph of original annotation, see *Myres v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 779, 168 C. C. A. 125. See further *U. S. v. De Bolt*, (S. D. Ohio 1918) 253 Fed. 78, also holding that in such cases state statutes and decisions may be persuasive.

**5. Questions of Unwritten or Common Law**

**b. Present Rule** (p. 1129)

**In general.**—To same effect as second paragraph of original annotation, see *Aktieselskabet Korn-og, etc. v. Rederiaktiebolaget, etc.*, (C. C. A. 2d Cir. 1918) 250 Fed. 935, 163

C. C. A. 185, Ann. Cas. 1918E 491; *U. S. v. Brewer-Elliott Oil, etc., Co.*, (W. D. Okla. 1918) 249 Fed. 609; *In re Jarmulowsky*, (C. C. A. 2d Cir. 1918) 249 Fed. 319, 161 C. C. A. 327, L. R. A. 1918E 634.

## 6. Constitutional and Statutory Questions Generally

### a. General Rule Stated (p. 1133)

To same effect as original annotation, see *Rockaway Pac. Corp. v. Stotesbury*, (N. D. N. Y. 1917) 255 Fed. 345; *Ludlow v. Ludlow*, (C. C. A. 6th Cir. 1918) 252 Fed. 559, 105 C. C. A. 9; *National Enameling, etc., Co. v. Zirkovics*, (C. C. A. 8th Cir. 1918) 251 Fed. 184, 163 C. C. A. 340.

**Constitutionality of state statute.**—A federal court in determining the constitutionality of a state statute under the state constitution, is bound by decisions of the highest court of the state regarding the constitutionality of similar state statutes. *Union Sulphur Co. v. Reed*, (E. D. La. 1918) 249 Fed. 172.

**Construction violating federal statutes.**—Although a federal court is usually bound by the construction of state statutes by the highest court of the state, it is not so bound in an inquiry as to whether such statutes, as enforced, effect results contrary to the express language of federal statutes. *Iowa Loan, etc., Co. v. Fairweather*, (S. D. Ia. 1918) 252 Fed. 605.

### c. Local Law; Rules of Property (p. 1130)

To the same effect as the original annotation, see *St. Louis, etc., R. Co. v. Quinette*, (C. C. A. 8th Cir. 1918) 251 Fed. 773, 164 C. C. A. 7.

### e. Questions Not Decided until after Accrual of Rights (p. 1140)

A state decision on the constitutionality of a state statute will be treated as conclusive in a proceeding begun in the federal court before the rendition of the decision where the decision was rested on the rule of cases decided prior to the accrual of the rights in question. *Nichols v. Cleveland*, (C. C. A. 6th Cir. 1917) 247 Fed. 731, 159 C. C. A. 589.

### f. Effect of Earlier Federal Decisions or Institution of Action in Federal Court (p. 1141)

To the same effect as first paragraph of the original annotation, see *St. Louis, etc., R. Co. v. Quinette*, (C. C. A. 8th Cir. 1918) 251 Fed. 773, 164 C. C. A. 7.

### l. Passage or Repeal of Statutes (p. 1147)

**Notice of local law.**—A state holding that the sufficiency of the publication of notice of a special law is to be determined solely by the legislature is binding on the federal court. *Bush v. Branson*, (C. C. A. 8th Cir. 1918) 248 Fed. 377, 160 C. C. A. 387.

## 7. Decisions of Intermediate Appellate and Lower Courts (p. 1148)

It is not incumbent upon a federal court to adopt a construction given to a state statute by a trial judge in a state court. *In re F. & D. Co.*, (C. C. A. 2d Cir. 1919) 256 Fed. 73.

## II. APPLICATION OF RULES TO PARTICULAR SUBJECTS

### 1. Adverse Possession (p. 1148)

**Title by limitation.**—A federal court is bound by state decisions as to title by limitation, and hence a judgment of a District Court following the latest state decision on the subject will be reversed where pending the writ of error the state court decision is reversed. *Conn v. Drew*, (C. C. A. 5th Cir. 1918) 250 Fed. 852, 163 C. C. A. 166.

### 2. Assignments for Benefit of Creditors and State Insolvency Proceedings (p. 1149)

To the same effect as the original annotation, see *Bryan v. Barriger*, (W. D. Ky. 1918) 251 Fed. 328.

### 5. Commercial Paper

#### b. Effect of State Statute and Construction Thereof by State Court (p. 1159)

In *Walker v. Arkansas Nat. Bank*, (C. C. A. 8th Cir. 1919) 256 Fed. 1, it was held that in an action based on a promissory note, executed and payable in a certain state, the laws of that state controlled, and hence where a state statute removed all restrictions on contracts of married women, a wife could be held liable as surety on a note executed for her husband.

### 7. Contracts Generally (p. 1163)

**Construction of contracts.**—In considering in bankruptcy proceedings the construction and legal effect to be given to a contract of a certain state, a federal court will follow the settled rule in force in such state. *In re American Steel Supply Syndicate*, (E. D. Mich. 1919) 256 Fed. 876.

**Voidability of contract as against public policy.**—Where a decision in the highest court of a state declaring a contract void as against public policy, is not based on any state statute, such decision is not binding on a federal court in that state in construing a similar contract, executed prior to the decision of the state court and which is valid under the decisions of the federal courts. *Interstate Compress Co. v. Agnew*, (C. C. A. 8th Cir. 1919) 255 Fed. 508, 168 C. C. A. 199, wherein the court said: "When a ruling of the highest court of a state is controlling, when the same question arises in an action pending in a national court of that state, has been determined by the national Supreme Court so frequently, that it has ceased to be an open question. Like most important legal principles, it has been of gradual growth, until

it has finally become a well-established rule of law. In *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 360, 30 Sup. Ct. 140, 143 (54 L. Ed. 228), the court, after a full review of the former rulings of that court on the subject, epitomizes the law as follows:

"We take it, then, that it is no longer to be questioned that the federal courts in determining cases before them are to be guided by the following rules: (1) When administering state laws and determining rights accruing under those laws, the jurisdiction of the federal court is an independent one, not subordinate to but co-ordinate and concurrent with the jurisdiction of the state courts. (2) Where, before the rights of the parties accrued, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the federal court as authoritative declarations of the law of the state. (3) But where the law of the state has not been thus settled, it is not only the right, but the duty, of the federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence. (4) So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, or when there has been no decision by the state court on the particular question involved, then the federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the federal court should always lean to an agreement with the state court if the question is balanced with doubt."

**Actions on contracts with county.**—In an action against a county on a contract made with it, a federal court will enforce a state statute requiring all persons having claims against a county to present them to the county board before bringing suit thereon. Such requirement will not be enforced, however, if the county board has taken action which is equivalent to a rejection of the claim and which makes the presentation of it futile. *Covington County v. Stevens*, (C. C. A. 5th Cir. 1919) 256 Fed. 328.

**Municipal contracts.**—A rule, established by the decisions of the highest court of a state, affecting rights of parties arising out of municipal contracts for street improvements and sureties on bonds filed in pursuance of statutory provisions, if fixed and definite and uniform in its application, should be followed by a federal court where no question of general or commercial law or of rights under the Federal Constitution or the laws of Congress is involved. *American Surety Co. v. Bellingham Nat. Bank*, (C. C. A. 9th Cir. 1918) 254 Fed. 54, 165 C. C. A. 464.

## 12. *Decedents' Estates Generally* (p. 1169)

**Testator's residence.**—The decision of a state court has been held to be controlling in the determination of the testator's residence where property is situated. *Swann v. Austell*, (N. D. Ga. 1918) 253 Fed. 807.

**Effect of judgment against administrator.**—The decisions of the highest court of a state as to whether a judgment against an administrator is conclusive against the sureties on his bond, are binding on the federal courts. *Gillespie v. Riggs*, (C. C. A. 4th Cir. 1918) 253 Fed. 943, 165 C. C. A. 385.

## 13. *Death by Wrongful Act*

### b. Who May Maintain Action (p. 1172)

Federal courts will follow the decisions of state courts upon the question whether a right of action for the death by wrongful act inures to the personal representative of the deceased or to his surviving spouse and next of kin. *Sarpy County v. Galvin*, (C. C. A. 8th Cir. 1918) 251 Fed. 888, 164 C. C. A. 104.

## 14. *Deeds, Mortgages and Leases of Realty*

### a. Deeds (p. 1174)

**Grant of mineral rights.**—Where grants of mineral rights are made in view of the local rule of a state, the federal courts will follow it, whether or not it is to be considered strictly as a rule of property. *Marquette Cement Min. Co. v. Oglesby Coal Co.*, (N. D. Ill. 1918) 253 Fed. 107.

**Grant of right to cut timber.**—In construing a provision in a deed regarding the cutting and removal of timber from certain land, a federal court will follow decisions of the state court, even though there were no decisions in the state courts establishing a rule of property binding upon it when the rights of the parties accrued. *Norfolk Bank For Sav., etc. v. Whipple*, (E. D. S. C. 1918) 254 Fed. 195.

## 21. *Immigration and Naturalization* (p. 1192)

**Decision of state court as res judicata.**—The decision of a state court denying leave to file a naturalization petition is res judicata and binding on a federal court, and if the government insists upon the benefit of such judgment the applicant's only remedy is to renew his application five years after the date of its denial by the state court. *In re Norman*, (D. C. Mont. 1919) 256 Fed. 543.

## 22. *Insurance Contracts*

### b. Effect of State Statute (p. 1194)

The decisions of the highest state court construing statutes in relation to insurance are in general binding upon the federal courts and it has been so held with reference to the construction of the terms of a fire insurance policy the form of which is prescribed by a state statute. *Grant Lumber Co. v. North*

River Ins. Co., (D. C. Idaho 1918) 253 Fed. 83.

#### 24. *Judgments* (p. 1197)

**What constitutes final judgment.**—The ruling of the highest court of a state on the question of what constitutes a final judgment reviewable on a writ of error or appeal, is not controlling on a federal court sitting in that state. *J. W. Darling Lumber Co. v. Porter*, (C. C. A. 5th Cir. 1919) 256 Fed. 455.

**"Circuit courts of this state."**—In *Denny v. Giles*, (C. C. A. 5th Cir. 1918) 250 Fed. 987, 163 C. C. A. 237, it was held that the term "circuit courts of this state" as used in a state statute providing "all final judgments and decrees heretofore or hereafter rendered and entered in the circuit courts of this state, and certified copies thereof, shall be admissible as prima facie evidence in the several courts of this state of the entry and validity of such judgments and decrees," meant circuit courts of that state and could not be enlarged by a federal court to include the former Circuit Courts of the United States.

#### 25. *Liens* (p. 1199)

The construction of a mechanic's lien law by the state court is binding on the federal court. *Follansbee Bank v. Follansbee Lumber Co.*, (C. C. A. 4th Cir. 1918) 248 Fed. 645, 160 C. C. A. 545.

#### 26. *Limitations of Actions*

##### a. *Actions at Law* (p. 1200)

**Rule stated.**—To the same effect as the original annotation, see *St. Louis, etc., R. Co. v. Quinette*, (C. C. A. 8th Cir. 1918) 251 Fed. 773, 164 C. C. A. 7; *Farley v. Carey Show Print Co.*, (C. C. A. 2d Cir. 1918) 249 Fed. 476, 161 C. C. A. 434.

##### b. *Suits in Equity* (p. 1204)

**General rule stated.**—To the same effect as the original annotation, see *Benidict v. New York*, (1919) 250 U. S. 321, 39 S. Ct. 476, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 2d Cir. 1917) 247 Fed. 758, 159 C. C. A. 616.

In the absence of any statute of limitations enacted by Congress, the federal courts of equity usually follow the state statutes; and they do this even in actions which depend upon or arise under the laws of the United States. *Benedict v. New York*, (C. C. A. 2d Cir. 1917) 247 Fed. 758, 159 C. C. A. 616.

#### 27. *Master and Servant*

##### b. *Liability of Master for Injuries to Servant Generally* (p. 1206)

**Effect of state statute generally.**—To the same effect as the original annotation, see *Fillippon v. Albion Vein State Co.*, (1919) 250 U. S. 76, 39 S. Ct. 435, 63 U. S. (L. ed.) —, *reversing* on other grounds (C. C. A. 3d Cir. 1917) 242 Fed. 258, 155 C. C. A. 98.

**Safeguarding machinery.**—To the same effect as the original annotation, see *National Enameling, etc., Co. v. Zirkovics*, (C. C. A. 8th Cir. 1918) 251 Fed. 184, 163 C. C. A. 340.

**Instructions.**—In an action under a state Employers' Liability Act to recover damages for the death of an employee, an instruction defining contributory negligence as shown by the evidence in the case is proper, where it follows an established rule set forth in the decisions of the state. *Roberts v. Tennessee Coal, etc., Co.*, (C. C. A. 5th Cir. 1919) 255 Fed. 469, 166 C. C. A. 545.

#### 30. *Municipal and Quasi Municipal Corporations* (p. 1211)

The national courts uniformly follow the construction of the constitution and statutes of a state announced by its highest judicial tribunal in all cases that involve no question of general or commercial law and no question of right under the national Constitution or the acts of Congress. The character and limits of the powers and liabilities of the municipal and quasi municipal corporations of a state are generally questions of state or local law. *Vincennes Bridge Co. v. Atoka County*, (C. C. A. 8th Cir. 1917) 248 Fed. 93, 160 C. C. A. 233.

#### 31. *Negligence Questions*

##### a. *In General* (p. 1215)

**Violation of statute regulating speed of automobiles.**—A federal court will follow the decision of the highest court of a state on the question whether the violation of a statute of the state regulating the speed of automobiles is negligence per se. *Harmon v. Barber*, (C. C. A. 6th Cir. 1918) 247 Fed. 1, 159 C. C. A. 219.

**Liability of charitable corporation for tort.**—A federal court will as a matter of comity apply the settled rule of the state where it sits that a charitable corporation is not liable for the negligence of its employees. *Paterlini v. Memorial Hospital Ass'n*, (C. C. A. 3d Cir. 1918) 247 Fed. 639, 160 C. C. A. 49.

#### 33. *Practice, Procedure and Remedies Generally* (p. 1217)

**Sufficiency of service.**—Service upon a foreign corporation doing business within a district, will be regarded as sufficient in a federal court if it is sufficient under the state law. *Walsh v. Atlantic Coast Line R. Co.*, (D. C. Mass. 1916) 256 Fed. 47.

#### 35. *Private Corporations*

##### a. *Generally* (p. 1219)

To same effect as original annotation, see *Ramsay v. Crevlin*, (C. C. A. 8th Cir. 1918) 254 Fed. 813, 166 C. C. A. 259.

In the absence of any controlling state statute, a federal court can be justified in de-

clining to adopt the general rules of corporate law approved by the United States Supreme Court only in case there is a clear, definite and settled rule to the contrary in the state. *Thoms v. Goodman*, (C. C. A. 6th Cir. 1918) 254 Fed. 39, 165 C. C. A. 449.

### 37. *Statute of Frauds* (p. 1225)

To same effect as original annotation, see *Standard Bitulithic Co. v. Curran*, (C. C. A. 2d Cir. 1919) 256 Fed. 68.

### 38. *Taxation*

#### a. In General (p. 1226)

**Tax penalties.**—A federal court is bound by a decision of the highest court of a state regarding a state statute imposing tax penalties. *Bright v. Arkansas*, (C. C. A. 8th Cir. 1918) 249 Fed. 953, 162 C. C. A. 151.

#### i. Levy and Collection of Taxes Generally (p. 1231)

**Lien of tax.**—The decision of the highest court of a state as to the nature and extent of the lien of a personal property tax is binding on a federal court in a bankruptcy proceeding. *Polk County v. Burns*, (C. C. A. 8th Cir. 1917) 247 Fed. 399, 159 C. C. A. 453.

**Notice to property owners.**—Where the Supreme Court of a state deliberately considers and construes a clause of a state statute concerning a notice to property owners fixing a certain date for their appearance before a board of equalization to object to assessments, such construction is binding on the federal courts, regardless of the fact that it criticised as dictum. *Skagit County v. Fuget Mill Co.*, (C. C. A. 9th Cir. 1918) 249 Fed. 965, 162 C. C. A. 163.

#### k. Special or Local Assessments (p. 1231)

The decision of the Supreme Court of a state holding valid under the state constitution a law vesting power in boards of supervisors to submit propositions relating to special road taxes, is binding on a federal court. *Lancaster v. Police Jury*, (W. D. La. 1917) 254 Fed. 179.

### 40. *Title and Incidents of Realty Generally*

#### a. Rule Stated (p. 1233)

To same effect as original annotation, see *Powe v. Kidd*, (E. D. Ky. 1916) 249 Fed. 882.

#### 41. *Wills*

#### c. State Statute Relating to Wills (p. 1239)

To same effect as original annotation, see *Wells v. Brown*, (C. C. A. 8th Cir. 1919) 255 Fed. 852.

#### 42. *Receivers* [New]

In a suit by a statutory receiver appointed by a state court, the decisions of the highest court of the state as to the interpretation of his powers are binding on the federal court. *Hopkins v. Lancaster*, (N. D. Ala. 1918) 254 Fed. 190.

## Vol. VI, p. 21, §30. 914. [First ed., vol. IV, p. 563.]

### I. Construction generally.

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##### a. In general.

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#### 32. Nonsuit.

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#### 36. Pleadings.

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#### 41. Set-off and counterclaim.

#### 48. Witnesses.

#### 49. Writs and process.

##### b. Mode and sufficiency of service.

##### d. On foreign corporations.

### I. CONSTRUCTION GENERALLY.

#### 3. Principles Controlling Construction

##### a. In General (p. 23)

**State decisions and statutes not conclusive.**—"Whenever the question of the jurisdiction of a federal court is raised in an action pending therein, that court is not bound by the laws of the state in which it is sitting, but follows its own rules of practice in determining such question." *Golden v. Connersville Wheel Co.*, (E. D. Mich. 1918) 252 Fed. 904.

#### 4. Clauses in Act Construed

##### c. "As Near as May Be" (p. 26)

**General doctrine.**—A federal court is not required by this section to follow a rule of practice of a state which directly conflicts with a well-settled rule prevailing in the federal courts. *Sligo Furnace Co. v. Dalton*, (C. C. A. 8th Cir. 1919) 255 Fed. 532, 166 C. C. A. 600.

### V. APPLICABILITY IN PARTICULAR INSTANCES

#### 11. Counterclaim (p. 35)

The question whether a claim is available as a counterclaim in an action in a federal court, is governed by the laws of the state in which the court is sitting. *Walsh Constr. Co. v. Cleveland*, (N. D. Ohio 1918) 250 Fed. 137.

#### 13. Criminal Cases (p. 36)

State statutes relating to the competency of a wife to testify against her husband in a criminal case do not control in a federal court. *Denning v. U. S.*, (C. C. A. 5th Cir. 1918) 247 Fed. 403, 159 C. C. A. 517, L. R. A. 1918 E. 487.

## 20. Evidence and Mode of Obtaining (p. 37)

**Burden of proof.**—In *Harmon v. Barber*, (C. C. A. 6th Cir. 1918) 247 Fed. 1, 159 C. C. A. 219, it was held that the rule that the burden is on a carrier in a suit by a passenger for personal injury to show contributory negligence "is one of general law, enforced by the federal courts even where the rule of the state practice is otherwise."

## 24. Judgments and Proceedings Subsequent to

### a. In General (p. 40)

**Application generally of section.**—The Conformity Act by its express terms refers only to proceedings in district (and formerly circuit) courts, and has no application to appellate proceedings either in the Supreme Court or in the Circuit Court of Appeals. *Camp v. Gress*, (1919) 250 U. S. 308, 39 S. Ct. 478, 63 U. S. (L. ed.) —, reversing in part and affirming in part (C. C. A. 4th Cir. 1917) 244 Fed. 121, 156 C. C. A. 549.

Any local rule of practice which might require the reversal as against all defendants in an action on a joint contract for error not prejudicial to the resident defendants in retaining jurisdiction over a nonresident co-defendant can have no effect in a case coming up to the Supreme Court from a lower federal court, since in such cases the Supreme Court is given by statute full power to enter such judgment or order as the nature of the appeal or writ of error or certiorari requires, and by the Act of February 26, 1919, amending the Judicial Code, § 269 (see Pamph. Supp. No. 19, p. 155), the duty is especially enjoined of giving judgment in appellate proceedings "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." *Camp v. Gress*, (1919) 250 U. S. 308, 39 S. Ct. 478, 63 U. S. (L. ed.) —, reversing in part and affirming in part (C. C. A. 4th Cir. 1917) 244 Fed. 121, 156 C. C. A. 549.

## 27. Jury and Jurors

### a. In General (p. 46)

**Drawing of talesman by disqualified officer.**—The fact that an Alaska statute providing for the drawing of talesmen makes no provision for the disqualification of the marshal does not prevent the application of section 280 of the Judiciary Act providing for such a contingency. *Johnson v. U. S.*, (C. C. A. 9th Cir. 1917) 247 Fed. 92, 159 C. C. A. 310.

**Waiver of jury.**—In cases in which by stipulation a jury is waived, state practice should be followed by a federal court. *Pannill v. Roanoke Times Co.*, (W. D. Va. 1918) 252 Fed. 910.

### b. Submission of Case to Jury (p. 47)

**Where a case is submitted to the jury,** the federal court should follow the state practice and statute. *Pannill v. Roanoke Times Co.*, (W. D. Va. 1918) 252 Fed. 910.

**Argument of counsel.**—The rule of the New York practice that a counsel in opening

a personal injury case may state the amount claimed obtains in a federal court sitting in that state, though the cause of action arose in a state where the rule is otherwise. *Philadelphia, etc., R. Co. v. Skerman*, (C. C. A. 2d Cir. 1917) 247 Fed. 269, 159 C. C. A. 363.

## 32. Nonsuit

### a. Voluntary Nonsuit (p. 49)

The Conformity Act gives plaintiff in a suit in a District Court, sitting in Virginia, the same right that he has under the Virginia statutes, in the absence of a demurrer to the evidence and joinder therein, to take a nonsuit at any time before submission of the case to the jury and their retirement. *Barrett v. Virginian R. Co.*, (1919) 250 U. S. 473, 39 S. Ct. 540, 63 U. S. (L. ed.) —, reversing (C. C. A. 4th Cir. 1917) 244 Fed. 397, 157 C. C. A. 23.

In the Eighth Circuit, the Circuit Court of Appeals, following the practice of the state courts, has decided that a plaintiff may take a voluntary nonsuit "at any time before the jury has actually retired." *Alsop v. McCombs*, (C. C. A. 8th Cir. 1918) 253 Fed. 949, 165 C. C. A. 391.

Where the state practice permits a voluntary nonsuit at any time before the jury retires to consider its verdict, a federal court sitting in that state will permit the taking of a nonsuit under the same conditions. *Cybur Lumber Co. v. Erkhart*, (C. C. A. 5th Cir. 1918) 247 Fed. 284, 159 C. C. A. 378.

If there is no state practice regarding the granting of a voluntary nonsuit, federal courts in the state are governed only by general law. *Pannill v. Roanoke Times Co.*, (W. D. Va. 1918) 252 Fed. 910.

## 36. Pleadings

### a. General Matters (p. 53)

**Necessity of plea.**—Under this section a decision by the highest court of a state regarding the necessity of pleading an estoppel in pais is binding on a federal court holding sessions within such state. *Shelton v. Southern R. Co.*, (E. D. Tenn. 1918) 255 Fed. 182.

## 41. Set-off and Counterclaim (p. 58)

**Set off of usurious interest against national bank.**—The rule that the penalty prescribed by R. S. sec. 5198 for the taking of usury by a national bank cannot be enforced by set-off in an action for the principal (see annotations vol. 6, p. 754), is a rule of federal law and the Conformity Act does not make state rules on that subject applicable. *Planters' Nat. Bank v. Wysong, etc., Co.*, (N. C. 1919) 99 S. E. 199.

## 48. Witnesses (p. 60)

**Competency of wife against husband.**—State statutes regulating the competency of a wife to testify against her husband in a criminal proceeding have no application to a trial in a federal court. *Denning v. U. S.*,



(C. C. A. 5th Cir. 1918) 247 Fed. 463, 159 C. C. A. 517, L. R. A. 1918 E. 487.

**Calling adversary for cross-examination.**—A state statute giving the right to call an adversary party for cross-examination does not fix a rule of procedure and will not be followed in a federal court. *American Issue Pub. Co. v. Sloan*, (C. C. A. 6th Cir. 1917) 243 Fed. 251, 160 C. C. A. 329.

#### 49. Writs and Process

##### b. Mode and Sufficiency of Service (p. 60)

**Computation of time.**—The rule of the state practice will not be followed in determining whether a final Sunday is excluded in computing the time for suing out a writ of error. *Siegelschiffer v. Penn. Mut. Life Ins. Co.*, (C. C. A. 2d Cir. 1917) 248 Fed. 226, 160 C. C. A. 304.

##### d. On Foreign Corporations (p. 62)

The manner of service of summons on a foreign corporation is governed by the state law. *McCullough v. United Grocers' Corp.* (N. D. Ohio 1918) 247 Fed. 880.

### Vol. VI, p. 80, sec. 921. [First ed., vol. IV, p. 587.]

**Actions against several stockholders.**—It is not an abuse of discretion to order the consolidation of a number of actions by a corporation against stockholders to recover in each case a balance due on the stock subscription, each stockholder defending the action and bringing a cross action to recover the amount paid by him on the stock on the ground that his subscription was procured by fraud, the alleged fraudulent representations being substantially identical. *Columbia-Knickerbocker Trust Co. v. Abbott*, (C. C. A. 1st Cir. 1918) 247 Fed. 833, 160 C. C. A. 55.

**Foreclosure suits affecting railroad trust mortgages were consolidated in Bankers' Trust Co. v. Missouri, etc., R. Co., (C. C. A. 8th Cir. 1918) 251 Fed. 789, 164 C. C. A. 23.**

### Vol. VI, p. 82, sec. 941. [First ed., vol. IV, p. 588.]

#### I. CONSTRUCTION AND OPERATION GENERAL (p. 83)

Where no bond is given or deposit made for the release of a vessel pursuant to this section, or the rules of court, the vessel remains for all purposes of the action in the custody of the court. *In re Whitney Steamboat Corp.*, (1919) 249 U. S. 115, 39 S. Ct. 192, 63 U. S. (L. ed.) —.

### Vol. VI, p. 93, sec. 953. [First ed., vol. IV, p. 594.]

#### I. In general.

#### III. Signature.

##### 3. Time of signing.

#### I. IN GENERAL (p. 94)

**Necessity for bill of exceptions.**—On writ of error from a final judgment, errors of law appearing on the face of the record proper may be availed of without resorting to a bill of exceptions or other equivalent proceeding. But errors in rulings of law occurring in the course of a trial are not a part of the record proper, and in order that they may be reviewed on writ of error by an appellate court must be excepted to at the time they are made, and incorporated into the record by a bill of exceptions or other equivalent proceeding. *Ana Maria Sugar Co. v. Quinones*, (C. C. A. 1st Cir. 1918) 251 Fed. 499, 163 C. C. A. 493.

#### III. SIGNATURE

##### 3. Time of Signing (p. 95)

**When bill deemed presented.**—A bill is presented when counsel takes it to the judge for signatures, though on the suggestion of the judge he takes it away again to substitute a photographic copy of the policy in suit for a typewritten copy. *In re Federal Life Ins. Co.*, (C. C. A. 7th Cir. 1918) 248 Fed. 908, 161 C. C. A. 26.

**Delay in second presentation.**—Counsel having withdrawn a bill for correction was held not negligent in failing to present it again during the term. *In re Federal Life Ins. Co.*, (C. C. A. 7th Cir. 1918) 248 Fed. 908, 161 C. C. A. 26.

### Vol. VI, p. 121, sec. 566. [First ed., vol. IV, p. 88.]

#### II. TRIAL BY JURY (p. 121)

**Condemnation proceedings.**—Where a state statute authorizing the condemnation by telegraph companies of easements over railroad rights of way, plainly contemplates that the question of the necessity of condemnation and similar precedent conditions shall be decided by the court in advance of or separately from the jury trial concerning compensation, the fact that a condemnation proceeding is a suit at law within this section for some purposes, does not warrant it being so regarded for all purposes where it is brought in a federal court nor require a jury trial on the question of the necessity of the condemnation. *Louisville, etc., R. Co. v. Western Union Tel. Co.*, (C. C. A. 6th Cir. 1918) 249 Fed. 385, 161 C. C. A. 359.

### Vol. VI, p. 124, sec. 648. [First ed., vol. IV, p. 389.]

#### V. PROVINCE OF COURT AND JURY (p. 127)

**Comment on evidence.**—The rule is well settled in the federal courts that the trial judge has the right to express his opinion upon the facts of the case and to advise the jury regarding their conclusions thereon, provided the jury is given to unequivocally understand that it is not bound by the judge's

expressed opinion. This general rule is subject to the limitation that his comments upon the facts should be "judicial and dispassionate, and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment." *Shea v. U. S.*, (C. C. A. 6th Cir. 1918) 251 Fed. 440, 163 C. C. A. 458.

**Vol. VI, p. 130, sec. 649.** [First ed., vol. IV, p. 393.]

**Findings.**—This section gives the court discretion as to finding the facts either generally or specially. *Virginia, etc., Coal Co. v. Charles*, (W. D. Va. 1917) 251 Fed. 83.

**Scope of review.**—Where under the provisions of this section parties to an action have waived a jury, the Circuit Court of Appeals on a writ of error is limited to the inquiry whether the findings of the referee as altered or amended by the district judge justify his conclusions of law. *Roessler, etc., Chemical Co. v. Standard Silk Dyeing Co.*, (C. C. A. 2d Cir. 1918) 254 Fed. 777, 166 C. C. A. 223.

**Vol. VI, p. 130, sec. 1.** [First ed., vol. IV, p. 557.]

**Conclusiveness of findings.**—To same effect as first paragraph of original annotation, see *The Beaver*, (C. C. A. 9th Cir. 1918) 253 Fed. 312, 165 C. C. A. 94; *Charles W. Lewis Towing, etc., Co. v. Corbin*, (C. C. A. 4th Cir. 1918) 252 Fed. 990, 164 C. C. A. 663; *Lake Drummond Canal, etc., Co. v. John L. Roper Lumber Co.*, (C. C. A. 4th Cir. 1918) 252 Fed. 796, 164 C. C. A. 636; *The W. H. Flannery*, (C. C. A. 2d Cir. 1918) 249 Fed. 349, 161 C. C. A. 357; *The Baron Napier*, (C. C. A. 4th Cir. 1918) 249 Fed. 126, 161 C. C. A. 178.

Where the trial court in an admiralty suit "has rejected the positive testimony of witnesses who were in the best position to know exactly what the truth was as to some disputed fact, and accepted the testimony of others whose opportunity to know the truth was manifestly not as good, and does this on the expressed ground that the testimony rejected does not harmonize . . . with the inherent probabilities of the case, there is no reason why the appellate court should not review the testimony unembarrassed by the finding as to such facts." *The Mason*, (C. C. A. 2d Cir. 1918) 249 Fed. 718, 161 C. C. A. 628.

**Vol. VI, p. 141, sec. 20.** [First ed., 1916 Supp., p. 280.]

**Relation to Sherman Act.**—This section "legalizes regular and proper strikes by trade unions, and takes combinations or agreements to bring about that class of strikes out of the purview of section 1 of the

*Sherman Act* [9 Fed. Stat. Ann. 644], but . . . it does not apply to irregular or malicious strikes, those not entered into for the betterment of labor conditions." *U. S. v. Norris*, (N. D. Ill. 1918) 255 Fed. 423.

**Picketing.**—Under this section of the Clayton Act picketing, if carried on without violence, and peaceful efforts to prevent the sale of the product of an employer in whose works a strike has been declared cannot be enjoined. *Duplex Printing Press Co. v. Deering*, (S. D. N. Y. 1917) 247 Fed. 192.

**Strike for closed shop.**—A suit by an employer maintaining an open shop, for an injunction against the officers and members of unions that have gone out on a strike for a closed shop, comes within the provisions of this section. *Duplex Printing Press Co. v. Deering*, (C. C. A. 2d Cir. 1918) 252 Fed. 722, 164 C. C. A. 562.

**Unlawful conduct of striking employees.**—This section does not legalize any act or acts which were unlawful at the time of its passage. Accordingly, where employees of a company conducting a chain of retail grocery stores, go on a strike, congregate in front of various stores of the company, and use threatening and abusive language to the employees and customers in an effort to enforce a boycott, at a time when they know that the closing of the stores will result in the loss of a large quantity of perishable supplies, their unlawful conduct may be enjoined by a federal court under this section on the ground that the injunction is "necessary to prevent irreparable injury to property, or to a property right" and also under the Food Conservation Act of Aug. 10, 1918, ch. 53, § 4 (see 1918 Supp. Fed. Stat. Ann., p. 183) providing that it shall be illegal "for any person or persons to knowingly commit waste or willfully to permit preventable deterioration of any necessities in or in connection with their production, or distribution." *Kroger Grocery, etc., Co. v. Retail Clerks' International Protective Ass'n*, (E. D. Mo. 1918) 250 Fed. 890.

**Legalizing secondary boycotts.**—This section, perhaps in conjunction with section 6 of the Act (see vol. 6, p. 737), legalizes the secondary boycott, at least so far as it rests on, or consists of, refusing to work for any one who deals with the principal offender. *Duplex Printing Press Co. v. Deering*, (C. C. A. 2d Cir. 1918) 252 Fed. 722, 164 C. C. A. 562.

**Vol. VI, p. 143, sec. 24.** [First ed., 1916 Supp., p. 282.]

**Constitutionality.**—Where a defendant has been found guilty by the court of an attempt to influence a juror as to his verdict in a case on trial and punished under section 263 of the Judicial Code (see vol. 5, p. 1009) for contempt in misbehaving so near the court as to obstruct the administration of justice, despite the fact that his act was a

criminal offense both under the statutes of the state in which the court was sitting and under section 135 of the Penal Laws (see vol. 7, p. 688), he cannot, after failing to demand a jury trial, attack the constitutionality of this section on the ground that it is invalid as class legislation because it denies a person prosecuted for such a contempt of the right to a jury trial, whereas sections 21 and 22 of this Act permit a person accused of certain other contempts to demand a jury trial. *Couts v. U. S.*, (C. C. A. 8th Cir. 1918) 249 Fed. 595, 161 C. C. A. 521.

**Permitting escape of prisoner.**—A prosecution for violating an order of commitment by conspiring to permit the escape of the prisoner committed by the order is within the exception of this section. *Swepton v. U. S.*, (C. C. A. 6th Cir. 1918) 251 Fed. 205, 163 C. C. A. 361.

## Vol. VI, p. 145, sec. 2. [First ed., 1916 Supp., p. 136.]

**"Final judgments."**—In view of section 306 of the Revised Statutes and Codes of Porto Rico requiring the Supreme Court of Porto Rico upon reversal of a judgment of the court below, to render such judgment as the lower court should have rendered, except in certain cases when it must remand the case for a new trial, a judgment of the Supreme Court reversing the judgment of the lower court and remanding the case for a new trial, is not "final" within the meaning of this section and hence not reviewable by the Circuit Court of Appeals on writ of error. *Caballero v. Criado*, (C. C. A. 1st Cir. 1918) 250 Fed. 345, 162 C. C. A. 415.

**Review of decision.**—The determination of a pure question of local law is one which the Circuit Court of Appeals will not disturb, but, on the contrary, will uphold, except on conviction of clear error committed. *Graham v. O'Ferral*, (C. C. A. 1st Cir. 1918) 248 Fed. 10, 160 C. C. A. 150.

**Provisions of this section as to Porto Rico** adopted by reference, see section 43 of the Act of March 2, 1917, ch. 145, 39 Stat. L. 966, in title *PORTO RICO*, 1918 Supp. 627.

## Vol. VI, p. 149. [Writ of error, etc.] [First ed.; 1909 Supp., p. 292.]

III. Construction and sufficiency of indictment.

IV. Demurrer to indictment.

## III. CONSTRUCTION AND SUFFICIENCY OF INDICTMENT (p. 151)

**Construction of indictment.**—The District Court's interpretation of the indictment must be accepted by the Supreme Court on a direct writ of error sued out under this Act to review a judgment sustaining a demurrer to the indictment, which is based upon the construction of the statute upon which the indictment

is founded. Review in such case is confined to the question of the construction of the statute involved in the decision below. *U. S. v. Colgate*, (1919) 250 U. S. 300, 39 S. Ct. 465, 63 U. S. (L. ed.) —, *affirming* (*E. D. Va.* 1918) 253 Fed. 522.

## IV. DEMURRER TO INDICTMENT (p. 152)

In *U. S. v. Comyns*, (1919) 248 U. S. 349, 39 S. Ct. 98, 63 U. S. (L. ed.) —, it appeared that the lower court sustained a demurrer to an indictment brought under section 215 of the Penal Law (see *post*, p. 711, where the facts on which the indictment was based are briefly stated). On the question whether the Supreme Court had jurisdiction to review the judgment sustaining the demurrer that court said: "Notwithstanding a contention to the contrary, it seems to us that the decision was based upon a construction of section 215 of the Criminal Code, and hence that we have jurisdiction under the Criminal Appeals Act. *United States v. Patten*, 226 U. S. 525, 535; *United States v. Nixon*, 235 U. S. 231, 235."

## Vol. VI, p. 161, sec. 11. [First ed., vol. IV, p. 428.]

I. In general.

III. Computation of time.

## I. IN GENERAL (p. 161)

**Contempt proceedings.**—An appeal in a contempt proceeding will be dismissed if it is not taken within six months. *Shuler v. Raton Waterworks Co.*, (C. C. A. 8th Cir. 1917) 247 Fed. 634, 160 C. C. A. 44.

## III. COMPUTATION OF TIME (p. 163)

**Exclusion of Sunday.**—Where the last day of the six months falls on Sunday a writ of error cannot be sued out on the following day. *Siegelschiffer v. Penn Mut. Life Ins. Co.*, (C. C. A. 2d Cir. 1917) 248 Fed. 226, 160 C. C. A. 304.

## Vol. VI, p. 163, sec. 997. [First ed., vol. IV, p. 605.]

An exception is an indispensable basis for an assignment of error in the Circuit Court of Appeals. *Finley v. U. S.*, (C. C. A. 4th Cir. 1919) 256 Fed. 845, 168 C. C. A. 191, a criminal case.

## Vol. VI, p. 170, sec. 11. [First ed., vol. IV, p. 428.]

Where there was direct and positive testimony connecting the defendant with the charge, the Circuit Court of Appeals held that the verdict was beyond its power to review. *Banks v. U. S.*, (C. C. A. 3d Cir. 1918) 251 Fed. 889, 164 C. C. A. 105.

**Vol. VI, p. 174, sec. 698.** [First ed.,  
vol. IV, p. 446.]

**III. NEW EVIDENCE**

**3. Allowance of New Proof (p. 179)**

**Suit in admiralty affecting alien enemy.**—In admiralty, cases are tried *de novo* on appeal, and the Supreme Court in the exercise of its appellate jurisdiction has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at the time require. And in determining what justice requires the court must consider the changes in fact and in law which have supervened since the decree was entered below. Thus, where a libel in personam was brought in the District Court by a British corporation against an Austro-Hungarian corporation during the progress of the world war and the court assumed jurisdiction and dismissed the libel without prejudice, on the ground that the belligerent countries forbid a payment by one belligerent subject to his enemy during the continuance of the war, which decree was affirmed by the Circuit Court of Appeals on the ground that it was within the discretion of the trial court whether to take or to decline jurisdiction, whereupon the case went to the Supreme Court on certiorari, that court, reversing the courts below, said: "Since the certiorari was granted, the relation of the parties to the court has changed radically. Then, as earlier, the proceeding was one between alien belligerents in a court of a neutral nation. Now it is a suit by one belligerent in a court of a co-belligerent against a common enemy. A suit may be brought in our courts against an alien enemy. *McVeigh v. United States*, 11 Wall. 259, 267. See also *Dorsey v. Kyle*, 30 Maryland 512. If the libel had been filed under existing circumstances, security for the claim being obtained by attachment, probably no American court would, in the exercise of discretion, dismiss it and thus deprive the libellant not only of its security, but perhaps of all possibility of ever obtaining satisfaction. Under existing circumstances, dismissal of the libel is not consistent with the demands of justice.

"The respondent, although an alien enemy, is, of course, entitled to defend before a judgment should be entered. *McVeigh v. United States*, supra. See also *Windsor v. McVeigh*, 93 U. S. 274, 280; *Hovey v. Elliott*, 167 U. S. 409. It is now represented by counsel. But intercourse is prohibited by law between subjects of Austria-Hungary outside the United States and persons in the United States. Trading with the Enemy Act of October 6, 1917, § 3 (c), c. 106, 40 Stat. 411. And we take notice of the fact that free intercourse between residents of the two countries has been also physically impossible. It is true that more than three years ago a stipulation as to the facts and the proof of foreign law was entered into by the then counsel for re-

spondent, who has died since. But reasons may conceivably exist why that stipulation ought to be discharged or modified, or why it should be supplemented by evidence. We cannot say that, for the proper conduct of the defense, consultation between client and counsel and intercourse between their respective countries may not be essential even at this stage. The war precludes this.

"Under these circumstances, we are of opinion that the decree dismissing the libel should be set aside and the case remanded to the District Court for further proceedings, but that no action should be taken there (except such, if any, as may be required to preserve the security and the rights of the parties in statu quo) until, by reason of the restoration of peace between the United States and Austria-Hungary, or otherwise, it may become possible for the respondent to present its defense adequately. Compare *The Kaiser Wilhelm II*, 246 Fed. Rep. 786; *Robinson & Co. v. Continental Insurance Company of Mannheim*, [1915] 1 K. B. 155, 161-162." *Watts v. Unione Austriaca Di Navigazione*, (1918) 248 U. S. 9, 39 S. Ct. 1, 63 U. S. (L. ed.) —, reversing (C. C. A. 2d Cir. 1915) 229 Fed. 136, 143 C. C. A. 412, which reversed (E. D. N. Y. 1915) 224 Fed. 188.

**Vol. VI, p. 198, sec. 1007.** [First ed., vol. IV, p. 618.]

**III. Applicability generally of section.**

**VIII. Effect of supersedeas.**

**III. APPLICABILITY GENERALLY OF SECTION (p. 199)**

**Supersedeas on certiorari to state court.**—*In Seaboard Air Line R. Co. v. Horton*, (1918) 248 U. S. 553, 39 S. Ct. 8, 63 U. S. (L. ed.) —, a petition for a writ of certiorari was granted to review the decision in (1918) 175 N. C. 472, 95 S. E. 883. In the same case (1918) 248 U. S. 21, 39 S. Ct. 21, 63 U. S. (L. ed.) —, a motion for supersedeas submitted by the petitioner for certiorari was "granted, a bond for \$25,000 to be given within ten days, to be approved by the clerk of this court."

**VIII. EFFECT OF SUPERSEDEAS (p. 203)**

**Proceedings for contempt.**—Where on appeal from a decree a supersedeas bond is given under R. S. sec. 1000 (see vol. 6, p. 187) and this section, obedience to the decree may not be enforced by contempt proceedings. *Smith v. Government of Canal Zone*, (C. C. A. 5th Cir. 1918) 249 Fed. 273, 161 C. C. A. 281. Regarding the court's jurisdiction in such a case, it was said: "By the terms of that superseded decree it perpetuated the preliminary injunction issued when the suit was brought, ordered the appellant to convey the lands described in the deeds which the complaint in the case prayed to be annulled, and ordered him to account for all rents, issues

and profits of the properties described in those deeds. By the decree rendered in the contempt proceedings there was what amounted to an ascertainment by the court that the sum of \$30,050 was what the appellant was chargeable with because of his conveying the lands in question, and what he was required to pay to satisfy the superseded decree, and it was ordered that the appellant be committed to jail, there to remain until he pay the said sum as he was ordered to do. We are of opinion that the court was without power so to coerce obedience to a decree which had ceased to be enforceable by it."

**Vol. VI, p. 205, sec. 700.** [First ed., vol. IV, p. 450.]

**IV. Findings and review.**

**3. General and special findings.**

**b. Effect.**

**V. Special findings and agreed statements of facts.**

**7. Questions reviewable.**

**IV. FINDINGS AND REVIEW**

**3. General and Special Findings**

**b. Effect (p. 215)**

To same effect as first paragraph of original annotation, see *Turner v. Schaeffer*, (C. C. A. 6th Cir. 1918) 249 Fed. 654, 161 C. C. A. 564.

To same effect as second paragraph of original annotation, see *Fuller v. Reed*, (C. C. A. 1st Cir. 1917) 249 Fed. 158, 161 C. C. A. 210; *Simmons v. Hodges*, (C. C. A. 5th Cir. 1918) 250 Fed. 424, 162 C. C. A. 494; *Virginia, etc., Coal Co. v. Charles*, (C. C. A. 4th Cir. 1918) 254 Fed. 379, 165 C. C. A. 599; *National Surety Co. v. Globe Grain, etc., Co.*, (C. C. A. 9th Cir. 1919) 256 Fed. 601.

**V. SPECIAL FINDINGS AND AGREED STATEMENTS OF FACTS**

**7. Questions Reviewable (p. 219)**

To same effect as second paragraph of original annotation, see *Caldwell v. Blodgett*, (C. C. A. 8th Cir. 1919) 256 Fed. 744, 168 C. C. A. 90.

On a writ of error to review a special finding, the only inquiries open to the Appellate Court are whether the evidence tends to support the ultimate finding, and the finding in turn is sufficient to sustain the respective judgments. *Turner v. Schaeffer*, (C. C. A. 6th Cir. 1918) 249 Fed. 654, 161 C. C. A. 564.

**Vol. VI, p. 224, sec. 701.** [First ed., vol. IV, p. 458.]

**Harmless error.**—Where the trial court in an action at law, where the jury has been waived, commits error in his conclusions of law, but renders such judgment as is clearly

right, the Appellate Court is amply justified in ordering an affirmance. *Hughitt v. Wayne County Securities Co.*, (C. C. A. 7th Cir. 1917) 251 Fed. 57, 163 C. C. A. 307.

**Vol. VI, p. 230, sec. 1011.** [First ed., vol. IV, p. 624.]

**IV. Jurisdictional questions.**

**V. Questions of fact and evidence.**

**IV. JURISDICTIONAL QUESTIONS (p. 231)**

**Effect of request for peremptory instruction.**—When both parties request a peremptory instruction and do nothing more, they thereby assume the facts to be undisputed and in effect submit to the trial judge the determination of the inferences proper to be drawn therefrom. And upon review a finding of fact by the trial court under such circumstances must stand if the record discloses substantial evidence to support it. *Williams v. Vreeland*, (1919) 250 U. S. 295, 39 S. Ct. 438, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 3d Cir. 1917) 244 Fed. 346, 156 C. C. A. 632.

**V. QUESTIONS OF FACT AND EVIDENCE (p. 231)**

**In general.**—To the same effect as the original annotation, see *Sharpless Separator Co. v. Skinner*, (C. C. A. 9th Cir. 1918) 251 Fed. 25, 163 C. C. A. 275.

**Where the determination of issues of fact is left to the trial judge.**—To same effect as original annotation, see *Bain v. White*, (C. C. A. 5th Cir. 1919) 256 Fed. 428.

**Vol. VI, p. 238, sec. 5.** [First ed., 1916 Supp., p. 137.]

**Effect of statute.**—This statute is amendatory of the Judicial Code and must be taken as requiring that a suit by or against a railroad company incorporated under an act of Congress be not regarded for jurisdictional purposes as arising under the laws of the United States, unless there be some adequate ground for so regarding it other than that the company was thus incorporated. *Bankers' Trust Co. v. Texas, etc., R. Co.*, (1916) 241 U. S. 295, 36 S. Ct. 569, 60 U. S. (L. ed.) 1010, wherein the court said: "Plainly, there was a purpose to effect a real change in the jurisdiction of such suits. Counsel for plaintiff concede that this is so. But they urge that all that is intended is to eliminate the mere creation of a railroad corporation under an act of Congress as a ground for regarding the suit as arising under the laws of the United States. In this there is an evident misapprehension of what constitutes incorporation, as also of the real basis of the jurisdiction affected. A corporation is never merely created. Being artificial, possessing no faculties or powers save such as are conferred by law, and having in legal contemplation no existence apart

from them, its incorporation consists in giving it individuality and endowing it with the faculties and powers which it is to possess. It is upon this theory that the decisions have proceeded. The ruling has been that a suit by or against a federal corporation arises under the laws of the United States, not merely because the corporation owes its creation to an act of Congress, but because it derives all of its capacities, faculties and powers from the same source. . . . And so, when due regard is had for the terms of the amendatory section of 1915 and for the real basis of the jurisdiction affected, the conclusion is unavoidable that what is intended is to make the fact that a railroad company is incorporated under an act of Congress, that is to say, derives its existence, faculties and powers from such an act, an entirely negligible factor in determining whether a suit by or against the company is one arising under the laws of the United States."

### 1918 Supp., p. 401, sec. 1.

**Amendment as retroactive.**—This amendment saves claimants the rights and remedies under the Workmen's Compensation Acts of any state. It is prospective, however, and does not validate a compensation action begun in a state court before its passage and which at the time of such passage the state court had no jurisdiction to entertain. *Coon v. Kennedy*, (1918) 91 N. J. L. 598, 103 Atl. 207, writ of error to review dismissed in 248 U. S. 457. See to the same effect *Thornton v. Grand Trunk-Milwaukee Car Ferry Co.*, (1918) 202 Mich. 609, 168 N. W. 410, wherein it was held that an award under a state Workmen's Compensation Act, made before the amendment took effect, in the case of an injury to a "coal passer" on a car ferry running between two states was held invalid on the ground that the contract of service was clearly maritime. There is authority, however, that retroactive effect may be given the amendment since it is remedial in its nature. *Veasey v. Peters*, (1918) 142 La. 1012, 77 So. 948.

**"Remedies under Workmen's Compensation Law."**—By virtue of the amendment saving to the claimant the rights and remedies under the workmen's compensation law of any state a workman injured while engaged in helping to unrig a derrick on a barge, the work being concededly of a maritime nature, may proceed under a state workmen's compensation law. *Stewart v. Knickerbocker Ice Co.* (1919) 226 N. Y. 302, 123 N. E. 382, wherein the court said: "This is an appeal from an affirmance of an award made under the Workmen's Compensation Act (Consol. Laws, c. 67) for injuries received by one Stewart, while engaged in helping to unrig a derrick on one of the defendant's barges. It is conceded that the work in which the injured man was engaged was of a maritime nature, and upon that conceded fact

the argument is made that our Workmen's Compensation Act is not applicable, because it is in conflict with the Constitution of the United States and with the federal statute passed thereunder. The attempt is made to support this argument almost exclusively by reference to the decision of the United States Supreme Court in *Southern Pac. Co. v. Jensen*, (1917) 244 U. S. 205, 37 S. Ct. 524, 61 U. S. (L. ed.) 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E 900.

"The *Jensen Case* was one involving the applicability of our Workmen's Compensation Act to injuries received by a stevedore while engaged in helping to unload a vessel belonging to the Southern Pacific Railroad Company. The two questions which were considered by Judge Miller in his opinion (1915) (215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A 403, Ann. Cas. 1916B 276) were the ones whether our act was unconstitutional, as depriving employers of property without due process of law; and, second, whether it was in conflict with the Federal Constitution, because attempting directly to regulate or impose a tax or burden on interstate or foreign commerce—the Southern Pacific Company, owner of the vessel, being concededly engaged in such commerce. He reached the conclusion, concurred in by all members of the court voting, that the act was not vulnerable in either of those respects. When the case reached the Supreme Court, however, a new question was argued, and it was held by a closely divided vote that, inasmuch as the injured man was engaged in maritime work, our Compensation Act was violative of the United States Constitution as embodied in the federal statutes adopted thereunder conferring jurisdiction in such a case upon the federal courts. . . . The enactment by the states of Workmen's Compensation Acts has become very general. Public sentiment has justified and demanded the enactment of these statutes, as offering speedy and simple relief to injured workmen and their dependents, and as being a positive and decided step in the interest of industrial welfare and of better relations between employers and employees. In recognition of this widespread public sentiment, and realizing it is desirable that the states should be given power to enact and administer such statutes as these, the Congress, since the decision of the *Jensen Case*, has very materially modified the federal statute under which it was held that our decision in the latter case could not stand. It has amended this statute, so that it now saves from the jurisdiction of the federal courts 'to suitors in all cases the right of a common-law remedy when the common law is competent to give it, and to claimants the rights and remedies under the Workmen's Compensation Law of any state.' In view of the close division of opinion amongst the learned justices of the Supreme Court, involved in the decision of the *Jensen Case*, and in view of the concession made in the prevailing opinion that it was difficult to determine just how far the jurisdiction of

the federal courts in maritime matters might be limited or affected by such legislation, we think that we are justified in assuming that the Congress has acted within its powers under the Constitution when, after due consideration, it has confided to the states the power to enact and enforce Workmen's Compensation Acts in respect of injuries received in the course of maritime employment. We think that it would be altogether an unjustifiable concession of lack of state jurisdiction in this field of compensation to injured workmen or their dependents, if, after this amendment by the Congress, we should hold that our statute was unconstitutional."

So an employee of a stevedore sustaining injuries while engaged in loading a vessel lying at a dock in navigable waters through the negligence of the employer is not obliged to resort to admiralty for relief but may proceed under a state Workmen's Compensation Law. *Veasey v. Peters*, (1918) 142 La. 1012, 77 So. 943, which reversed on a rehearing a contrary decision.

Although a stevedore, injured while loading a vessel, is entitled under this section to remedies afforded by the state Workmen's Compensation Act, he does not elect them by signing, at the request of an attorney, the notice to his employer contemplated by the Compensation Act. *Siebert v. Patapsco Ship Ceiling, etc., Co.*, (D. C. Md. 1918) 253 Fed. 685.

In *Fuget Sound Bridge, etc., Co. v. Industrial Ins. Commission*, (Wash. 1919) 177 Pac. 788, the court said that the Amendment of 1917 did not extend to the Industrial Insurance Commission jurisdiction of persons engaged in maritime work, for the reason that the Workmen's Compensation Act of this state withdraws all "remedy of workmen against employers for injuries received in hazardous work 'from private controversy,' and excludes 'every other remedy,' and therefore the Federal Act cannot create a liability where one already exists in admiralty."

## 1918 Supp., p. 411, sec. 2.

- I. In general.
- II. Writ of error.
- III. Certiorari.

### I. IN GENERAL (p. 412)

"Or otherwise" as used in the second paragraph of this section after the words "by writ of certiorari," add nothing of substance to the thought expressed by the new act. *Chicago Great Western R. Co. v. Basham*, (1919) 249 U. S. 164, 39 S. Ct. 213, 63 U. S. (L. ed.) —, *dismissing* writ of error to review (1916) 178 Ia. 998, 154 N. W. 1019, 157 N. W. 192.

"Since the passage of the amendment, cases brought within its effect, of the character of this one, cannot be brought here by writ of error unless there is drawn in question the validity of a statute of or an

authority exercised under the state on the ground of their being repugnant to the Federal Constitution, treaties or laws. Other cases of alleged denial of federal rights as specified in the statute can be reviewed in this court only upon writ of certiorari." *Dana v. Dana*, (1919) 250 U. S. 220, 39 S. Ct. 449, 63 U. S. (L. ed.) —, *dismissing* a writ of error to the Massachusetts Supreme Judicial Court resting upon the assertion that the state court erred in sustaining a state succession tax because it was imposed on or on account of real estate situated outside the state; and holding that the only right of review was by writ of certiorari.

Finality of the judgment of the state court is essential to a review by the federal Supreme Court, either by writ of error or by certiorari. And where the state court after judgment entertained a petition for rehearing the date on which it entered an order denying such petition was the date on which the original judgment became effective for the purpose of review. *Chicago Great Western R. Co. v. Basham*, (1919) 249 U. S. 164, 39 S. Ct. 213, 63 U. S. (L. ed.) —. To the same point, see *Citizens' Bank v. Opperman*, (1919) 249 U. S. 448, 39 S. Ct. 330, 63 U. S. (L. ed.) —.

See also notes to vol. 5, p. 723, Jud. Code, sec. 237, *supra*, p. 624.

### II. WRIT OF ERROR (p. 412)

A writ of error must be dismissed.—To the same effect as the original annotation, see *J. Homer Fritch v. U. S.*, (1919) 248 U. S. 458, 39 S. Ct. 158, 63 U. S. (L. ed.) —, (*dismissing* writ of error to review *Coon v. Kennedy*, (1918) 91 N. J. L. 598, 103 Atl. 207) wherein the court said: "This writ of error runs to a judgment of the Court of Errors and Appeals of New Jersey filed March 11, 1918, 103 Atl. Rep. 207, denying relief to Rebecca Coon who sued to recover under the New Jersey Workmen's Compensation Act on account of her husband's death by drowning in the navigable waters of that state while employed as a fireman on a tug boat. The court held that as the accident occurred August 4, 1915, the Act of Congress approved October 6, 1917, c. 97, 40 Stat. 395, 'saving . . . to claimants the rights and remedies under the workmen's compensation law of any state' was inapplicable, and that under the doctrine announced in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, the rights of the parties depended upon the maritime law of the United States. There was no decision against the validity of a treaty or statute of or an authority exercised under the United States, nor in favor of the validity of a statute of or an authority exercised under a state challenged because of repugnance to the Constitution, treaties or laws of the United States."

A writ of error from the federal Supreme Court to a state court to review a judgment which became final after the effective date of the Act of September 6, 1916,

must be dismissed where an examination of the record shows that there was not really drawn in question in the courts below the validity of a treaty or statute of or an authority exercised under the United States, or the validity of a statute of or an authority exercised under any state, on the ground of their being repugnant to the Federal Constitution, treaties, or laws. *Citizens' Bank v. Opperman*, (1919) 249 U. S. 448, 39 S. Ct. 30, 63 U. S. (L. ed.) —, *dismissing writ of error to review* (Ind. 1917) 115 N. E. 55.

Since this amendment to the Judicial Code, § 237, cases brought within its effect, involving alleged denials of federal rights, cannot be brought up to the federal Supreme Court by writ of error to a state court unless there is drawn in question the validity of a statute of or an authority exercised under the state, on the ground of their being repugnant to the Federal Constitution, treaties, or laws. Other cases can be reviewed only upon writ of certiorari. *Dana v. Dana*, (1919) 250 U. S. 220, 39 S. Ct. 449, 63 U. S. (L. ed.) —, wherein the court said: "This is a writ of error seeking to review in this court a decree of the Supreme Judicial Court of Massachusetts. The controversy concerned the right to tax under the Massachusetts Statutes of 1909, c. 490, Part IV, § 1, as amended by Stats. 1912, c. 678, the passing of certain interests under the will of Edith L. Dana, in the Duluth and Gladstone Real Estate Trust, in thirty preferred shares, forty-five common shares of the Amoskeag Manufacturing Company and in one hundred and thirty shares of the Boston Ground Rent Trust. The probate court held in favor of the treasurer and receiver general,—that all of the interests of the testatrix in the several trusts and companies named were taxable under the Massachusetts statute. The case was decided in the Supreme Judicial Court of Massachusetts on June 29, 1917, and final decree entered July 23, 1917. 227 Massachusetts 502. The ground upon which it is sought to bring the case here on writ of error rests upon the assertion that the Supreme Judicial Court erred in sustaining the succession tax because it was imposed on or on account of real estate situated outside of Massachusetts; therefore rendering the assessment of the tax a violation of rights secured by the Fourteenth Amendment to the Constitution of the United States, in that it took the property of the plaintiff in error without due process of law. . . . An examination of the record in the case and the opinion of the Supreme Judicial Court shows that neither the validity of the statute nor the validity of any authority exercised under the state was drawn in question. The case was decided on the view which the Supreme Judicial Court entertained of the character of the property involved, and neither in the record nor in the opinion of the court does it appear that any question was raised or decided

which involved the validity of the statute of the state, or of an authority exercised under the state, on the ground of their repugnancy to the Constitution, treaties, or laws of the United States. It follows that the only right of review in this court of the decree of the Supreme Judicial Court of Massachusetts was by writ of certiorari. . . . The writ of error must be dismissed for want of jurisdiction."

**Review of judgment made final after taking effect of amendment.**—In *Andrews v. Virginian R. Co.*, (1919) 248 U. S. 272, 39 S. Ct. 101, 63 U. S. (L. ed.) —, a writ of error to a Circuit Court of Virginia to review a judgment rendered in that court June 16, 1916, was dismissed on the ground that the judgment was by virtue of this amendment only reviewable by the Supreme Court by certiorari, for while it was rendered before the amendment took effect the state Court of Appeals had discretion to review it and did not exercise that discretion and decline to take jurisdiction till after the amendment became effective. It was said that not until the state Court of Appeals acted did the judgment become a final one.

**Construction of treaty.**—Where the construction and not the validity of a treaty is the subject of consideration, a writ of error will not lie. *Erie R. Co. v. Hamilton*, (1919) 248 U. S. 369, 39 S. Ct. 95, 63 U. S. (L. ed.) — (*dismissing writ of error to review* (1915) 169 App. Div. 936, 154 N. Y. S. 1125, (1916) 219 N. Y. 343, 114 N. E. 399, Ann. Cas. 1918A 928), wherein the court said: "Since, as we have seen, the plaintiff in error has not assailed the validity of the Russian treaty but on the contrary has claimed under an asserted construction of it, which was denied, it is clear that the case cannot come into this court by writ of error, under the statute quoted. At most the railroad company asserted a right under the treaty which was denied to it by the state courts, and this under the plain reading of the statute could give it a right to review here only by writ of certiorari. The distinction between assailing the validity of a treaty or of a statute and relying upon a special construction of either is patent and has been the subject of such full discussion by this court that it should not now be considered either doubtful or obscure."

**Right, privilege, or immunity claimed under Federal Constitution or treaties.**—A question respecting a right, privilege, or immunity claimed under the Federal Constitution or the treaties made thereunder will not, since the amendment of September 6, 1916, to the Judicial Code, § 237, afford the basis of a writ of error from the federal Supreme Court to a state court. The only possible review is by writ of certiorari. *Rust Land, etc., Co. v. Jackson*, (1919) 250 U. S. 71, 39 S. Ct. 424, 63 U. S. (L. ed.) —.

**Validity of authority exercised under United States.**—No question respecting the



validity of an authority exercised under the United States which would support a writ of error from the federal Supreme Court to a state court under the Judicial Code, § 237, as amended by the Act of September 8, 1916, was involved in the contention urged as the ground for continuance in the highest state court that the original jurisdiction of the federal Supreme Court over boundary controversies between states was of such a nature as to render a decree made in a suit of that kind binding upon private parties asserting opposing claims to lands in the disputed territory, and to prevent such private parties from prosecuting their litigation in a state court pending determination of a suit between the states. This is but the assertion of a title, right, privilege, or immunity under the Federal Constitution which at most affords ground for a review of the resulting judgment by certiorari. *Rust Land, etc., Co. v. Jackson*, (1919) 250 U. S. 71, 39 S. Ct. 424, 63 U. S. (L. ed.) —.

**Rights and immunities under Employers' Liability Act.**—In *Chicago Great Western R. Co. v. Basham*, (1919) 249 U. S. 164, 39 S. Ct. 213, 63 U. S. (L. ed.) —, *dismissing* writ of error to review (1916) 178 Ia. 998, 154 N. W. 1019, 157 N. W. 192, the question raised by the record and assignments of error related wholly to the alleged denial by the Supreme Court of Iowa of certain rights and immunities asserted by the plaintiff in error under the Employers' Liability Act. It was held that under the new system established by the Act of 1916, the judgment was in the class of those that were reviewable in the Supreme Court not by writ of error but by certiorari.

**Validity of state statute.**—Writ of error, not certiorari, is the proper method of reviewing in the federal Supreme Court a judgment of the highest court of a state in a case in which the conflict of a state statute with a valid law of the United States was involved, and the decision was in favor of the validity of the state statute. *New Orleans, etc., R. Co. v. Scarlet*, (1919) 249 U. S. 528, 39 S. Ct. 369, 63 U. S. (L. ed.) —, *reversing* on other grounds (1917) 115 Miss. 285, 76 So. 265; *Yazoo, etc., R. Co. v. Mullins*, (1919) 249 U. S. 531, 39 S. Ct. 368, 63 U. S. (L. ed.) —, *reversing* (1917) 115 Miss. 343, 76 So. 147.

**Validity of state statute or authority.**—A real and substantial question under the contract clause of the Federal Constitution which would afford the basis for a writ of error to a state court under this section, cannot be said to have been involved in a decision of the state court which makes no reference to the state law that is asserted to impair contract obligations, but undertakes to support its conclusions by former relevant and apposite opinions, there being nothing to indicate a purpose to give effect to the specified act. *U. S. Fidelity, etc., Co. v. Oklahoma*, (1919) 250 U. S. 111, 39 S.

Ct. 399, 63 U. S. (L. ed.) — (*dismissing* writ of error to review, (Okla. 1917) 168 Pac. 234), wherein the court said: "In support of our jurisdiction it is said: 'The case is properly here by writ of error because it involves the validity of legislation of the state of Oklahoma alleged by the plaintiff in error to impair the obligation of its contract.' But we have often held that mere assertion of a claim in respect of some constitutional right is not sufficient; there must be a real and substantial controversy of the required character which deserves serious consideration. *Ennis Waterworks v. Ennis*, (1914) 233 U. S. 652, 658, [34 S. Ct. 767, 58 U. S. (L. ed.) 1139, 1141]."

**Validity of municipal ordinance.**—A decision of the highest court of a state adverse to the contention that the taxing provision of a telegraph franchise ordinance as construed and applied has the effect of depriving the telegraph company of rights secured to it by the Constitution and laws of the United States is reviewable in the federal Supreme Court by writ of error. *Mackay Tel., etc., Co. v. Little Rock*, (1919) 250 U. S. 94, 39 S. Ct. 428, 63 U. S. (L. ed.) —, *affirming* (1917) 131 Ark. 306, 199 S. W. 90.

### III. CERTIORARI (p. 413)

**Writ by whom granted.**—In *Seaboard Airline R. Co. v. Horton*, (1918) 176 N. C. 115, 96 S. E. 954, the court after quoting the statute said: "It will be seen that such application for certiorari could not be made to this court, but must be made to the United States Supreme Court, which alone can decide whether such application can be granted or not. It will be granted only where sufficient cause, doubtless, is shown why the petitioner had failed to make his application for writ of error in the time allowed by law, or, where such writ of error would not lie, it would be a substitute for a writ of error if the Supreme Court in its discretion should think fit to issue it. But when there is a writ of error the supersedeas is granted as ancillary and by the presiding officer of the state court, or by a judge of the United States Supreme Court, who grants the writ of error. And where the certiorari is granted in lieu of a writ of error, this cannot be done by a single judge, but by the United States Supreme Court in its discretion, and that court alone can grant the supersedeas. In such cases the supersedeas is ancillary to the writ of error, or to the certiorari issued in lieu thereof, and can be granted only in aid of such process, and by the same authority which grants the writ of error or the certiorari."

**Federal question relating to full faith and credit clause when not raised.**—The exercise by state courts of an independent judgment in placing a construction upon the legislative charter of a foreign corporation cannot present a federal question under the full faith and credit clause of the Federal

Constitution, so as to sustain a writ of certiorari from the federal Supreme Court to a state court, where no statute of the state of incorporation, nor decision of any court of that state, giving a construction to the provision of the charter interpreted, was pleaded or introduced in evidence. *Hartford L. Ins. Co. v. Johnson*, (1919) 249 U. S. 490, 39 S. Ct. 336, 63 U. S. (L. ed.) —, *dismissing* writ of certiorari to review (1917) 271 Mo. 562, 197 S. W. 132.

**Dismissal of writ after allowance.**—Although a writ of certiorari has been allowed, it may subsequently be dismissed, on motion, for want of jurisdiction, as in *Hartford Life Ins. Co. v. Johnson*, (1919) 249 U. S. 490, 39 S. Ct. 336, 63 U. S. (L. ed.) —.

**The question of validity of a state statute** in respect of the Federal Constitution is not reviewable by certiorari, but only by writ of error. *New Orleans, etc., R. Co. v. Scarlet*, (1919) 249 U. S. 528, 39 S. Ct. 369, 63 U. S. (L. ed.) —; *Yazoo, etc., R. Co. v. Mullins*, (1919) 249 U. S. 531, 39 S. Ct. 368, 63 U. S. (L. ed.) —.

**Federal Employers' Liability Act of 1908.** In an action on that act resulting in a judgment against the defendant, a claim that rights and immunities asserted by said defendant under that act were denied, can be presented to the Supreme Court only on a writ of certiorari, and not by writ of error. *Chicago Great Western R. Co. v. Basham*, (1919) 249 U. S. 164, 39 S. Ct. 213, 63 U. S. (L. ed.) —.

**Reported cases.**—*Certiorari was granted* in *Galveston, etc., R. Co. v. Woodbury*, (1919) 250 U. S. V, 39 S. Ct. 493, 63 U. S. (L. ed.) — and *Southern Pac. Co. v. Berkshire*, (1919) 250 U. S. VI, 39 S. Ct. 494, 63 U. S. (L. ed.) —, to the Texas Court of Civil Appeals. *Pere Marquette R. Co. v. French*, (1919) 250 U. S. V, 39 S. Ct. 494, 63 U. S. (L. ed.) —, to the Michigan Supreme Court. *Brooks-Scanlon Co. v. Louisiana Railroad Commission*, (1919) 250 U. S. VII, 39 S. Ct. 495, 63 U. S. (L. ed.) —, to the Louisiana Supreme Court.

*Certiorari was denied* in *Southern Pac. Co. v. D'Utassy*, (1919) 250 U. S. VII, 39 S. Ct. 490, 63 U. S. (L. ed.) —, to the New York Supreme Court. *Gulf, etc., R. Co. v. Carpenter*, (1919) 250 U. S. IX, 39 S. Ct. 492, 63 U. S. (L. ed.) — and *Parlin, etc., Implement Co. v. Frey*, (1919) 250 U. S. VIII, 39 S. Ct. 491, 63 U. S. (L. ed.) —, to the Texas Court of Civil Appeals. *Lipman v. Slimmer*, (1919) 250 U. S. IX, 39 S. Ct. 492, 63 U. S. (L. ed.) —, to the Minnesota Supreme Court. *Prall v. Great Northern R. Co.*, (1919) 250 U. S. XI, 39 S. Ct. 494, 63 U. S. (L. ed.) —, and *Simpson v. Grand International Brotherhood, etc.*, (1919) 250 U. S. XII, 39 S. Ct. 494, 63 U. S. (L. ed.) —, to the Washington Supreme Court. *Smith v. Grand International Brotherhood, etc.*, (1919) 250 U. S. XIII, 39 S. Ct. 494, 63 U. S. (L. ed.) —, to the West Virginia Supreme Court of Appeals. *Broadwell v. Carter County*, (1919) 249 U. S.

594, 39 S. Ct. 259, 63 U. S. (L. ed.) —, to the Oklahoma Supreme Court. *Pennsylvania R. Co. v. Kittaning Iron, etc., Mfg. Co.*, (1919) 249 U. S. 595, 39 S. Ct. 260, 63 U. S. (L. ed.) —, to the Pennsylvania Supreme Court. *Calhoun v. Masie*, (1919) 249 U. S. 596, 39 S. Ct. 289, 63 U. S. (L. ed.) —, to the Virginia Supreme Court of Appeals. *Macleod v. New England Telephone, etc., Co.*, (1919) 249 U. S. 597, 39 S. Ct. 389, 63 U. S. (L. ed.) —, to the Massachusetts Supreme Judicial Court. *Kenney v. Supreme Lodge, etc.*, (1919) 249 U. S. 597, 39 S. Ct. 390, 63 U. S. (L. ed.) —, to the Illinois Supreme Court.

*A writ of certiorari was granted* in *Philadelphia, etc., R. Co. v. Smith*, (1918) 248 U. S. 551, 39 S. Ct. 6, 63 U. S. (L. ed.) —, to the Maryland Court of Appeals. *Kinzell v. Chicago, etc., R. Co.* (1918) 248 U. S. 552, 39 S. Ct. 6, 63 U. S. (L. ed.) —, to the Idaho Supreme Court. *Lee v. Central of Georgia R. Co.*, (1918) 248 U. S. 552, 39 S. Ct. 7, 63 U. S. (L. ed.) —, to the Georgia Court of Appeals. *Hull v. Philadelphia, etc., R. Co.*, (1918) 248 U. S. 552, 39 S. Ct. 7, 63 U. S. (L. ed.) —, to the Maryland Court of Appeals. *Seaboard Air Line R. Co. v. Horton*, (1918) 248 U. S. 553, 39 S. Ct. 8, 63 U. S. (L. ed.) —, to the North Carolina Supreme Court. *New York Cent. R. Co. v. Mohoney*, (1918) 248 U. S. 554, 39 S. Ct. 10, 63 U. S. (L. ed.) —, to the Ohio Court of Appeals. *Chicago, etc., R. Co. v. Ward*, (1918) 248 U. S. 555, 39 S. Ct. 10, 63 U. S. (L. ed.) —, to the Oklahoma Supreme Court. *Postal Tel. Cable Co. v. Dickerson*, (1918) 248 U. S. 555, 39 S. Ct. 11, 63 U. S. (L. ed.) —, to the Mississippi Supreme Court. *Ward v. Love County*, (1918) 248 U. S. 556, 39 S. Ct. 12, 63 U. S. (L. ed.) —, to the Oklahoma Supreme Court. *Tyrrell v. Shaffer*, (1918) 248 U. S. 556, 39 S. Ct. 19, 63 U. S. (L. ed.) —, to the Oklahoma Supreme Court. *Seaboard Air Line R. Co. v. Gray*, (1918) 248 U. S. 557, 39 S. Ct. 19, 63 U. S. (L. ed.) —, to the South Carolina Supreme Court.

A decision of the Supreme Court of Oklahoma was affirmed on certiorari in *Tyrrell v. Shaffer*, (1919) 249 U. S. 582, 39 S. Ct. 258, 63 U. S. (L. ed.) —.

*A writ of certiorari was denied* in *Zanesville, etc., R. Co. v. Williams* (1918) 248 U. S. 533, 39 S. Ct. 18, 63 U. S. (L. ed.) —, to the Ohio Court of Appeals. *Illinois Cent. R. Co. v. Anderson*, (1919) 248 U. S. 546, 39 S. Ct. —, 63 U. S. (L. ed.) —, to the Mississippi Supreme Court. *Polluck v. Minneapolis, etc., R. Co.*, (1918) 248 U. S. 558, 39 S. Ct. 6, 63 U. S. (L. ed.) —, to the South Dakota Supreme Court. *Black Mountain R. Co. v. Mumpower*, (1918) 248 U. S. 559, 39 S. Ct. 6, 63 U. S. (L. ed.) —, to the North Carolina Supreme Court. *New York Cent. R. Co. v. Gallagher*, (1918) 248 U. S. 559, 39 S. Ct. 6, 63 U. S. (L. ed.) —, and *Pennsylvania R. Co. v. Long*, (1918) 248 U. S. 561, 39 S. Ct. 7, 63 U. S. (L. ed.) —, to the New York Supreme Court. *North Michigan Water Co.*

*v. Escanaba*, (1918) 248 U. S. 561, 39 S. Ct. 7, 63 U. S. (L. ed.) —, to the Michigan Supreme Court. *Ohio v. Langdale*, (1918) 248 U. S. 564, 39 S. Ct. 9, 63 U. S. (L. ed.) —, to the Ohio Supreme Court. *Snyder v. Snyder*, (1918) 248 U. S. 566, 39 S. Ct. 9, 63 U. S. (L. ed.), to the Pennsylvania Supreme Court. *Darling v. Newport News*, (1918) 248 U. S. 567, 39 S. Ct. 9, 63 U. S. (L. ed.) —, to the Virginia Supreme Court of Appeals. *Grand Trunk R. Co. v. Mt. Clemens Sugar Co.*, (1918) 248 U. S. 568, 39 S. Ct. 9, 63 U. S. (L. ed.) —, to the Michigan Supreme Court. *Toledo, etc., Cent. R. Co. v. S. J. Kibler, etc., Co.*, (1918) 248 U. S. 569, 39 S. Ct. 10, 63 U. S. (L. ed.) —, to the Ohio Supreme Court. *Wertz v. Ross*, (1918) 248 U. S. 570, 39 S. Ct. 10, 63 U. S. (L. ed.) —, to the Oklahoma Supreme Court. *Cohen v. New York*, (1918) 248 U. S. 571, 39 S. Ct. 11, 63 U. S. (L. ed.) —, to the New York Supreme Court. *New Orleans, etc., R. Co. v. Hill Mfg. Co.*, (1918) 248 U. S. 571, 39 S. Ct. 11, 63 U. S. (L. ed.) —, to the Mississippi Supreme Court. *New York, etc., R. Co. v. Kimball*, (1918) 248 U. S. 572, 39 S. Ct. 11, 63 U. S. (L. ed.) —, to the New York Supreme Court. *King v. Boyd*, (1918) 248 U. S. 572, 39 S. Ct. 11, 63 U. S. (L. ed.) —, to the Michigan Supreme Court. *Erie R. Co. v. Mahla*, (1918) 248 U. S. 572, 39 S. Ct. 11, 63 U. S. (L. ed.) —, to the Ohio Court of Appeals. *Yazoo, etc., Valley R. Co. v. Craig*, (1918) 248 U. S. 573, 39 S. Ct. 11, 63 U. S. (L. ed.) —, to the Mississippi Supreme Court. *New York State Industrial Commission v. Clarence P. Howland Co.*, (1918) 248 U. S. 574, 39 S. Ct. 11, 63 U. S. (L. ed.) —; *New York State Industrial Commission v. Johnson Lighterage Co.*, (1918) 248 U. S. 574, 39 S. Ct. 11, 63 U. S. (L. ed.) —; *New York State Industrial Commission v. Rock Plaster Mfg. Co.*, (1918) 248 U. S. 574, 39 S. Ct. 12, 63 U. S. (L. ed.) —; and *Schneider v. New York*, (1918) 248 U. S. 575, 39 S. Ct. 12, 63 U. S. (L. ed.) —, to the New York Supreme Court. *Cudahy Packing Co. v. Bixby*, (1918) 248 U. S. 577, 39 S. Ct. 19, 63 U. S. (L. ed.) —, to the Missouri Court of Appeals. *Louisiana Nav. Co. v. Oyster Commission* (1918) 248 U. S. 577, 39 S. Ct. 19, 63 U. S. (L. ed.) —, and *Louisiana v. New Orleans Land Co.*, (1918) 248 U. S. 577, 39 S. Ct. 19, 63 U. S. (L. ed.) —, to the Louisiana Supreme Court. *Hill v. E. D. Stimson Co.*, (1918) 248 U. S. 577, 39 S. Ct. 19, 63 U. S. (L. ed.) —, to the Washington Supreme Court. *Mooney v. California*, (1918) 248 U. S. 579, 39 S. Ct. 21, 63 U. S. (L. ed.) —, to the California Supreme Court. *Hall v. Paine*, (1918) 248 U. S. 581, 39 S. Ct. 133, 63 U. S. (L. ed.) —, to the Massachusetts Superior Court. *Wise v. Virginia*, (1918) 248 U. S. 582, 39 S. Ct. 287, 63 U. S. (L. ed.) —, to the Virginia Supreme Court of Appeals. *Tribble v. Southern Express Co.*, (1918) 248 U. S. 582, 39 S. Ct. 287, 63 U. S. (L. ed.) —, to the South Carolina Supreme Court. *Faison v. Adair*, (1919) 248 U. S. 583, 39 S. Ct. 136, 63 U. S. (L. ed.)

—, to the Georgia Supreme Court. *Pontiac, etc., R. Co. v. Michigan R. Co.*, (1919) 248 U. S. 584, 39 S. Ct. 136, 63 U. S. (L. ed.) —, to the Michigan Supreme Court. *Mitchell v. Mason*, (1919) 248 U. S. 584, 39 S. Ct. 182, 63 U. S. (L. ed.) —, to the Florida Supreme Court. *Supreme Conclave, etc., v. Wilson*, (1919) 249 U. S. 583, 39 S. Ct. 287, 63 U. S. (L. ed.) —, to the North Carolina Supreme Court. *Chicago, etc., R. Co. v. Seay*, (1919) 249 U. S. 598, 39 S. Ct. 257, 63 U. S. (L. ed.) —, to the Oklahoma Supreme Court. *Norfolk, etc., R. Co. v. King*, (1919) 249 U. S. 599, 39 S. Ct. 257, 63 U. S. (L. ed.) —, to the North Carolina Supreme Court. *Lasater v. Magnolia Petroleum Co.*, (1919) 249 U. S. 599, 39 S. Ct. 257, 63 U. S. (L. ed.) —, to the Texas Court of Civil Appeals. *Glascock v. McDaniel*, (1919) 249 U. S. 600, 39 S. Ct. 257, 63 U. S. (L. ed.) —, to the Oklahoma Supreme Court. *Lehigh Valley R. Co. v. New Jersey Fidelity, etc., Ins. Co.*, (1919) 249 U. S. 598, 39 S. Ct. 257, 63 U. S. (L. ed.) —, to the New Jersey Court of Errors and Appeals. *Chicago, etc., R. Co. v. McBride*, (1919) 249 U. S. 601, 39 S. Ct. 259, 63 U. S. (L. ed.) —, to the Arkansas Supreme Court. *California Railroad Commission v. Allen*, (1919) 249 U. S. 601, 39 S. Ct. 259, 63 U. S. (L. ed.) —, to the California Supreme Court. *Cincinnati, etc., R. Co. v. Sheridan*, (1919) 249 U. S. 602, 39 S. Ct. 259, 63 U. S. (L. ed.) —, to the Tennessee Supreme Court. *Massachusetts v. Liquid Carbonic Co.*, (1919) 249 U. S. 603, 39 S. Ct. —, 63 U. S. (L. ed.) —, to the Massachusetts Supreme Judicial Court. *Iowa Cent. R. Co. v. Breen*, (1919) 249 U. S. 604, 39 S. Ct. 288, 63 U. S. (L. ed.) —, to the Iowa Supreme Court. *Haney v. Anderson*, (1919) 249 U. S. 606, 39 S. Ct. 288, 63 U. S. (L. ed.) —, to the Oklahoma Supreme Court. *Gillespie v. Scott*, (1919) 249 U. S. 606, 39 S. Ct. 289, 63 U. S. (L. ed.) —, to the Kansas Supreme Court. *Gray v. Hartford Bank*, (1919) 249 U. S. 608, 39 S. Ct. 290, 63 U. S. (L. ed.) —, to the Arkansas Supreme Court. *Arkansas Cent. R. Co. v. Goad*, (1919) 249 U. S. 609, 39 S. Ct. 291, 63 U. S. (L. ed.) —, to the Arkansas Supreme Court. *Pulp Wood Co. v. Green Bay Paper, etc., Co.*, (1919) 249 U. S. 610, 39 S. Ct. 291, 63 U. S. (L. ed.) —, to the Wisconsin Supreme Court. *St. Louis, etc., R. Co. v. True*, (1919) 249 U. S. 611, 39 S. Ct. 386, 63 U. S. (L. ed.) —, to the Oklahoma Supreme Court. *Hewett v. Washington*, (1919) 249 U. S. 611, 39 S. Ct. 386, 63 U. S. (L. ed.) —, to the Washington Supreme Court. *Davis v. Thompson*, (1919) 249 U. S. 611, 39 S. Ct. 386, 63 U. S. (L. ed.) —, to the Oklahoma Supreme Court. *Morrison v. Chicago, etc., R. Co.*, (1919) 249 U. S. 611, 39 S. Ct. 386, 63 U. S. (L. ed.) —, to the Washington Supreme Court. *Duane v. Merchants Legal Stamp Co.*, (1919) 249 U. S. 613, 39 S. Ct. 388, 63 U. S. (L. ed.) —, to the Massachusetts Supreme Judicial Court. *Renfro v. Olentine*, (1919) 249 U. S. 614, 39 S. Ct. 389, 63 U. S. (L. ed.) —, to the Oklahoma Supreme Court. *Mississippi Central R.*

*Co. v. Lott*, (1919) 249 U. S. 616, 39 S. Ct. 391, 63 U. S. (L. ed.) —, to the Mississippi Supreme Court. *Benner v. New York Cent.*, etc., R. Co., (1919) 249 U. S. 616, 39 S. Ct. 391, 63 U. S. (L. ed.) —, to the New York Supreme Court.

In *New Orleans, etc., R. Co. v. Scarlet*, (1919) 249 U. S. 528, 39 S. Ct. 369, 63 U. S. (L. ed.) —, and *Yazoo, etc., R. Co. v. Mullins*, (1919) 249 U. S. 531, 39 S. Ct. 368, 63 U. S. (L. ed.) —, upon reversing a judgment of the Mississippi Supreme Court on a writ of error, which was held to be the proper appellate remedy, the court denied a petition for a writ of certiorari.

On a writ of certiorari to the Kentucky Court of Appeals in *Baltimore, etc., R. Co. v. Leach*, (1919) 249 U. S. 217, 39 S. Ct. 254, 63 U. S. (L. ed.) —, the railroad in a suit against it for damages to a shipment of goods set up noncompliance with a provision in a bill of lading issued as required by Act of Congress.

A decision was rendered on a writ of certiorari to the Oklahoma Supreme Court in *Gilcrease v. McCullough*, (1919) 249 U. S. 178, 39 S. Ct. 198, 63 U. S. (L. ed.) —, involving a right or immunity claimed by a Creek Indian under an enrollment record of Creek citizenship pursuant to an Act of Congress.

On a writ of certiorari to the Michigan Supreme Court to review a judgment in favor of a trustee in bankruptcy suing to recover an illegal preference. *Gratiot State Bank v. Johnson*, (1919) 249 U. S. 246, 39 S. Ct. 263, 63 U. S. (L. ed.) —.

In *Hartford Life Ins. Co. v. Johnson*, (1919) 249 U. S. 490, 39 S. Ct. 336, 63 U. S. (L. ed.) —, a writ of certiorari theretofore granted was dismissed on motion on the ground that the claim of right under the "full faith and credit clause" of the Federal Constitution was not so "set up or claimed" as to give the Supreme Court jurisdiction to review by certiorari.

**Supersedeas.**—See notes to 6 Fed. Stat. Ann. 198, sec. 1007, *supra*, p. 652, under heading "III. Applicability generally of section."

### 1918 Supp., p. 414, sec. 2.

**State Workmen's Compensation Acts** were not applicable to persons engaged in maritime work before this section was enacted, as will be seen from cases considered *supra*, p. 603.

### 1918 Supp., p. 421, sec. 4. [*Review of judgment or decree, etc.*]

**Provision mandatory.**—Under this section when a writ of error is erroneously taken instead of an appeal, a federal Appellate Court may not dismiss the writ but must disregard the error. *Toyo Kisen Kaisha v. Hartman*,

(C. C. A. 9th Cir. 1918) 253 Fed. 422, 165 C. C. A. 164.

**Review of contempt proceeding.**—A contempt is civil in its nature when it arises in connection with a suit in equity for disobedience of an order made to preserve and enforce the rights of a private party, and administer the remedy to which he is entitled, and is reviewable only by appeal, but by virtue of this section where the order is sought to be reviewed by writ of error it will be regarded as being in the appellate court on appeal. *Cutting v. Van Fleet*, (C. C. A. 9th Cir. 1918) 252 Fed. 100, 164 C. C. A. 212.

**A writ of error to review a decree in equity** was treated as an appeal, in consequence of this section, in *Howard v. Lee's*, (C. C. A. 6th Cir. 1919) 257 Fed. 918, 922, 169 C. C. A. 68.

### 1918 Supp., p. 422, sec. 5.

**No retroactive effect.**—In *Compania General, etc., v. Alhambra Cigar, etc., Mfg. Co.*, (1919) 249 U. S. 72, 39 S. Ct. 224, 63 U. S. (L. ed.) —, an appeal perfected before this section was enacted was held controlled by section 248 of the Judicial Code.

**A writ of certiorari was granted** in *Board of Public Utility Com'rs v. Yuchausti*, (1918) 248 U. S. 554, 39 S. Ct. 10, 63 U. S. (L. ed.) —.

**A writ of certiorari was denied** in *Guzman v. Lichanco*, (1919) 250 U. S. XII, 39 S. Ct. 494, 63 U. S. (L. ed.) —; *Gsell v. Insular Collector of Customs*, (1919) 250 U. S. XIII, 39 S. Ct. 494, 63 U. S. (L. ed.) —; *Dick v. Hohmann*, (1918) 248 U. S. 568, 39 S. Ct. 10, 63 U. S. (L. ed.) —.

### 1918 Supp., p. 422, sec. 6.

**In general.**—A writ of certiorari from the federal Supreme Court to a state court is expressly forbidden by this act unless duly applied for within three months after the entry of the judgment or decree sought to be reviewed. *Citizens' Bank v. Opperman*, (1919) 249 U. S. 448, 39 S. Ct. 330, 63 U. S. (L. ed.) —, *dismissing* writ of error to review (Ind. 1917) 115 N. E. 55.

**Time of making as affected by question whether record shows proper case.**—An application for a writ of certiorari to a state court, made after the expiration of the three months limited by this act, cannot be entertained by the federal Supreme Court, irrespective of whether the record shows a proper case for the allowance of that writ. *Rust Land, etc., Co. v. Jackson*, (1919) 250 U. S. 71, 39 S. Ct. 424, 63 U. S. (L. ed.) —.

**Court rule affecting application for certiorari.**—In (1917) 243 U. S. 623, there is an amendment of section 4 of Rule 37 of the rules of this court which makes it read as follows, viz.: "4. An application for a writ of certiorari will be deemed in time

when the petition therefor, accompanied by the printed record and brief, is filed within the period prescribed by law: Provided this is followed by submitting the petition in open court on some motion day not later than the first one which follows a period of four weeks after such filing. Notice of the date of submission and copies of the petition and brief must be served as required by section 3 of this rule." It was promulgated by the Supreme Court March 26, 1917. This amendment slightly changes the same paragraph in (1916) 241 U. S. 635. See also Jud. Code, sec. 240, 5 Fed. Stat. Ann. p. 859.

### 1918 Supp., p. 422, sec. 7.

**Final judgments.**—This section has to do with final judgments and not a judgment subject to reconsideration through the medium of a petition for rehearing. *Chicago Great Western R. Co. v. Basham*, (1919) 249 U. S. 164, 39 S. Ct. 213, 63 U. S. (L. ed.) —, *dismissing writ of error to review* (1916) 178 Ia. 998, 154 N. W. 1019, 157 N. W. 192.

A judgment was not entered "before this act takes effect" so as to be unaffected by

this section, where, though entered before the enactment of the statute, its finality for the purpose of review was suspended by consideration of a petition for rehearing, until an order denying such petition was entered after the act took effect. *Chicago Great Western R. Co. v. Basham*, (1919) 249 U. S. 164, 39 S. Ct. 213, 63 U. S. (L. ed.) —.

**Writ of error.**—In *Campbell v. Wadsworth*, (1918) 248 U. S. 169, 39 S. Ct. 63, 63 U. S. (L. ed.) —, it was held that a judgment of the Supreme Court of Oklahoma (see (1916) 53 Okla. 728, 157 Pac. 713), being within the provisions of this section, was properly before the Supreme Court of the United States.

### 1918 Supp., p. 423. [Act of Feb. 22, 1917.]

**Venue of suit.**—Under the proviso of this section, suits must be brought in the district where the beneficiaries reside, regardless of whether the policies have been assigned. *New York L. Ins. Co. v. Kennedy*, (S. D. Fla. 1918) 253 Fed. 287.

## LABOR

### Vol. VI, p. 270, sec. 1. [First ed., vol. IV, p. 779.]

**Person employed in dredging work on Panama Canal.**—This act does not apply to persons performing services similar to those of laborers and mechanics employed in connection with dredging work on the Panama Canal. (1913) 30 Op. Atty.-Gen. 139.

### Vol. VI, p. 278, sec. 1. [First ed., 1914 Supp., p. 236.]

**Improvement of selected roads.**—This Act and the Act of August 1, 1892, ch. 352, as amended (see vol. 6, p. 270), do not apply to the improvement of selected roads over which rural delivery is or may be established as provided for under the provisions of the Post Office Appropriations Act of August 24, 1912. (1913) 30 Op. Atty.-Gen. 210.

**Necessity of insertion of eight-hour provision—Excepted contracts.**—The requirement as to the insertion in a contract of a provision as to eight-hour labor does not apply to contracts in the excepted classes. (1913) 30 Op. Atty.-Gen. 31.

**Letters of proposal and acceptance.**—Where a contract is made by letters of proposal and acceptance, the latter should contain the provision regarding eight-hour labor. (1913) 30 Op. Atty.-Gen. 31.

**Appropriation made prior to passage of act.**—Contracts for public buildings for which appropriation was made in full prior to the passage of this act, are not required to contain the eight-hour work day provision prescribed by this section. So also where the limit of cost of a public building has been fixed by law and the authority has been given to enter into contracts up to the full limit prior to the passage of this act, but the appropriation therefor has been only partly made prior to that time, the contracts for that portion of the work appropriated for subsequent thereto are not required to contain such provision. (1913) 30 Op. Atty.-Gen. 137.

The same rule applies where Congress has fixed the limit of cost of a public building and made a partial appropriation therefor prior to the passage of this act, but subsequent thereto has increased the limit of cost. (1913) 30 Op. Atty.-Gen. 150.

**Employment of labor.**—This section applies to the employment of labor on the work contemplated by the contract regardless of who employs it. (1913) 30 Op. Atty.-Gen. 31.

### Vol. VI, p. 279, sec. 2. [First ed., 1914 Supp., p. 237.]

**Repeal of former acts.**—By express provision of this section, this act does not repeal or modify the eight-hour law of August

1, 1892, ch. 352 (see vol. 6, p. 270), which still applies to work done on public buildings, no matter when the appropriation therefor may have been made. (1913) 30 Op. Atty.-Gen. 137.

"Such materials or articles as may usually be bought in the open market."—Articles or materials used in printing or binding, such as printing and binding machinery, paper, bookbinding leathers, bookcloths, etc., are "materials or articles as may usually be bought in the open market" within the meaning of this section, and hence contracts for their purchase are excepted from the operation of this act. (1913) 30 Op. Atty.-Gen. 24.

On the same principle, contracts for the purchase of materials and articles entering into the construction of public buildings, are excepted under the provisions of this section. (1913) 30 Op. Atty.-Gen. 31, (1913) 30 Op. Atty.-Gen. 134.

The same rule applies to labor employed in the dressing of marble and stone for public buildings, such labor not being performed at the sites of the buildings themselves. (1913) 30 Op. Atty.-Gen. 211. To same effect see (1915) 30 Op. Atty.-Gen. 364.

Likewise, contracts for the purchase of locomotives made according to standard designs and assembled, as ordered, of parts kept in stock, are excepted from the operation of this act. (1913) 30 Op. Atty.-Gen. 49.

#### Vol. VI, p. 282, sec. 4. [First ed., 1909 Supp., p. 331.]

Final authority to determine claims arising under this act, as amended, rests in the Secretary of Labor. (1913) 30 Op. Atty.-Gen. 145.

#### 1918 Supp., p. 429, sec. 1.

**Exclusiveness of remedy.**—"The petition alleges that the plaintiff was an employé of the government, in the performance of his duties as a mail clerk upon the Illinois Central Railroad in Iowa, at the time of the accident which resulted in the injuries

of which he complains. The Congress, in the act to which reference is above made, has imposed upon the United States a liability for injuries to its employés when in the performance of their duties, except under the conditions prescribed in the act; and it may be that the Congress might have required the injured employé to seek redress for such disability or injury exclusively from the United States, and in the manner provided in the act. *New York Central R. R. v. White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. ed. 667, L. R. A. 1917D, 1 Ann. Cas. 1917D 629, and cases cited; and *New York Central R. R. v. Winfield*, 244 U. S. 147, 150, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D 1139. But, be this as it may, the Congress has not done so. By section 1 of that act it is provided:

"That the United States shall pay compensation as hereinafter specified for the disability or death of an employé resulting from a personal injury sustained while in the performance of his duty," except under the conditions prescribed in the act.

"Other sections of the act provide in detail the method and procedure by which the injured employé may recover from the United States the compensation therein provided for such injury. That a mail clerk employed by the United States upon a mail car used in the carriage of mails upon railroads is an employé of the United States, within the meaning of this act, is not doubted, nor is it disputed, and when such an employé is disabled or killed in the performance of his duties, and seeks to recover from the United States the compensation so provided, it is obvious that he must proceed in the manner provided by this act. But in no part of the act is it directly or by reasonable implication provided that the injured employé or his legal representatives shall be limited to the amount of compensation so provided in this act as against a wrongdoer, who by some negligent or other wrongful act has caused the death or disability of the injured employé, and to so prohibit would be to amend the act, which the court will not do." *Dahn v. McAdoo*, (N. D. Ia. 1919) 256 Fed. 549, holding that a railway mail clerk may bring suit for personal injuries against the director general of railroads.

## LIMITATION OF VESSEL OWNERS' LIABILITY

**Vol. VI, p. 330, sec. 4281.** [First ed., vol. IV, p. 837.]

**Effect of statute—Extent of exemption.**

—It is now settled that this section is to be construed so as to relieve the carrier only of its liability as a common carrier, and not of any liability as a bailee. *Kuhnhold v. Compagnie Generale Transatlantique*, (S. D. N. Y. 1918) 251 Fed. 387.

**Vol. VI, p. 336, sec. 4283.** [First ed., vol. IV, p. 839.]

III. Construction.

IV. Scope of statute.

3. Owners affected.

5. Losses covered.

V. Privy or knowledge of owner.

1. In general.

2. Corporation.

3. Competency of master and crew.

VI. Measure of liability.

1. Value of vessel.

VIII. Procedure.

1. Jurisdiction.

9. Answer.

10. Evidence.

### III. CONSTRUCTION (p. 338)

These statutes are, of course, to be enforced in such spirit and with such liberality as will effect their purpose—the encouragement of shipbuilding and the employment of ships in commerce. But such liberality of enforcement should not be carried to an extent that will deprive cargo owners and passengers of that degree of care on the part of those owning and operating ships which their safety demands and to which they are entitled. *The Santa Rosa*, (N. D. Cal. 1918) 249 Fed. 160.

### IV. SCOPE OF STATUTE

#### 3. Owners Affected (p. 338)

**Towing company.**—A company which was under contract to tow all the boats of another company for a period of time and which employed a tug owned by others to do some of the towing cannot take advantage of this section. *In re Reichert Towing Line*, (C. C. A. 2d Cir. 1918) 251 Fed. 214, 163 C. C. A. 370.

#### 5. Losses Covered (p. 341)

**Sinking by submarine.**—The sinking of the steamship *Lusitania* by a German submarine, in violation of international law, was an illegal act for which the owners of the steamship were in no way to blame, and

therefore they had a right to limit their liability under this section. *The Lusitania*, (S. D. N. Y. 1918) 251 Fed. 715.

### V. PRIVY OR KNOWLEDGE OF OWNER

#### 1. In General (p. 344)

**Knowledge or privity shown by evidence.**

—In *The Santa Rosa*, (N. D. Cal. 1918) 249 Fed. 160, it appeared that the corporation owning a steamer carrying passengers was informed by wireless that the steamer was aground and that two steam schooners were standing by. Messages were exchanged, the owner discouraging the acceptance of assistance. The master asked permission to transfer the passengers, and was directed not to do so unless an agreement as to payment was made, which agreement was refused by the schooners. Consent of the owner to a transfer without agreement was not given until the condition of the sea made transfer impossible. It was held that liability for loss of the lives and effects of passengers could not be limited.

**Knowledge not shown.**—In an action to limit a tug owner's liability for injury to a tow caused by the breaking of a crank pin on the tug, it was held that the evidence was not sufficient to overcome the presumption of fault on the part of the tug owner. *In re Reichert Towing Line*, (C. C. A. 2d Cir. 1918) 251 Fed. 214, 163 C. C. A. 370.

#### 2. Corporation (p. 345)

**In general.**—To same effect as original annotation, see *The Erie Lighter 108*, (D. C. N. J. 1918) 250 Fed. 490, also holding that the superintendent of the marine department of a railroad is "a managing officer" of the corporation within the rule set forth in the original annotation.

**Superintendent.**—Where a superintendent has the general control and direction of a corporation's business at a place where a collision occurs, his privity or knowledge is the privity or knowledge of the corporation, but notice to him of the sinking of a boat in the channel does not preclude a limitation of liability for collision with the sunken boat unless the superintendent had time after receiving the notice to have the wreck marked. *Eastern Steamship Corp. v. Great Lakes Dredge, etc., Co.*, (C. C. A. 1st Cir. 1919) 256 Fed. 497, 168 C. C. A. 3, affirming (D. C. Mass. 1917) 250 Fed. 916.

**Manager.**—In *McKie Lighter Co. v. Collins*, (C. C. A. 1st Cir. 1919) 255 Fed. 524, 166 C. C. A. 592, it was held proper to refuse to limit liability for a personal injury where the general manager of the shipowners saw work

being done in a dangerous manner and did not stop it before the accident happened.

**Delegation of duties by managing officers.**—The managing officers of a corporation may employ others to perform the duties ordinarily imposed by law upon the owner, such as equipment, examination, repairs, etc., and, if due diligence is exercised in selecting persons competent for such work, losses or damage done or occasioned through their fault, without actual complicity or knowledge on the part of the owner, are done or occasioned without the "privity or knowledge" of the owner within the meaning of this Act. *The Erie Lighter 108*, (D. C. N. J. 1918) 250 Fed. 490, holding that the liability should be limited where the accident was caused by a defect in a rail which had been rebuilt shortly before by competent carpenters and inspected in the usual manner.

### 3. Competency of Master and Crew (p. 346)

Where a collision occurred during the master's watch because of faulty navigation, the absence of the mate is not a fault chargeable to the owners and does not prevent limitation of liability. *The North Star*, (C. C. A. 2d Cir., 1919) 255 Fed. 955.

**Charter as continuing warranty.**—A monthly charter of a tug, the owner to furnish the crew, is a continuing personal contract of warranty as to the competency of the crew, and accordingly there can be no limitation of liability for a loss caused by the negligence of members of the crew. *The Ice King*, (S. D. N. Y. 1916) 256 Fed. 895.

## VI. MEASURE OF LIABILITY

### 1. Value of Vessel (p. 348)

**Tug and tow.**—Where the death of the captain of a lighter was caused by the tearing off of a defective cap on the rail, under the strain of the tow line, and there was no negligence on the part of the tug, the liability is to be limited to the value of the lighter. *The Erie Lighter 108*, (D. C. N. J. 1918) 250 Fed. 490.

Where a collision is due entirely to the fault of the tug the tow is an innocent instrument and the liability is to be limited to the value of the tug alone. *The O'Brien Bros.*, (E. D. N. Y. 1918) 252 Fed. 185.

**Only claim less than vessel owner's interest.**—Where the only claim filed is of less amount than the appraised value of the vessel owner's interest and the claimant waives any demand for interest on his claim the petition for a limitation of liability should be dismissed. *Shipowners', etc., Tugboat Co. v. Hammond Lumber Co.*, (C. C. A. 9th Cir. 1918) 251 Fed. 266, 163 C. C. A. 422.

## VIII. PROCEDURE

### 1. Jurisdiction (p. 351)

**Determination of vessel owner's liability.**—If a vessel owner is entitled to limit his liability under this Act, the court may pro-

ceed to determine whether he is liable at all and, if so, to fix and assess the damages that should be awarded the claimant. But if the vessel owner is not entitled to avail himself of the provisions of this Act, the court is without jurisdiction to proceed further but must dismiss the proceeding. *The Erie Lighter 108*, (D. C. N. J. 1918) 250 Fed. 490.

While a petition to limit liability would primarily presuppose some liability to be limited, the language of the statute and the decisions thereunder have made it plain that the petitioner has the right to contest the sufficiency of the claims in the same way and to the same extent as if the actions were being tried in admiralty, upon pleadings originally filed in this court. *The O'Brien Bros.*, (E. D. N. Y. 1918) 252 Fed. 185.

### 9. Answer (p. 355)

**Sufficiency.**—In a proceeding to limit the liability of the operator of a vessel for damages growing out of the death of a passenger who fell through an open doorway, an answer which alleged that the deceased had been for a long time prior to the accident a regular passenger on the boat and had always been accustomed to see a bar across the doorway and relied upon its being in place for his protection, and that relying upon the bar being in place as usual and upon the duty of the petitioners as common carriers to place either the said bar in its proper position or other proper protection, and by reason of there being no proper protection at the time in question, and not because of his own negligence, the deceased fell through the open doorway into the waters of the bay and was drowned, was held to be sufficient. *Coggeshall Launch Co. v. Early*, (C. C. A. 9th Cir. 1918) 248 Fed. 1, 160 C. C. A. 141.

### 10. Evidence (p. 356)

**Burden of proof.**—The burden is on the petitioner for limitation of liability to show that the loss occurred without its privity or knowledge. *The Santa Rosa*, (N. D. Cal. 1918) 249 Fed. 160.

In the case of *In re Reichert Towing Line*, (C. C. A. 2d Cir. 1918) 251 Fed. 214, 163 C. C. A. 370, the injury was the result of a broken crank pin on a tug. The court said: "Although the Reichert Company has been held liable for negligence, it will not be liable beyond the value of the tug, if it was without knowledge or privity of the insufficiency of the crank pin. The burden of proving this is on it. Its officers knew of the prior breaking of a steel crank pin of the same size, and no sufficient explanation of that accident is given. They do not show whether they knew the size of the pin, or whether they knew the prevailing practice as to the size of such pins, nor whether, if they did, they made any inquiry whatever as to what the requirements of such crank pins should be, in view of the prevailing practice of employing a much stronger one. Although the boat had been



inspected by the United States local inspectors some three or four months before the accident, and the owners employed an engineer to supervise their equipment from time to time, we do not think that they have discharged the burden of proving their want of knowledge or privity."

*Contributory negligence* is an affirmative defense, is always relative, and the burden of establishing it is upon the party who asserts it. *Coggeshall Launch Co. v. Early*, (C. C. A. 9th Cir. 1918) 248 Fed. 1, 160 C. C. A. 141.

**Sufficiency.**—For evidence held sufficient to establish negligence on the part of the operator of a vessel for failure to guard properly an open doorway, through which a passenger fell and was drowned, see *Coggeshall Launch Co. v. Early*, (C. C. A. 9th Cir. 1918) 248 Fed. 1, 160 C. C. A. 141..

**Vol. VI, p. 367, sec. 4289.** [First ed., vol. IV, p. 852.]

**Scope of statute — Drill boat.**—The term "vessel" includes a "drill boat" described as follows: "Drillboat No. 4 was about 132 feet long, 33 feet beam, and about 8 feet deep; it was divided into five watertight compartments, and carried a boiler, drilling machinery, four two-cylinder engines, and other apparatus used in connection with its work. It was built of steel, and, when at work on a ledge, was held in place by four spuds or iron legs 65½ feet long, about 23½ inches square, and weighing 12½ tons each. . . . The drillboat was towed from the Great Lakes around through the St. Lawrence to Boston Harbor. When being towed, the spuds are raised and held by pawls fastened to the deck." *Eastern Steamship Corp. v. Great Lakes Dredge, etc., Co.*, (C. C. A. 1st Cir. 1919) 256 Fed. 497, *affirming* (D. C. Mass. 1917) 250 Fed. 916, and holding further that "the drillboat by being temporarily sunk did not cease to be a vessel."

**Vol. VI, p. 368, sec. 18.** [First ed., vol. IV, p. 852.]

**Direct personal contracts.**—To the same effect as the original annotation, see *Luckenbach v. W. J. McCahan Sugar Refining Co.*, (1918) 248 U. S. 139, 39 S. Ct. 53, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 2d Cir. 1916) 235 Fed. 388, 14 C. C. A. 650.

The liability of shipowners under their personal contract for a loss of cargo due to unseaworthiness is not affected, despite their want of privity or knowledge, by the provisions of R. S. sec. 4283 and this section, for a limitation of liability to the value of the ship and pending freight. *Capitol Trans. Co. v. Cambria Steel Co.*, (1919) 249 U. S. 334, 39 S. Ct. 292, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 6th Cir. 1917) 244 Fed. 95, 156

C. C. A. 523, wherein the court said: "This is a petition to limit liability for the loss of cargo on *The Benjamin Noble*, brought by the present petitioner after libels in personam had been filed in different districts by the cargo owners, the Cambria Steel Company. The right was denied by the District Court on the ground that the vessel was unseaworthy with the privity and knowledge of the owner when she sailed, and that the owner had made a personal contract by which it warranted seaworthiness. 232 Fed. 382. The findings, rulings and decree of the District Court were affirmed by the Circuit Court of Appeals, 244 Fed. 95. . . . We are urged to reconsider the question whether the limitation of liability is not made independent of the 'privity or knowledge' of the owner by the omission of those words from the Act of June 26, 1884, c. 121, § 18, 23 Stat. 53, 57, coupled with the repeal, in § 30, of all laws and parts of laws in conflict with the provisions of that act. It is argued that the effect of the omission and the repealing section is to do away with the former qualification in Rev. Stats., § 4283, and the argument is fortified by a reference to the history of the act, which shows that some of the senators thought it important to make the limitation absolute. On the other hand in *Butler v. Boston & Savannah S. S. Co.*, 130 U. S. 527, 553, 554, it was said by Mr. Justice Bradley that possibly the later act was intended to remove all doubt as to the application of the law to all cases of loss 'caused without the privity or knowledge of the owner.' We find no different expression on *O'Brien v. Miller*, 168 U. S. 287, 303. Mr. Justice Bradley's opinion was adopted after considerable discussion in *Richardson v. Harmon*, 222 U. S. 96, 106, and *Richardson v. Harmon* was accepted as establishing that the statute does not limit liability for the personal acts of the owners done with knowledge, in the late case of *Pendleton v. Benner Line*, 246 U. S. 353, 356. In that case the argument that the limitation of the exoneration to acts, etc., done or incurred without the privity or knowledge of the owner was repealed by the Act of 1884, was presented in the fullest way. We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go. But in this case in addition to the finding of the owner's privity to the unseaworthiness was the further finding that the contract was the personal contract of the petitioner—a finding that seems warranted if any contract by a corporation can fall within the class. That such contracts may impose a liability that cannot be transferred to what is left of the ship is decided. *Luckenbach v. McCahan Sugar Refining Co.*, 248 U. S. 139, 149 [39

S. Ct. 53, 63 U. S. (L. ed.) —]. Upon the whole case we cannot escape from the conclusion that the decree must be affirmed."

**Vol. VI, p. 371, sec. 1.** [First ed., vol. IV, p. 854.]

**Limitation of value of package.**—To same effect as original annotation, see *Leyland v. Hornblower*, (C. C. A. 1st Cir. 1919) 256 Fed. 289.

**Vol. VI, p. 377, sec. 3.** [First ed., vol. IV, p. 857.]

- I. In general.
- IV. Seaworthy vessel.
- V. Navigation or management of ship.
- VI. Burden of proof.

**I. IN GENERAL (p. 378)**

**Construction of statute.**—This Act should be enforced with such liberality as will effect its purpose, but the liberality should not be carried to such an extent as to deprive cargo owners and passengers of that degree of care on the part of those owning and operating ships which their safety demands and to which they are entitled. *The Santa Rosa*, (N. D. Cal. 1918) 249 Fed. 160.

The statute should be strictly construed and not extended to include exemptions which are clearly within its scope. *Mallory Steamship Co. v. Harriess-Irby Cotton Co.*, (Tex. 1918) 204 S. W. 789.

**IV. SEAWORTHY VESSEL (p. 384)**

That a vessel developed serious leaks in a voyage from France to San Francisco during which no unusual storm was encountered shows lack of seaworthiness. *Compagnie Maritime, etc. v. Meyer*, (C. C. A. 9th Cir. 1918) 248 Fed. 881, 160 C. C. A. 639.

**Loss due to failure to cap sounding pipes.**—Where damage to cargo was due to the failure of the carpenter to replace caps on the sounding pipes, whereby large quantities of water entered the hold, the damage resulted from a mere fault of management and liability may be limited. *The Carisbrook*, (D. C. Mass. 1917) 247 Fed. 583.

**Manner of stowing cargo.**—The Harter Act does not relieve the carrier from liability for damage due to improper stowage. *The Aki Maru*, (C. C. A. 9th Cir. 1919) 255 Fed. 721, holding the evidence sufficient to show improper stowage of eggs for a trans-Pacific voyage.

**V. NAVIGATION OR MANAGEMENT OF SHIP (p. 389)**

**Failure to keep hatches covered**, whereby cargo is damaged by water, is not within the exemption. *Mallory Steamship Co. v. Harriess-Irby Cotton Co.*, (Tex. 1918) 204 S. W. 789.

**Vessel driven aground from anchorage.**—Under this section no recovery can be had for damage to a cargo caused by errors in navigation which resulted in the vessel being driven aground in a storm from the place where she was anchored. *The John B. Robbins*, (E. D. Va. 1919) 256 Fed. 61. The court said: "The court has given much consideration to this case, and its conclusion is that the evidence does not establish the unseaworthiness of the vessel at the beginning of the voyage, nor does it show that there was any negligence either in the loading, stowage, or custody of the goods after their delivery. It is true that the cargo was not loaded below deck of the vessel, where perhaps it would have been safer from exposure to rain or storm; but those conditions did not enter especially into this disaster, and the fact that the cargo was loaded on deck in no manner, in the opinion of the court, affected the loss, as it would have been quite as seriously damaged in the hold, and probably more so than upon deck."

**VI. BURDEN OF PROOF**

**The burden is on the vessel owner to show that the damage was due to one of the causes specified in the statute.** *Mallory Steamship Co. v. Harriess-Irby Cotton Co.*, (Tex. 1918) 204 S. W. 789.

The burden is on the owner to show seaworthiness in a proceeding to limit liability. *The Carisbrook*, (D. C. Mass. 1917) 247 Fed. 583.

If by failure to make proper inspection and tests at the port of departure the question of seaworthiness is left in doubt, the doubt must be resolved against the seaworthiness of the vessel. *Compagnie Maritime, etc. v. Meyer*, (C. C. A. 9th Cir. 1918) 248 Fed. 881, 160 C. C. A. 639.

**Recital in the bill of lading that the goods are in "apparent good order and condition"** casts the burden on the vessel to show that the loss proceeded from a cause which existed but was not apparent. *The Aki Maru*, (C. C. A. 9th Cir. 1919) 255 Fed. 721.

**Vol. VI, p. 393, sec. 5.** [First ed., vol. IV, p. 863.]

**Nature of proceeding to enforce.**—*Wrong remedy without objection.*—There is no jurisdiction in admiralty to collect the penalty imposed by this section in proceedings in personam. The proper procedure is by a qui tam action. But if an admiralty proceeding is heard without objection, the court has jurisdiction of the subject matter and the libel may be treated "as the analogue of a complaint qui tam at common law." The right to a jury trial is waived by this proceeding, and the decision will be reviewed as one in admiralty and not as the equivalent of a verdict. *U. S. v. Elwell*, (C. C. A. 2d Cir. 1918) 250 Fed. 939, 163 C. C. A. 189.

# MINERAL LANDS, MINES AND MINING

**Vol. VI, p. 509, sec. 2319.** [First ed., vol. V, p. 4.]

**Location of nonmineral lands — Cancellation of patent.**— A patent procured under the mining law to nonmineral lands will not be cancelled as against a bona fide purchaser, and bona fides is not negated by the fact that the purchaser knew that no mining operations were being carried on. *U. S. v. Grand Canyon Cattle Co.*, (C. C. A. 9th Cir. 1918) 247 Fed. 446, 159 C. C. A. 500.

**Vol. VI, p. 512, sec. 2320.** [First ed., vol. V, p. 8.]

- III. Discovery of vein or lode.
- IV. Legal limits of lode.
- V. Conflicting lode claimants.

**III. DISCOVERY OF VEIN OR LODE (p. 517)**

**Essentiality of discovery.**—To same effect as original annotation, see *McKenzie v. Moore*, (Ariz. 1918) 176 Pac. 568.

A discovery of mineral is essential to create valid rights in, or initiate a title to, mineral lands, as against the United States. *Union Oil Co. v. Smith*, (1919) 249 U. S. 337, 39 S. Ct. 309, 63 U. S. (L. ed.) —, *affirming* (1913) 166 Cal. 217, 135 Pac. 966.

**Discovery subsequent to location.**—The discovery of mineral may follow the location of a mining claim and give validity to the claim as of the time of discovery, provided no rights of third persons have intervened. *Union Oil Co. v. Smith*, (1919) 249 U. S. 337, 39 S. Ct. 309, 63 U. S. (L. ed.) —, *affirming* (1913) 166 Cal. 217, 135 Pac. 966.

**IV. LEGAL LIMITS OF LODE (p. 517)**

**Rejection of excess.**—The general rule is that, where the claim is excessive in length, if the error is innocently made the claim is valid, but the excess is void. *Nelson v. Smith*, (Nev. 1918) 176 Pac. 261.

**V. CONFLICTING LODE CLAIMANTS (p. 521)**

**Invalid prior location.**—Every competent locator has the right to initiate a lawful claim to unoccupied public land by a peaceable adverse entry upon it while it is in the possession of those who have no superior right to acquire title or to hold the possession. *Nelson v. Smith*, (Nev. 1918) 176 Pac. 261.

**Vol. VI, p. 523, sec. 2322.** [First ed., vol. V, p. 13.]

- II. Possessory rights.
- III. Extralateral rights.

**II. POSSESSORY RIGHTS (p. 524)**

**Nature of right.**—Even without a patent the possessory right of a qualified locator of a mining claim after discovery of minerals upon the claim is a property right in the full sense, unaffected by the fact that the paramount title to the land is in the United States, and such right is capable of transfer by conveyance, inheritance, or devise. *Union Oil Co. v. Smith*, (1919) 249 U. S. 337, 39 S. Ct. 309, 63 U. S. (L. ed.) —, *affirming* (1913) 166 Cal. 217, 135 Pac. 966.

**Actual possession.**—Actual and continuous occupation of a valid mining location, based upon discovery, is not essential to the preservation of the possessory right. The right is lost only by abandonment, as by nonperformance of the annual labor, which R. S. sec. 4324 (see vol. 6, p. 523) requires. *Union Oil Co. v. Smith*, (1919) 249 U. S. 337, 39 S. Ct. 309, 63 U. S. (L. ed.) —, *affirming* (1913) 166 Cal. 217, 135 Pac. 966.

**III. EXTRALATERAL RIGHTS (p. 527)**

**Extent of right — Obstruction of vein.**—In *Original Sixteen to One Mine v. Twenty-One Min. Co.*, (N. D. Cal. 1918) 254 Fed. 630, it was conceded throughout the trial that there is a vein on the Sixteen to One claim; that this vein dips in an easterly direction at an angle of 45 or 50 degrees; that the vein terminates at a fault at about the 200-foot level; and that by dropping down a distance of 15 or 20 feet at the shaft, and a distance of 35 or 40 feet at the northerly boundary of the claim, another vein is picked up, likewise terminating at a fault. It was held that a finding that the two were in fact a single vein which the owner of the apex was entitled to follow would be sustained.

**Vol. VI, p. 533, sec. 2324.** [First ed., vol. V, p. 19.]

- IV. Notice of location.
- VI. Notice to co-owner.
- VII. Forfeiture of interests.

**IV. NOTICE OF LOCATION (p. 541)**

**Actual notice cures defects.**—If a subsequent locator obtains from markings and monuments on the ground actual notice of the extent of a prior location, the fact that the notice of that location is indefinite in its description is immaterial. *Thompson v. Underwood*, (Ark. 1919) 211 S. W. 164.

**VI. NOTICE TO CO-OWNER (p. 549)**

**Record of notice as evidence.**—To bring a case within the California statute providing that a certified copy of a recorded notice

shall be *prima facie* evidence of delinquency, the notice must have been filed for record within ninety days after it was served. *Robinson v. Buiest*, (Cal. 1918) 173 Pac. 88.

#### VII. FORFEITURE OF INTERESTS (p. 551)

**Co-owner excluded from possession.**—Where a cotenant in possession excludes his cotenant and refuses to permit him to contribute to the assessment work he is not entitled to forfeit the interests of the excluded cotenant. *Becker-Franz Co. v. Shannon Copper Co.*, (C. C. A. 9th Cir. 1919) 256 Fed. 522.

#### Vol. VI, p. 555, sec. 2325. [First ed., vol. V, p. 31.]

**Jurisdiction of land department—Cancellation of location.**—The Land Department, on an application for a patent, has power to cancel the location after finding the land is not of a mineral character. *Cameron v. U. S.* (C. C. A. 9th Cir. 1918) 250 Fed. 943, 163 C. C. A. 193. The court said: "On the hearing of Cameron's application much testimony on the part of the claimant, as well as on the part of the government, appears to have been given before the officers of the Land Department respecting the character of the land applied for, and its location, some of it of a conflicting nature, the decision of which questions was not only within the jurisdiction of the Land Department, but within its exclusive determination. It is altogether too late to contend to the contrary, for nothing is better settled than that the facts in respect to the character of public land applied for under the laws authorizing its disposition, as well as the facts in respect to the performance of the acts required by the law to be performed by the applicant, are for the exclusive determination of the Land Department. Very many decisions of the Supreme and other federal courts to that effect might readily be cited, but we think it needless to do so. And even though it be conceded that the Land Department was without jurisdiction to order, as it did in the instant case, the cancellation of the applicant's mining location, yet its determination of the fact that the ground applied for was not mineral land in effect cut up by the roots every step taken by the applicant under the mining laws, necessarily including his mining location; and such was the decision of the Supreme Court of Arizona in the case of *Cameron v. Bass*, 168 Pac. 645, regarding, in part, the very ground here in controversy."

#### Vol. VI, p. 563, sec. 2326. [First ed., vol. V, p. 35.]

##### I. NATURE OF PROCEEDINGS (p. 564)

**Suits arising under laws of United States.**—To same effect as original annotation, see *Ralph v. Cole*, (C. C. A. 9th Cir. 1918) 249 Fed. 81, 161 C. C. A. 133.

#### Vol. VI, p. 577, sec. 2330. [First ed., vol. V, p. 42.]

**Excess area.**—A location of a placer claim made in good faith, but by mistake containing an excessive area, is not wholly void, but is invalid only as to the excess, which may be rejected from such portion as the owner may select, and until the owner is advised that there is an excess, and has had a reasonable time within which to make his selection, his possession extends to the entire claim, and any one who goes upon it and makes a location becomes a trespasser, and his location is a nullity and void for any purpose. *Adams v. Yukon Gold Co.*, (C. C. A. 9th Cir. 1918) 251 Fed. 226, 163 C. C. A. 382.

**Permission to locate excess.**—One of the owners of an association placer claim which contains an excess acreage cannot give permission to a person to locate the excess and thereby bind his co-owners who have no knowledge that the claim was excessive. *Adams v. Yukon Gold Co.*, (C. C. A. 9th Cir. 1918) 251 Fed. 226, 163 C. C. A. 382.

#### Vol. VI, p. 589, sec. 2337. [First ed., vol. V, p. 52.]

**Mill site—abandonment.**—Under the mining law mill sites may be located either in connection with the ownership of a vein or lode or independently of the ownership of a mine by the owner of a quartz mill or reduction works. R. S. sec. 2337. The findings in this case expressly declare that the mill sites in question were located and used in connection with lode mining claims owned by the Mines Company, "and not otherwise." The company's right was therefore founded upon the first provision of section 2337, the one permitting the location of a mill site as an adjunct to a lode claim. Where the locator of such a site ceases, by reason of abandonment or forfeiture, to be the proprietor of the vein or lode, the right to the associated mill site is also ended. *Watterson v. Cruse*, (Cal. 1918) 176 Pac. 870, holding further that by the abandonment the land and mill site became open to relocation and that the relocater became entitled to all that had been affixed to the land.

#### Vol. VI, p. 593, sec. 2347. [First ed., vol. V, p. 55.]

**Entry by one in interest of another.**—To the same effect as the original annotation, see *U. S. v. Kirk*, (C. C. A. 8th Cir. 1917) 248 Fed. 30, 160 C. C. A. 170, wherein the court found from the evidence that "each coal land entry involved herein was not made in the interest of the entrymen, but, on the contrary, either in the interest of an association of persons who were seeking to obtain from the United States more coal land than they were entitled to, or in the interest of individuals who were seeking to obtain more coal land than they were entitled to."

**Vol. VI, p. 596, sec. 2350.** [First ed., vol. V, p. 56.]

**Entry for benefit of corporation.**—Where a private person has made an entry on coal lands for the benefit of a corporation the corporation is not entitled thereafter to make another entry. *Union Coal, etc., Co. v. U. S.*, (C. C. A. 8th Cir. 1917) 247 Fed. 108, 159 C. C. A. 324, wherein it was said: "It is not contended that Westlake could not enter coal lands for the coal company in the absence of evasion as to quantity (*United States v. Colorado Anthracite Co.*, 225 U. S. 219, 32 Sup. Ct. 617, 56 L. Ed. 1063), but that the coal company, having received the benefit of the entry made by Oakes, could not make another entry either itself or by an agent. There is nothing in the case cited opposed to this view. The restriction to one entry found in section 2350, *supra*, must be given full effect. To decide that an individual or an association could make several coal land entries, provided the total amount of land filed upon did not exceed the maximum allowed by the statute, would be to read out of section 2350 the words 'only one entry.' *United States v. Keitel*, 211 U. S. 370-388, 29 Sup. Ct. 123, 53 L. Ed. 230."

**Entry of one person for another.**—To the same effect as the original annotation, see *U. S. v. Kirk*, (C. C. A. 8th Cir. 1917) 248 Fed. 30, 160 C. C. A. 170, wherein the court found from the evidence that "each coal land entry involved herein was not made in the interest of the entrymen, but, on the contrary, either in the interest of an association of persons who were seeking to obtain from the United States more coal land than they were entitled to, or in the interest of

individuals who were seeking to obtain more coal land than they were entitled to."

**Vol. VI, p. 607.** [*Act of Feb. 12, 1903.*] [First ed., vol. X, p. 236.]

**Annual assessment labor.**—One who has acquired the possessory rights of locators before discovery in five contiguous placer claims taken up as oil-bearing lands cannot preserve and maintain an inchoate right as to all of them by means of a continuous actual possession of one claim, coupled with diligent prosecution in good faith of a sufficient amount of discovery work thereon having a tendency to determine the oil-bearing character of the other claims, despite the provisions of this Act that where oil lands are located as placer mining claims, the "annual assessment labor" upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person, not exceeding five claims in all, provided that such labor will tend to the development or to determine the oil-bearing character of the contiguous claims, since this statute will not be construed as dispensing with discovery as an essential of a valid oil location, or as in any wise breaking down the recognized distinction between the possessory right of a prospector doing work for the purpose of discovering oil, and the more substantial right of one who has made a discovery and performed annual development work to exclusive possession and enjoyment until patent is obtained. *Union Oil Co. v. Smith*, (1919) 249 U. S. 337, 39 S. Ct. 309, 63 U. S. (L. ed.) —, *affirming* (1913) 166 Cal. 217, 135 Pac. 966.

## MONEY PAID INTO COURT

**Vol. VI, p. 631, sec. 995.** [First ed., vol. V, p. 70.]

**Requiring depositary to pay interest.**—*"The District Court, in the suit of the Kingdom of Roumania against the Guaranty Trust Company of New York, entered an order substituting one Arditti as defendant in place of the trust company upon its paying into court to the credit of the action \$73,433.65, with interest at the rate of two per cent. per annum, the trust company thereupon to be discharged of all liability either to Arditti or to the Kingdom of Roumania.*

*"The trust company paid the money, with interest, to the clerk of the court, who deposited it with the Chatham & Phenix National Bank, a designated depositary of the United States, in his account as clerk, and he has never received any interest upon it. This order we reversed, upon the ground that the court had no jurisdiction to make it;*

*the Kingdom of Roumania being a sovereign state, immune from suits in the courts of this country. 250 Fed. 341, 162 C. C. A. 411, Ann. Cas. 1918E 524.*

*"Thereafter the District Court, upon motion of the trust company, entered an order that the clerk pay to it the money so deposited, less his statutory fee of one per cent., and that the Chatham & Phenix National Bank pay to it interest at the rate of two per cent. per annum on the said fund to date of payment. This is a writ of error taken by the bank to the said order.*

*"We do not think that the bank's motion to vacate amounts to a general appearance by it, submitting it to the jurisdiction of the court. Wood v. Furtick, 17 Misc. Rep. 561, 40 N. Y. Supp. 687; Regelmann v. South Shore Co., 67 Misc. Rep. 590, 123 N. Y. Supp. 353. The bank was not a party to the action, had made no contract with the trust company, and if it owed interest on*

the deposit it owed it to its depositor, the clerk of the court, who alone had standing to collect the same. The objection that the court was without jurisdiction to make the

order is good." *Chatham, etc., Nat. Bank v. Guaranty Trust Co.*, (C. C. A. 2d Cir. 1919) 256 Fed. 90.

## MOTOR BOATS

**Vol. VI, p. 642, sec. 3.** [First ed., 1912 Supp., p. 39.]

**Sufficiency of lights.**—Where the stern of a motor boat anchored for repairs was toward a tug which ran her down, and her

aft light was sufficient to comply with the provisions of this section, it was held that the sufficiency of her bow and side lights was immaterial. *The O'Brien Bros.*, (E. D. N. Y. 1918) 252 Fed. 185.

## NATIONAL BANKS

**Vol. VI, p. 651, sec. 5133.** [First ed., vol. V, p. 79.]

**Corporate existence may be proved by parol evidence.** *Farmers' Nat. Bank v. Johnston*, (Okla. 1918) 176 Pac. 236, 3 A. L. R. 99.

**Vol. VI, p. 654, sec. 5136.** [First ed., vol. V, p. 95.]

III. Directors, president, and other officers.

5. Cashier.

V. "Incidental powers as shall be necessary," etc.

1. Banking powers in general.

12. Miscellaneous transactions.

a. Independent business enterprises.

e. Assuming obligations of insolvent bank.

III. DIRECTORS, PRESIDENT, AND OTHER OFFICERS

5. Cashier (p. 659)

**Discharge by directors.**—Under the National Bank Act, cashiers of national banks hold their office subject to dismissal at the pleasure of the board of directors. So where the cashier of a national bank is elected for a fixed time, and is dismissed prior to the expiration of the period for which he was employed, he cannot recover his wages for the unexpired period, even though dismissed without a cause. *Colquitt First Nat. Bank v. Miller*, (1919) 23 Ga. App. 441, 98 S. E. 402.

V. "INCIDENTAL POWERS AS SHALL BE NECESSARY," ETC.

1. *Banking Powers, in General* (p. 663)

**Guaranty of deposits.**—A national bank may enter into a contract with a guaranty company under which, in consideration of premiums paid by the bank, the company in-

sures and guarantees each depositor in the bank the full payment of his deposit therein. (1915) 30 Op. Atty-Gen. 341.

### 12. Miscellaneous Transactions

a. Independent Business Enterprises (p. 674)

**The buying and selling of cattle at a profit** is not within the incidental powers granted to national banks. *Leslie First Nat. Bank v. Stokes*, (1918) 134 Ark. 368, 203 S. W. 1026.

e. Assuming Obligations of Insolvent Bank (p. 676)

A national bank has no authority to join with other banks in undertaking to supply funds, whatever might be necessary, to pay the deficiencies of an insolvent state bank. *Lake County v. Citizens' Trust, etc., Bank*, (Ind. App. 1919) 123 N. E. 130.

**Vol. VI, p. 687, sec. 5138.** [First ed., vol. V, p. 95.]

The word "place," as used in this section, means a corporate or quasi corporate body organized for the purpose of local government in a defined territory. (1913) 30 Op. Atty-Gen. 173.

**Vol. VI, p. 711, sec. 5153.** [First ed., vol. V, p. 109.]

**Money paid into court not "public money."**—To same effect as original annotation, see *Chatham, etc., Nat. Bank v. Guaranty Trust Co.*, (C. C. A. 2d Cir. 1919) 256 Fed. 90.

**Interest on money paid into court.**—Where the Secretary of the Treasury under the provisions of this section has required banks which are depositories of public moneys to pay interest to the United States upon its average monthly balance, including moneys

deposited by courts, this is not an authorization to a court to require a bank to pay interest to the clerk of the court or to a party to a suit on money deposited by the clerk. *Chatham, etc., Nat. Bank v. Guaranty Trust Co.*, (C. C. A. 2d Cir. 1919) 256 Fed. 90.

**Vol. VI, p. 718, sec. 5.** [First ed., vol. V, p. 91.]

**Notice of withdrawal—To whom given.**—A notice of withdrawal under this section to the president of a bank is insufficient unless shown to have been communicated to the board of directors. The same is true of a notice addressed to the bank. *Conway v. Rome First Nat. Bank*, (C. C. A. 5th Cir. 1919) 256 Fed. 277.

**Time of giving notice.**—A notice of withdrawal may be given under the provisions of this section only after an amendment of the bank's articles of association has been approved by the comptroller. It must, however, be received by the directors within thirty days thereafter in order to be effective. *Conway v. Rome First Nat. Bank*, (C. C. A. 5th Cir. 1919) 256 Fed. 277.

**Letter as notice.**—A letter by a stockholder to the president of a national banking association, in answer to a request by the latter to consent to a disposition of certain assets of the bank, preliminary to a renewal of its charter, stating that he has purchased the stock with intent to liquidate it and is not in a position to carry it, cannot be regarded by reason of the language used as a notice of withdrawal, nor can be it treated as a substitute for such notice where the stockholder at a later date attempts to give such notice. *Conway v. Rome First Nat. Bank*, (C. C. A. 5th Cir. 1919) 256 Fed. 277.

**Waiver.**—A resolution of a board of directors of a bank authorizing its president or cashier to apply to the comptroller of the currency to have an amendment to its articles of association approved, does not authorize the president to receive or waive for them a notice of withdrawal made by a nonassenting shareholder pursuant to this section. *Conway v. Rome First Nat. Bank*, (C. C. A. 5th Cir. 1919) 256 Fed. 277.

**Estoppel.**—The power to act regarding withdrawals being vested by this section exclusively in the directors of a bank, its president is without authority to commit it by any statement relative to notice of withdrawals, and want of such authority to represent the bank prevents an estoppel. *Conway v. Rome First Nat. Bank*, (C. C. A. 5th Cir. 1919) 256 Fed. 277.

**Vol. VI, p. 722, sec. 23.** [First ed., 1914 Supp., p. 282.]

I. Who are liable as stockholders.

2. Married women.

II. Contracts, debts and engagements.

**I. WHO ARE LIABLE AS STOCKHOLDERS**

**2. Married Women (p. 723)**

**Unauthorized transfer of stock to wife.**—The mere transfer of stock in a national bank from husband to wife, without the latter's knowledge and consent, does not impose upon her the individual liability attached by law to the position of a shareholder, and she cannot be deemed to have approved, ratified, or acquiesced in such transfer so as to assume the position of a shareholder by indorsing the certificates in blank, in the belief that she was enabling her husband to correct his avowed mistake. *Williams v. Vreeland*, (1919) 250 U. S. 295, 39 S. Ct. 438, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 3d Cir. 1917) 244 Fed. 346, 156 C. C. A. 632, wherein the court said: "In *Keyser v. Hitz*, (1890) 133 U. S. 138 [10 S. Ct. 290, 33 U. S. (L. ed.) 531], which involved the liability of a married woman for an assessment levied against national bank stockholders, speaking through Mr. Justice Harlan, this court approved a charge—'If the stock in controversy was transferred upon the books of the German-American Savings Bank to and in the name of the defendant without her knowledge and consent, she was entitled to a verdict, unless she subsequently ratified and confirmed such transfer.' And it was further said—'We must not be understood as saying that the mere transfer of the stocks on the books of the bank, to the name of the defendant, imposed upon her the individual liability attached by law to the position of shareholder in a national banking association. If the transfers were, in fact, without her knowledge and consent, and she was not informed of what was so done—nothing more appearing—she would not be held to have assumed or incurred liability for the debts, contracts and engagements of the bank. But if, after the transfers, she joined in the application to convert the savings bank into a national bank or in any other mode approved, ratified or acquiesced in such transfers, or accepted any of the benefits arising from the ownership of the stock thus put in her name on the books of the bank, she was liable to be treated as a shareholder, with such responsibility as the law imposes upon the shareholders of national banks. Approval, ratification and acquiescence all presuppose the existence of some actual knowledge of the prior action and what amounts to a purpose to abide by it. *Owings v. Hull*, 9 Pet. 607, 629; *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 352; *Glenn v. Garth*, *supra*. When defendant in error signed blank powers of attorney she did not know what her husband had done and certainly entertained no purpose to approve transfer of the certificates to herself. She thought she was merely doing something to enable him to correct his avowed mistake and nothing else. Nobody was misled or put in a worse position as the result of her act."

Facts and circumstances concerning a wife's indorsement in blank of national bank stock certificates are admissible in evidence to negative the inference that by such indorsement she ratified a prior unauthorized transfer of such stock to her by her husband and assumed the duty promptly to remove her name from the bank books or suffer the liability imposed upon duly registered shareholders. *Williams v. Vreeland*, (1919) 250 U. S. 295, 39 S. Ct. 438, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 3d Cir. 1917) 244 Fed. 346, 156 C. C. A. 632.

## II. "CONTRACTS, DEBTS AND ENGAGEMENTS" (p. 724)

**Contracts for consolidation.**—Where two national banks contract to consolidate, one agreeing to liquidate and transfer its assets to the other which agrees to assume its liabilities and act as liquidating agent, and the contract is thus construed and acted upon by the parties, the relation of debtor and creditor is created between the banks, and the stockholders of the liquidating bank may be held individually responsible under this section. *American Nat. Bank v. Commercial Nat. Bank*, (C. C. A. 5th Cir. 1918) 254 Fed. 249, 165 C. C. A. 537.

## Vol. VI, p. 747, sec. 5198. [First ed., vol. V, p. 133.]

- I. Introductory.
- III. Validity of contract.
- IV. "Forfeiture of entire interest."
  - 2. Renewal notes.
  - 4. Necessity that interest stipulated for be unpaid.
  - 9. Limitation of action.
- V. Recovery back of twice amount of interest paid.
  - 5. Exclusiveness of remedy provided.
  - 12. Limitation of action.

### I. INTRODUCTORY (p. 748)

**Federal decisions controlling.**—Decisions of the federal court of last resort as to the construction of the Act are conclusive in a state court. *Planters' Nat. Bank v. Wysong, etc., Co.*, (N. C. 1919) 99 S. E. 199.

State statutes relating to usury, and prescribing penalties for the charging, reserving, or taking of usury, have no application to negotiable instruments held by national banks. *Young v. Covington First Nat. Bank*, (1918) 22 Ga. App. 58, 95 S. E. 381.

### III. VALIDITY OF CONTRACT (p. 748)

**Attorney's fees as constituting usury.**—A stipulation for the recovery of 10 per cent. as attorney's fees, in a note payable to a national bank, is not usurious and unenforceable, but may be enforced when the provisions of the law as to notice are complied with. *Young v. Covington First Nat. Bank*, (1918) 22 Ga. App. 58, 95 S. E. 381.

**Discharge of surety or guarantor.**—A surety or guarantor of a debt to a national bank is not discharged from liability on the note given although the bank charged or received usury. *Young v. Covington First Nat. Bank*, (1918) 22 Ga. App. 58, 95 S. E. 381.

### IV. "FORFEITURE OF ENTIRE INTEREST"

#### 2. *Renewal Notes* (p. 749)

To the same effect as the original annotation, see *Young v. Covington First Nat. Bank*, (1918) 22 Ga. App. 58, 95 S. E. 381.

**Submission to jury of disputed question of renewal.**—The courts will countenance no device or contrivance to evade the usury laws, but will always look to the actual nature of the transaction, and not to the form which the parties may have given to it. Where it is uncertain from the evidence whether, in a transaction by a national bank with the makers of a note due the bank, the debt was actually paid by a loan negotiated with an individual director of the bank, or whether it was in fact a renewal by the bank and an attempt to evade the usury laws by the ostensible substitution of a new creditor and a transfer of the new note to the bank, the issue should be submitted to the jury. *Young v. Covington First Nat. Bank*, (1918) 22 Ga. App. 58, 95 S. E. 381.

#### 4. *Necessity that Interest Stipulated for Be Unpaid* (p. 750)

**Distinction between clauses of statute.**—There are two entirely different divisions of section 5198; the first provides for a forfeiture when usury has been knowingly contracted for and such usury entered into the note; the second provides for the recovery back of twice the amount of all interest actually paid when said interest is in part usurious. The courts uniformly hold that under the first provision the maker of the note or debtor can interpose the plea of usurious interest in a suit on the note, and defeat the payment of any interest where said interest is in part usurious; while on the other hand, if he has in fact made any payment on interest which includes a payment in part of usurious interest, he cannot plead such payment either as a credit on the principal or as an offset or counterclaim to the principal, but his only remedy for such usury thus paid is found in the second provision of section 5198, and consists solely in his right to recover in a separate suit double the amount of interest actually paid. *Mitchell v. Joplin Nat. Bank*, (1918) 200 Mo. App. 243, 204 S. W. 1125, holding that acquiescence in application of payment to interest precluded an action to forfeit the entire interest.

#### 9. *Limitation of Action* (p. 751)

To the same effect as the original annotation, see *Young v. Covington First Nat. Bank*, (1918) 22 Ga. App. 58, 95 S. E. 381.



## V. RECOVERY BACK OF TWICE AMOUNT OF INTEREST PAID

### 5. Exclusiveness of Remedy Provided (p. 754)

**Set-off of interest paid.**—Although payments made directly as interest will be so regarded, and cannot be made use of as a set-off or counterclaim, yet where a payment is made generally, without any direction as to the application, it will ordinarily be applied on the principal instead of on the interest, all right to which was forfeited under such section by the agreement for usury. *Young v. Covington First Nat. Bank*, (1918) 22 Ga. App. 58, 95 S. E. 381.

**Set-off of penalty.**—Payment of the penalty provided can be enforced only by a separate and independent action in the nature of an action of debt, and cannot be enforced by way of set-off in an action for the principal debt. *Planters' Nat. Bank v. Wyson, etc.*, Co., (N. C. 1919) 99 S. E. 199, wherein the court said: "Although state courts have concurrent jurisdiction with the federal courts in actions by and against national banks, in an action in a state court the practice and pleadings prescribed by the legislature of the state in regard to a counterclaim or recoupment cannot be resorted to, so as to defeat the object and intention of a federal enactment. The provision of the United States statute (section 914), that the practice, pleadings, forms, and modes of proceedings, in civil cases, in the circuit and district courts, shall conform, as near as may be, to those existing at the time in the courts of record of the state, has no application in such case; it cannot annul or operate to prevent the application and enforcement of a statutory provision of a penal character."

### 12. Limitation of Action (p. 757)

To the same effect as the original annotation, see *Young v. Covington First Nat. Bank*, (1918) 22 Ga. App. 58, 95 S. E. 381.

The date of payment is the date from which an action to recover twice the amount of usurious interest begins to run. *Mitchell v. Joplin Nat. Bank*, (1918) 200 Mo. App. 243, 204 S. W. 1125.

## Vol. VI, p. 770, sec. 5209. [First ed., vol. V, p. 145.]

### II. Embezzlement.

#### 2. Elements of offense.

### IV. Misapplication of funds, etc.

#### 2. Elements of offense.

##### d. Withdrawal of funds.

### 9. Indictment.

#### e. Conversion.

#### g. Felonious intent.

### 10. Evidence.

### 12. Instructions.

## II. EMBEZZLEMENT

### 2. Elements of Offense (p. 774)

**Elements stated.**—"The crime of embezzlement from a national bank by an officer, clerk, or agent, within Revised Statutes,

5209, involves two general elements; one a breach of trust or duty with respect to the moneys, funds, or credits of the bank embezzled, which must have been lawfully in the custody or possession of the accused by virtue of his office or employment, although such possession need not have been exclusive of that of other officers, clerks, or agents; and, second, wrongful appropriation of such moneys, funds, or credits to his own use, with intent to injure or defraud the association or others. . . .

"The intent to injure or defraud . . . need not necessarily have been the object or purpose with which the act was done; but it is sufficient if the natural and necessary effect of the act was to injure or defraud the bank or others, and it was willfully and intentionally done." *Union Nat. Bank v. U. S. Fidelity, etc., Co.*, (1918) 143 La. 329, 78 So. 582.

## IV. MISAPPLICATION OF FUNDS, ETC.

### 2. Elements of Offense

#### d. Withdrawal of Funds (p. 777)

**Sufficiency of evidence.**—In *McCallum v. U. S.*, (C. C. A. 8th Cir. 1917) 247 Fed. 27, 159 C. C. A. 245, the evidence was summarized by the court as follows: "The sum of the evidence was that the St. Louis bank owed and had credited the Arkansas bank on August 31, 1914, \$110.80 interest on deposit balances during August; that on receipt of the St. Louis bank's statement of account during the first half of September, McCallum entered that \$110.80 on the reconciliation book of the Arkansas bank as an exception which showed a credit to the Arkansas bank of that amount with the St. Louis bank; that on October 15, 1914, he caused that \$110.80 to be charged in the regular account books of the Arkansas bank against the St. Louis bank, but failed to credit it to profit and loss, or to interest account, as he should have done; that the effect of this failure to credit profit and loss necessarily was to make the cash balance on that night appear to be \$110.80 over, but that balance was in fact \$5.53 short; that this discrepancy might have resulted from the abstraction of the \$110.80 from the bank by some one, or by a corresponding error in entries in the books regarding the accounts of others." It was held that the evidence was insufficient to show any abstraction or misapplication of funds.

### 9. Indictment

#### e. Conversion (p. 780)

**An averment of the taking of a false credit on the books of a bank, without alleging that the money was checked out or that the bank was in any way deprived of the use of it, is insufficient.** *McCallum v. U. S.*, (C. C. A. 8th Cir. 1917) 247 Fed. 27, 159 C. C. A. 245.

#### g. Felonious Intent (p. 781)

**Specific allegation.**—An indictment for misapplication of the funds of a national bank

must allege specifically the intent to defraud or injure. *McCallum v. U. S.*, (C. C. A. 8th Cir. 1917) 247 Fed. 27, 159 C. C. A. 245.

#### 10. Evidence (p. 781)

**Misleading question.**—In *McCallum v. U. S.*, (C. C. A. 8th Cir. 1917) 247 Fed. 27, 159 C. C. A. 245, the evidence showed that the accused failed to make a proper credit entry to profit and loss of a sum due to another bank. The court interrogated a witness as follows: "By the Court: Q. Supposing I came in the bank and deposit \$1,000, and I get it entered on my book, but on that evening there is no entry made on the books showing that I was credited with \$1,000 and the cash balance, what became of that \$1,000? A. It must have taken out of the cash." It was held that this question was misleading and improper.

**Intent.**—In a prosecution of a cashier of a national banking association under this section for misapplying the association's moneys, evidence tending to prove that the defendant, while acting as cashier, obtained money from the bank by discounting a note purporting to be that of a third party, but which was known to the defendant to be a forgery, such transaction not being one that was charged in any count of the indictment, is admissible on the question of the intent which accompanied the alleged misapplications for which the defendant was tried. *Apgar v. U. S.*, (C. C. A. 5th Cir. 1919) 255 Fed. 16, 166 C. C. A. 344, wherein the court said: "The existence of an intent on his part to injure or defraud the bank was in issue. The fact that, while acting as cashier, he obtained money from the bank on a note he knew to be forged, had some tendency to prove that when, on other occasions, he obtained the bank's money in the way charged in the indictment, he did so with intent to injure or defraud it."

#### 12. Instructions (p. 781)

In *McCallum v. U. S.*, (C. C. A. 8th Cir. 1917) 247 Fed. 27, 159 C. C. A. 245, the court, in commenting on a charge to the effect that intent to defraud is to be inferred from an act whose necessary tendency is to defraud, said: "If the court had instructed the jury that the defendant's intent to defraud the bank was an indispensable element of each offense with which he was charged, that there is a presumption of law that one intends the natural and probable effect of the acts he intentionally does, that this presumption may be overcome by evidence, that a defendant's testimony as to his intent and his explanations of his acts and omissions are competent and material evidence upon the subject of his intent, that acts are sometimes more persuasive evidence of intent than words, and that it was their duty to consider all the evidence of the acts and omissions of the defendant, the rebuttable presumption that one intends the natural and probable

effect of his acts intentionally done, the testimony of the defendant as to his intent and his explanations of his transactions, and from them all to determine whether or not they were satisfied beyond a reasonable doubt that the acts with which he was charged were done with intent to defraud the bank, the charge would have been more satisfactory. As given it minimized, it almost ignored, the testimony of the defendant regarding his intent, and it in effect instructed the jury that they must determine his intent, not from his testimony on that subject, his acts, his explanations, and the rebuttable presumption of law, but that they must determine it by the natural and probable effect of his acts in view of the legal presumption without regard to his explanations and testimony. It deprived the defendant of the just and proper consideration by the jury of his explanations and testimony, and for that reason was erroneous."

### Vol. VI, p. 796, sec. 5219. [First ed., vol. V, p. 157.]

#### I. Power of state to tax.

##### 1. Rule stated.

#### IV. Mode of collecting tax.

##### 1. Rule stated.

#### V. Discrimination.

##### 1. In general.

##### 2. "Moneyed capital."

##### 8. Shares taxed to owners.

#### VI. Exemptions and deductions.

##### 4. Real estate.

#### I. POWER OF STATE TO TAX

##### 1. Rule Stated (p. 797)

"Without considering some modifications made by the Act of February 10, 1868, c. 7, 15 Stat. 34, which are negligible for the purposes of the questions before us, the section is but the reproduction of a provision of § 41 of the Act of June 3, 1864, dealing with the organization of national banks. (13 Stat. 99, 112.) The forms of expression used in the section make it certain that in adopting it the legislative mind had in view the subject of how far the banking associations created were or should be made subject to state taxation, which presumably it was deemed necessary to deal with in view of the controversies growing out of the creation of the Bank of the United States and dealt with by decisions of this court. *McCulloch v. Maryland*, 4 Wheat. 316, 436; *Osborn v. United States Bank*, 9 Wheat. 738, 867; *Weston v. Charleston*, 2 Pet. 449. There is also no doubt from the section that it was intended to comprehensively control the subject with which it dealt and thus to furnish the exclusive rule governing state taxation as to the federal agencies created as provided in the section. All possibility of dispute to the contrary is foreclosed by the

decisions of this court. *People v. Weaver*, 100 U. S. 539; *Mercantile Bank v. New York*, 121 U. S. 138, 154; *Owensboro National Bank v. Owensboro*, 173 U. S. 664; *Covington v. First National Bank*, 198 U. S. 100. Two provisions in apparent conflict were adopted. First, the absolute exclusion of power in the state to tax the banks, the national agencies created, so as to prevent all interference with their operations, the integrity of their assets, or the administrative governmental control over their affairs. Second, preservation of the taxing power of the several states so as to prevent any impairment thereof from arising from the existence of the national agencies created, to the end that the financial resources engaged in their development might not be withdrawn from the reach of state taxation, but on the contrary that every resource possessed by the banks as national agencies might in substance and effect remain liable to state taxation. The first aim was attained by the non-recognition of any power whatever in the states to tax the federal agencies, the banks, except as to real estate specially provided for, and, therefore, the exclusion of all such powers. The second was reached by a recognition of the fact that, considered from the point of view of ultimate and beneficial interest, every available asset possessed or enjoyed by the banks would be owned by their stockholders and would be, therefore, reached by taxation of the stockholders as such. Full and express power on that subject was given, accompanied with a limitation preventing its exercise in a discriminatory manner, a power which again from its very limitation was exclusive of other methods of taxation and left, therefore, no room for taxation of the federal agency or its instrumentalities or essential accessories, except as recognized by the provision in question." *California Bank v. Richardson*, (1919) 248 U. S. 476, 39 S. Ct. 165, 63 U. S. (L. ed.) —, *reversing* (1917) 175 Cal. 813, 165 Pac. 152.

"The legislation in this state respecting the taxation of banks is based upon and is responsive to the federal legislation permitting the taxation by the state of shares in national banks which, because of their character as governmental agencies, would not otherwise be subject to such taxation; and the object and effect of this legislation was to enable the state to reach for taxing purposes the capital of banks as the property of its stockholders, thus placing the burden of state taxation equally upon national and state banks." *In re Feliciana Bank, etc., Co.*, (1918) 143 La. 46, 78 So. 169.

#### IV. MODE OF COLLECTING TAX

##### 1. Rule Stated (p. 799)

To the same effect as the original annotation, see *Junction City First Nat. Bank v. Moon*, (1918) 102 Kan. 334, 170 Pac. 33, L. R. A. 1918C 986.

**Ascertainment of tax as of what time.**—As relates to the function, liability, or authority of a bank, in its capacity as agent, for the payment of the tax upon its shareholders and their shares under the statute, an assessment is completed and the amount of the tax ascertained only upon the deposit of the tax rolls by the assessor. And this is true notwithstanding that the completed assessment, in so far as the direct liability of the stockholders and their shares is concerned, may perhaps relate back to the 1st day of January of the tax year. A proceeding by the state against the liquidator of an insolvent bank for the collection of the taxes assessed against its shareholders and their shares under the statute cannot be maintained, where it is neither alleged nor proved that the liquidator has, or that the bank had at the time of the deposit of the assessment rolls or on the date of its insolvency, any assets belonging or accruing to the shareholders. *In re Feliciana Bank, etc., Co.*, (1918) 143 La. 46, 78 So. 169.

**Duty of bank to pay tax on shares when statute does not provide for recovery over against shareholders.**—In *Adams v. Gulfport First Nat. Bank*, (1917) 116 Miss. 450, 77 So. 195, the facts involved and conclusions reached were stated by the court as follows: "This is a proceeding in which the revenue agent is attempting to back-assess the shares of appellee's capital stock, together with the accumulations thereon for the years 1902 to 1907, inclusive, during which it is alleged that these shares have escaped taxation. Appellee is a national bank, and claims, and the court below held, that the tax is imposed against it upon its capital stock as such, which the state is without power to do. It is true that a national bank is not subject to taxation upon its capital stock by the state or any subdivision thereof, but the shares into which its capital stock is divided, and which are the property not of the bank but of the holders thereof, may be taxed under the provisions of U. S. Rev. Stat. § 5219, and the taxes imposed thereon may be collected in the first instance from the bank itself, 'as the debt and in behalf of the shareholders, leaving to the corporation the right to reimbursement for the tax paid from the shareholders' (*Home Sav. Bank v. Des Moines*, (1907) 205 U. S. 503, 27 S. Ct. 571, 51 U. S. (L. ed.) at p. 910; *Jackson First Nat. Bank v. McNeel*, [C. C. A. 5th Cir. 1917] 238 Fed. 559, 151 C. C. A. 495); and such is the object sought to be accomplished by the statute by which the tax here sought to be collected is imposed (*Oxford Bank v. Oxford*, (1892) 70 Miss. 504, 12 So. 203; Constitution, § 181; Code of 1906, § 4273; *Hemingway's Code*, § 6907). That the statute makes no provision for a recovery by the bank from its shareholders for the taxes paid by it pursuant thereto is not material, for the reason that such recovery may be had 'under the general principle of law that one

who pays the debt of another at his request, can recover the amount from him.' *Home Savings Bank v. Des Moines*, supra."

#### V. DISCRIMINATION

##### 1. *In General* (p. 800)

**Overvaluation.**—In *Greeley First Nat. Bank v. Patterson*, (1918) 176 Pac. 498, the court in sustaining a tax said: "The injustice and discrimination, if any, arise wholly from an alleged overvaluation of property for taxation purposes enforced by action of the state tax commission and the state board of equalization. No claim is made of actual fraud or intentional wrong. The alleged overvaluation was the result of a flat increase ordered by the state tax commission and by the state board of equalization upon the aggregate value of all the property within the county originally assessed by the assessor, and imposed by the aforesaid central tax assessing agencies in strict conformity with the provisions of section 31 of the Act of 1911, ch. 216, p. 623."

##### 2. "*Moneyed Capital*" (p. 801)

The phrase "moneyed capital" does not include capital which does not come into competition with national banks and therefore does not cover capital in the hands of individuals. *Richmond v. Merchants Nat. Bank*, (Va. 1919) 98 S. E. 643.

##### 8. *Shares Taxed to Owners* (p. 804)

If a national bank owns shares of stock in other banks, state or national, it is subject to taxation on account of such shares as a shareholder, but those shares cannot be considered as assets of the bank in determining the amount the shareholders of the bank shall be taxed based on the value of its assets, for to do so might be to impose a double burden on such shareholders. *California Bank v. Richardson*, (1919) 248 U. S. 476, 39 S. Ct. 165, 63 U. S. (L. ed.) —, reversing (1917) 175 Cal. 813, 165 Pac. 152; *California Bank v. Roberts*, (1919) 248 U. S. 497, 39 S. Ct. 171, 63 U. S. (L. ed.) —, reversing (1916) 173 Cal. 398, 160 Pac. 225.

#### VI. EXEMPTIONS AND DEDUCTIONS

##### 4. *Real Estate* (p. 807)

A state statute taxing the stock of a national bank and providing that the value thereof shall be determined by deducting from the cash value of the shares the money invested in real estate within the state which has been taxed, is invalid. *Dennis v. Great Falls First Nat. Bank*, (1919) 55 Mont. 448, 178 Pac. 580.

**Vol. VI, p. 817, sec. 2.** [First ed., 1914 Supp., p. 261.]

**Abolition of federal reserve districts or banks.**—The Federal Reserve Board has no power to abolish any of the existing federal reserve districts or federal reserve banks, for

the merely negative statement of this section. (1915) 30 Op. Atty.-Gen. 497.

**Change of location of federal reserve banks.**—The Federal Reserve Board cannot legally change the present location of any federal reserve bank, whether there has been an alteration or readjustment in the district lines or not. (1916) 30 Op. Atty.-Gen. 517.

**Preservation of minimum capitalization.**—This section in prescribing a minimum capitalization of \$4,000,000 for federal reserve banks as a condition precedent to commencing business, does not require that such minimum capitalization shall be preserved when member banks reduce their capital stock or surplus, or cease to be members. (1916) 30 Op. Atty.-Gen. 517.

**Vol. VI, p. 826, sec. 10.** [First ed., 1914 Supp., p. 269.]

**Independent powers of Federal Reserve Boards.**—While one of the purposes of this section is to insure the preservation and supremacy of all existing powers of the Secretary of the Treasury in all cases where it may be claimed that such powers overlap or conflict with those of the Federal Reserve Board, nevertheless it clearly recognizes the existence of powers of the board independent of the Secretary in cases where no such conflict exists. (1914) 30 Op. Atty.-Gen. 308.

**Vol. VI, p. 833, sec. 15.** [First ed., 1914 Supp., p. 274.]

**"Revenues of the Government."**—All postal receipts, including fees only from the money-order business, are "revenues of the Government" within the meaning of this section, and may be deposited in federal reserve banks or in their member banks. (1916) 30 Op. Atty.-Gen. 553.

**Deposit of postal savings.**—The provision of this section that "No public funds of the . . . postal savings . . . shall be deposited, in the continental United States, in any bank not belonging to the system established by this Act," does not take effect until after a reserve bank has been authorized by the comptroller to "commence business" in the district and the Secretary "shall have officially announced" its establishment. Funds of the postal savings on deposit elsewhere at the time that the above clause becomes operative, need not be then transferred to, and redeposited in, a member or reserve bank. (1914) 30 Op. Atty.-Gen. 304.

**Vol. VI, p. 833, sec. 16.** [First ed., 1914 Supp., p. 275.]

**Mailing reserve notes under penalty envelopes.**—This section prohibits sending federal reserve notes through the mails under penalty envelopes or labels by the members of the Federal Reserve Board. (1915) 30 Op. Atty.-Gen. 456.

**Vol. VI, p. 843, sec. 5220.** [First ed., vol. V, p. 166.]

**Liability of stockholders.**—A transaction whereby one bank was dissolved by the vote of two-thirds of its stockholders, and its assets transferred to another bank, was held to be a sale creating no debt enforceable against the stockholders of the dissolved bank. *American Nat. Bank v. Commercial Nat. Bank*, (S. D. Ga. 1918) 248 Fed. 187.

**Actions pending dissolution.**—A national bank even in the process of dissolution may sue and be sued in its own name until its affairs are completely settled. *Farmers' Nat. Bank v. Johnston*, (Okla. 1918) 176 Pac. 236, 3 A. L. R. 99.

**Vol. VI, p. 873, sec. 5239.** [First ed., vol. V, p. 180.]

**II. Common law liability of directors and enforcement thereof.**

1. Liability in general.

4. Pleading.

**III. Statutory liability of directors and enforcement thereof.**

1. Duties as to management in general.

d. Delegation of duties.

3. "Knowingly violate or knowingly permit," etc.

**II. COMMON LAW LIABILITY OF DIRECTORS AND ENFORCEMENT THEREOF**

1. *Liability in General* (p. 874)

**Such liability affirmed.**—Directors of a national bank are not relieved from the common-law duty diligently to administer the affairs of the bank by the provisions of the National Bank Act, as is shown by the oath which they are required to take "to diligently and honestly administer the affairs of the association," as well as not "to knowingly violate or willingly permit the violation of any of the provisions" of such Act. *Bowerman v. Hamner*, (1919) 250 U. S. 504, 39 S. Ct. 549, 63 U. S. (L. ed.) —, *affirming McCormick v. King*, (C. C. A. 9th Cir. 1917) 241 Fed. 737, 154 C. C. A. 439.

The residence of a national bank director some 200 miles from the location of the bank does not excuse such utter abdication of his common-law responsibility for the conduct of its affairs and the flagrant violation of his oath of office, resulting in loss to others, as is shown by his failure to attend a single directors' meeting, regular or special, during the entire five and one-half years of the bank's existence, and his failure, being himself a banker, to make, or cause to be made, any examination whatever of the books or papers of the bank to determine its condition and the way in which it is being conducted. *Bowerman v. Hamner*, (1919) 250 U. S. 504, 39 S. Ct. 549, 63 U. S. (L. ed.) —, *affirming McCormick v. King*, (C. C. A. 9th Cir. 1917) 241 Fed. 737, 154 C. C. A. 439.

The common law liability of directors for damages flowing from their negligent acts

still remains, not being affected by this section. *Grandprey v. Bennett*, (S. D. 1919) 172 N. W. 514.

4. *Pleading* (p. 877)

The bill in a suit against national bank directors to obtain an accounting and a decree for money lost by alleged unlawful and negligent management of the bank's affairs may be so framed that, if the evidence fails to establish statutory negligence, but establishes common-law negligence, a decree may be entered accordingly; and thus the necessity for a resort to a second suit avoided. *Bowerman v. Hamner*, (1919) 250 U. S. 504, 39 S. Ct. 549, 63 U. S. (L. ed.) —, *affirming McCormick v. King*, (C. C. A. 9th Cir. 1917) 241 Fed. 737, 154 C. C. A. 439.

**III. STATUTORY LIABILITY OF DIRECTORS AND ENFORCEMENT THEREOF**

1. *Duties as to Management in General*

d. *Delegation of Duties* (p. 879)

**Waiver of by-law.**—A by-law, adopted by the directors of a bank at the time of its organization, and prior to the passage of this Act, providing for the appointment of a committee by the directors every six months to examine the affairs of the bank and report to the board at its next regular meeting, may be waived. *Dresser v. Bates*, (C. C. A. 1st Cir. 1918) 250 Fed. 525, 162 C. C. A. 541.

3. *Knowingly Violate or Knowingly Permit, etc.* (p. 880)

In general.—Directors of national banks are liable for violations of the provisions of this section only when such violations were committed knowingly. But there is in effect an intentional violation whenever a director deliberately refuses to examine that which it is his duty to examine, or deliberately refuses to do any act which under such provisions it is his duty to perform. *Grandprey v. Bennett*, (S. D. 1919) 172 N. W. 514.

**Declaration of dividends.**—The liability of a national bank director for voting and declaring dividends out of the capital stock is not an absolute liability, but the question of good faith, diligence, or knowledge on the part of the director enters into the question of his liability. *Williams v. Spensley*, (C. C. A. 7th Cir. 1917) 251 Fed. 58, 163 C. C. 308.

**Vol. VI, p. 903, sec. 5242.** [First ed., vol. V, p. 188.]

**II. ATTACHMENT, INJUNCTION, OR EXECUTION**

4. *Injunction or Execution*

a. *In General* (p. 913)

**Injunctions prohibited.**—The Act is broad enough "to inhibit a state court from issuing an injunction against a national banking association before final judgment against it." *America Nat. Bank v. Dure*, (1918) 148 Ga. 498, 97 S. E. 70.

## NATURALIZATION

Vol. VI, p. 947, sec. 2171. [First ed., vol. V, p. 208.]

**Section repealed.**—This section was repealed by Act of May 9, 1918, sec. 1, par. 11, set out in 1918 Supp. p. 491. That paragraph also contains the law affecting the admission to citizenship of alien enemies.

The words "at the time of his application" as used in this section refer to the time when the alien files his application for citizenship properly in the clerk's office of the court in the district of which he is at the time a resident. *In re Weisz*, (W. D. Ga. 1918) 250 Fed. 1008.

**War declared after filing of petition.**—Naturalization should not be granted where during the ninety days required to elapse after the filing of the petition war is declared whereby the petitioner becomes an enemy alien. *U. S. v. Kamm*, (E. D. Wis. 1918) 247 Fed. 968.

**Correction of petition filed before war.**—A petition by a native of Germany prior to the declaration which is insufficient to give jurisdiction cannot be amended and filed nunc pro tunc after the applicant has become an alien enemy. *In re Lindner*, (E. D. N. Y. 1917) 247 Fed. 138, wherein the court said: "There is no statute forbidding the filing of a petition while a state of war is existing. On the contrary, such petitions should be received when offered, and will go far to show the real purpose of those honestly acting with loyalty to the United States. But the law of April 14, 1802, as amended by the Act of July 30, 1813 (section 2171, R. S.), prohibits the admission 'then'—i. e., during the war—of a subject or denizen of the country at war with the United States. The court might have allowed the applicant to file his application before the declaration of war and the accidental omission of a clerical signature could have been later supplied. But the court has not the power to actually receive the petition after the declaration of war and 'then' complete a court proceeding over which jurisdiction had not been obtained before the declaration. The statute was enacted when the application and hearing could be completed at one hearing. The present law compels the lapse of 90 days before final hearing, and the case of *United States v. Meyer*, 241 Fed. 305, 154 C. C. A. 185, established the law for this circuit by excluding from the effect of section 2171 those cases in which the application was made (petition filed) before the declaration of war. But this does not allow the court to file nunc pro tunc those petitions which the court might feel would, if some physical occurrence had not intervened, have been actually on file."

1918 Supp., p. 491, sec. 1, par. 11.

**Alsatian as German citizen.**—An Alsatian must be regarded as a German citizen and not entitled to naturalization under this section except by consent of the President, where it appears that he was born before the cession of Alsace to Germany, but was at that time a child, and that his parents remained in Alsace, thus becoming German citizens. Where, however, the President has consented to his naturalization, no notice of his application need be given to the Department of Labor. *In re Pfeleiger*, (S. D. N. Y. 1918) 254 Fed. 511. In discussing the effect of the provisos of this paragraph it was said: "The Department of Labor suggests in opposition that no notice has been given to it as required under the first proviso to the eleventh paragraph of section 4 of the Naturalization Act, as amended. It is, however, an error to suppose that such a notice is necessary in cases of Germans where the declaration was made after April 6, 1915. In such cases the President alone may grant consent to the naturalization of an alien enemy under the third proviso of that section, and the inquiry precedent to that consent must be conducted by the Department of Justice. As the Department of Labor has no duties to perform respecting such cases, it is obviously unnecessary that notice should be given to it, and, indeed, to give such notice might presuppose the possibility of a decision by the Department of Labor different from the Department of Justice, an untoward result. The words in the third proviso, 'foregoing exemption,' mean the condition or exception set forth in the body of the eleventh paragraph, beginning with the words 'unless he made,' etc. The first proviso is attached both grammatically and in its meaning to this condition, but to nothing more. The third proviso reaches all cases within the general prohibition of the eleventh paragraph, except those included within the condition or exemption, but it does not reach those which are within the exclusive purview of the Department of Labor."

Vol. VI, p. 947, sec. 2172. [First ed., vol. V, p. 209.]

### I. FIRST CLAUSE (p. 948)

**Omission of name from petition and certificate.**—The fact that in the petition and the certificate the name of a minor child of the alien was inadvertently omitted does not prevent the child from becoming a citizen. *In re Hennig*, (E. D. N. Y. 1918) 248 Fed. 990, wherein an amendment of the certificate was allowed.

**Vol. VI, p. 950, sec. 2174.** [First ed., vol. V, p. 210.]

A master mariner is a "seaman" within the meaning of this section. *In re Scott*, (S. D. Ala. 1918) 250 Fed. 647. Concerning the meaning of the word "seaman" as used herein, the court said: "It is common knowledge that a man must be a seaman before he can be a master. It is manifest that the word 'seaman' might be used in different enactments in different senses, and the intended sense might appear from the context. If there is nothing in the context to show the sense in which the word is used, then it seems to me that it should be given the broadest meaning, so as to include a master, as well as a common seaman before the mast. Certainly an enabling act, such as this, should not receive such a narrow construction as to deprive one who comes within its terms of any rights thereby given, merely because he happened to be a high-class man instead of a low-class one. The fact that a man has made the most of his opportunities, and has risen to the head of his profession, should not bar him from receiving the benefits conferred on his profession. Nor, again, looking at the act from the angle of the benefit to this country from the people who are admitted as citizens, we should not admit the lower classes of a profession and deny admission to the heads of the profession, as it is manifest that the higher the class and more skillful the applicant, the more valuable citizen he would make."

**Time for application.**—The provision of the Act of June 29, 1906, requiring petition within seven years from the time of the declaration is applicable. *In re Britton*, (N. D. Cal. 1918) 248 Fed. 607.

**Vol. VI, p. 958, sec. 4, par. first.**  
[First ed., 1909 Supp., p. 366.]

**Omission of name of ruler of country.**—In *Banning v. Penrose*, (N. D. Ga. 1919) 255 Fed. 159, it was held that under section 2165 of the Revised Statutes (repealed by section 26 of this Act), a declaration which substantially complied with the statute and clearly indicated the country with which the applicant was severing his relations, was sufficient although the name of the ruler of such country was omitted.

**Error of clerk in stating residence.**—The fact that by an error of the clerk in filling out the declaration of intention the residence of the alien was insufficiently and ambiguously stated does not prevent the subsequent grant of naturalization on the declaration. *U. S. v. Smith*, (E. D. N. Y. 1917) 247 Fed. 131.

**Petition filed at temporary domicil.**—A declaration filed in good faith by an alien at a place where he is temporarily sojourning is sufficient to confer jurisdiction thereafter to grant naturalization. *In re Von Bernhardt*, (E. D. N. Y. 1916) 247 Fed. 129.

**Vol. VI, p. 959, sec. 4, par. second.**  
[First ed., 1909 Supp., p. 366.]

II. Signature and verification.

1. Signature.

III. Filing petition.

1. Time of filing.

V. Certificate.

II. SIGNATURE AND VERIFICATION

1. Signature (p. 961)

Under the proviso that if the declarant "filed his petition before the passage of this act" he need not sign the petition in his own handwriting, a person who made his declaration five days after the enactment of the statute, to wit, on July 5, 1906, but before it became effective, need not sign the petition. *In re Famolaro*, (W. D. Pa. 1918) 247 Fed. 596, wherein it was said: "From this proviso I think it is clear that all cases would be included where the declaration was in conformity with the law in force at the date of making such declaration. In other words, that the words 'passage of the act' refer to the date when the law went into effect, rather than the date of its actual enactment. If this were not so, then the legal status of an applicant declaring his intention immediately after the passage of the Act would be different from that of one declaring his intention immediately before that date, although their declaration was made under and in compliance with the same Act of Congress. This could hardly be, under an Act whose purpose, as expressed by the title, is 'to provide for a uniform rule for the naturalization of aliens throughout the United States.' And so I would read the proviso to the second paragraph of section 4 (section 4352), in these words:

"Provided, that if he has filed his declaration before the passage of this Act, he shall not be required to sign the petition in his own handwriting."

"The declarant in this case complied with the law in all respects as it was when he filed his declaration of intention. While it had been enacted that the petition for admission to citizenship 'must be signed by the applicant in his own handwriting,' such enactment had not gone into effect, and as to him was the same as if it had never been passed. The whole Act speaks, and of necessity must speak, as of the date when it became effective. Prior to that date, all the provisions of the Act in relation to naturalization had no legal existence. In legal effect, they were as if the Act had not been passed. It is entirely natural that that date should be regarded as the date of its passage. This interpretation, which makes all of its provisions harmonious, should be adopted unless there is a compelling reason to the contrary. In other words, I think the spirit of the Act should prevail over its mere letter."

### III. FILING PETITION

#### 1. *Time of Filing* (p. 962)

**Declaration filed before 1906.**—Where the declaration of intention was made before the enactment of the statute of June 29, 1906, the petition must be filed within seven years of the date of the Act. *U. S. v. Morena*, (C. C. A. 3d Cir. 1918) 247 Fed. 484, 159 C. C. A. 538.

**Effect of seaman's act.**—The requirement of petition within seven years is not affected by R. S. sec. 2174 relating to naturalization of seamen. *In re Britton* (N. D. Cal. 1918) 248 Fed. 607.

#### V. CERTIFICATE (p. 964)

**Correction of errors.**—By a subsequent petition unintentional errors of the original petition in stating the age of the alien and the names and ages of his minor children may be corrected. *In re Hennig*, (E. D. N. Y. 1918) 248 Fed. 990.

### Vol. VI, p. 967, sec. 4, par. fourth.

[First ed., 1909 Supp., p. 368.]

An alien who has pleaded guilty of conspiring to hire persons to enlist in the service of a foreign prince in violation of section 10 of the Penal Laws [see vol. 7, p. 430] and has been sentenced to pay a fine therefor, although subsequently pardoned by the President, will be denied naturalization on the ground that he has not behaved "as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." *In re Addis*, (N. D. Cal. 1918) 252 Fed. 886.

### Vol. VI, p. 987, sec. 15. [First ed., 1909 Supp., p. 373.]

#### III. Grounds for cancellation.

##### 2. Fraud.

##### 3. Illegal procurement.

#### III. GROUNDS FOR CANCELLATION

##### 2. *Fraud* (p. 991)

**False statement as to surrender of foreign allegiance.**—Where a native of Germany is naturalized under R. S. sec. 2165, now repealed by this Act, and some years later during a war between the United States and Germany is shown to have expressed a desire for the victory of Germany and recognized his allegiance to that country as superior to that owing by him to the United States, his certificate of naturalization may be cancelled on the ground that it was obtained by fraud. *U. S. v. Wursterbarth*, (D. C. N. J. 1918) 249 Fed. 908.

**Cancellation of certificate of member of I. W. W.**—In *U. S. v. Swelgin*, (D. C. Ore. 1918) 254 Fed. 884, it was held that the certificate of naturalization of an alien

should be cancelled, where it was shown that at the time of his naturalization and during the five years preceding it, he was a member of an organization known as the I. W. W., which advocated anarchy and the overthrow of the government, and the defendant admitted that he believed in the principles of the organization.

#### 3. *Illegal Procurement* (p. 992)

**Meaning of "illegally procured."**—"A reading of the cases gives the impression that an effort to define the terms 'illegally procured' has at times resulted in their conversion into words either of identical meaning or scope, or such as themselves necessitate or are susceptible of further interpretation or definition. For example, to say that a certificate is 'illegally procured,' when it is issued without 'authority of law,' or when it is in effect 'false' or 'spurious,' is not very helpful in the very cases before us. If section 2171 [see vol. 6, p. 947] be construed one way, it can surely be said that there is no authority in law for admitting the alien enemy subjects; whereas, a different view of the section leads to the opposite result. The question whether there has been continuous residence may upon one view of the facts bring the applicant within, and another view leave him without, the authority of the law to have his application granted; and as hereinafter shown, whether an application was heard in 'open' court may, upon the facts, lead to a diversity of views.

"Obviously, the term 'illegally procured' was used to comprehend something in addition to fraud; and the difficulties which attend a restricted interpretation have been referred to as a preliminary to a consideration of two cases decided by the United States Supreme Court, dealing with the scope of section 15, to the end of answering the question whether the proposition urged by the defendants here, in view of the result in those two cases, can be considered any longer open to debate. These cases are *Johannessen v. United States*, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. Ed. 1066, and *United States v. Ginsberg*, 243 U. S. 472, 37 Sup. Ct. 422, 61 L. Ed. 853." *U. S. v. Kamm*, (E. D. Wis. 1918) 247 Fed. 968.

**Naturalization of alien enemy.**—Naturalization granted in a state court to one who became an alien enemy by the outbreak of war after the filing of his petition but before the hearing thereof may be set aside by a proceeding in a federal court. *U. S. v. Kamm*, (E. D. Wis. 1918) 247 Fed. 968.

### Vol. VI, p. 996, sec. 23. [First ed., 1909 Supp., p. 375.]

**Sufficiency of indictment.**—An indictment for a violation of this section which alleges that the defendant in a naturalization proceeding testified that he had never operated



a saloon, nor been arrested, nor charged with the commission of crime, nor found guilty of violating any state law, whereas in fact it was not and is not true, and that at the time of so swearing the defendant did not believe it to be true, that he had not operated a saloon, etc., is not subject to attack upon the ground that it does not affirmatively state such facts. Also such an

indictment which alleges that the defendant knowingly gave false testimony regarding a material fact need not allege that the defendant took oath falsely nor that the fact was "required to be proved in such proceeding." *Gregorat v. U. S.*, (C. C. A. 5th Cir. 1918) 249 Fed. 470, 161 C. C. A. 428.

## NAVY

**Vol. VI, p. 1104.** [*Dental Reserve Corps.*] [First ed., 1914 Supp., p. 300.]

**Repeal of earlier Acts.**—This Act does not repeal the provision of the Act of August 22, 1912, ch. 335 (see vol. 6, p. 1101), authorizing appointments to the grade of acting assistant dental surgeon in the navy from among dental graduates in civil life. (1914) 30 Op. Atty-Gen. 279.

**Vol. VI, p. 1148.** [*Machinists, etc.*] [First ed., 1909 Supp., p. 399.]

**Commission to machinist invalid.**—In *Hooper v. U. S.*, (1918) 53 Ct. Cl. 90, a commission granted to a machinist was held

to be invalid because made in violation of R. S. secs. 1493 and 1505 (6 Fed. Stat. Ann. 1140, 1143).

**Vol. VI, p. 1226, sec. 22.** [First ed., vol. V, p. 343.]

**Permanent detachment of staff officers of Marine Corps from headquarters.**—Article 4141 of the Navy Regulations, in that it permits officers of the staff departments of the Marine Corps to be detached permanently from headquarters of the command and gives the power to the commandant of the corps to impose duties upon these staff officers inconsistent with their staff functions, is invalid as contravening this section. (1913) 30 Op. Atty-Gen. 234.

## OFFICERS OF MERCHANT VESSELS

**Vol. VI, p. 1256, sec. 4442.** [First ed., vol. V, p. 400.]

**Revocation of license.**—A pilot's license cannot be revoked for violation of this section where the charge against him is for

violation of article 16 of the Pilot Rules, 2 Fed. Stat. Ann. 389, the reference to this section in the charge preferred being merely incidental. *Benson v. Bulger*, (W. D. Wash. 1918) 251 Fed. 757.

## PATENTS

**Vol. VII, p. 11, sec. 4883.** [First ed., vol. V, p. 417.]

**Purpose and effect of patent right.**—"A patent conveys to the patentee only a negative right of exclusion, not the natural original right to make, use, and sell the device covered by it." *Webster Electric Co. v. Podlesak*, (N. D. Ill. 1919) 255 Fed. 907.

**Presumption of validity.**—The presumption of the validity of a patent extends to the fact that the patentee was the inventor and not an appropriator of the invention of another. "Nothing could be more completely invalid than a patent for invention to one who invented nothing." *Proctor, etc., Co. v. Berlin Mills Co.*, (C. C. A. 2d Cir. 1919) 256 Fed. 23.

**Vol. VII, p. 23, sec. 4886.** [First ed., vol. V, p. 421.]

- I. In general.
- II. Who may obtain patents.
- III. What may be patented.
- IV. Invention.
- VI. Novelty and anticipation.
- VII. Prior use or sale.

### I. IN GENERAL (p. 23)

**Effect of earlier decisions.**—"The view entertained by the courts in the earlier days of the life of a patent is usually a safer guide with which to judge invention and scope of claims than new and later contentions, which, as the case may be, seek to enlarge or defeat the inventor's accomplishment."

*American Graphophone Co. v. Emerson Phonograph Co.*, (S. D. N. Y. 1918) 255 Fed. 574.

## II. WHO MAY OBTAIN PATENTS (p. 23)

**Right to patent—requirements—Necessity of discovery.**—To same effect as original annotation, see *Knapp v. Will, etc., Co.*, (N. D. N. Y. 1918) 253 Fed. 191.

**Knowledge of inventor.**—To same effect as original annotation, see *Proctor, etc., Co. v. Berlin Mills Co.*, (C. C. A. 2d Cir. 1919) 256 Fed. 23.

**Employer and employee.**—If an employee of a corporation is "only a hired man" taking orders from another, an invention by him relating to the industry in which the corporation is engaged belongs to him and the corporation takes merely an implied license or shop right to use it. But if a principal or directing officer makes an invention which is essential to the success of the corporation and which is "developed by the whole corporate force as something absolutely necessary," it is inequitable to permit him to retain title thereto. *Dowse v. Federal Rubber Co.*, (N. D. Ill. 1918) 254 Fed. 308.

## III. WHAT MAY BE PATENTED (p. 35)

**An art dependent on mechanism.**—To same effect as original annotation, see *Buffalo Forge Co. v. Buffalo*, (C. C. A. 2d Cir. 1918) 255 Fed. 83.

**Means of producing results generally.**—To same effect as first paragraph of original annotation, see *Dudlo Mfg. Co. v. Varley Duplex Magnet Co.*, (C. C. A. 7th Cir. 1918) 253 Fed. 745, 165 C. C. A. 339.

**Different improvements as separate inventions.**—To same effect as original annotation, see *Jay v. Weinberg*, (N. D. Ill. 1918) 250 Fed. 469.

**Patent for function.**—To sustain a subsequent patent, there must be something distinctively different from that covered by the first patent. The mere function of a patented invention cannot be made the subject of a separate and subsequent patent. *Paramount Hosiery Form Drying Co. v. Moorhead Knitting Co.*, (M. D. Pa. 1918) 251 Fed. 897.

**Scope of patent.**—In *Henry v. Los Angeles*, (C. C. A. 9th Cir. 1919) 255 Fed. 769, the court, in holding that the scope of every patent was limited to the invention described in the claims, said: "As has been very recently said by the Supreme Court, referring to the claims of a patent:

"These so mark where the progress claimed by the patent begins and where it ends that they have been aptly likened to the description in a deed, which sets the bounds to the grant which it contains. It is to the claims of every patent, therefore, that we must turn when we are seeking to determine what the invention is, the exclusive use of which is given to the inventor by the grant provided for by the statute; 'he can claim nothing beyond them.' Motion Picture

*Patents Co. v. Universal Film Mfg. Co.* et al., 243 U. S. 502, 510, 37 Sup. Ct. 416, 61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959."

**Device patent.**—The patentee cannot patent a combination of device and material upon which the device works, nor limit other persons from the use of similar material by claiming a device patent. *F. N. Burt Co. v. Ritchie*, (E. D. N. Y. 1918) 251 Fed. 909.

**A hit or miss formula** which is not such a disclosure to those skilled in the art as would enable them to practice its manufacture without experimentation is not patentable. *Solva Waterproof Glue Co. v. Perkins Glue Co.*, (C. C. A. 7th Cir. 1918) 251 Fed. 64, 163 C. C. A. 314.

## IV. INVENTION (p. 44)

**Conception of invention.**—Whenever a new thought of real value is brought into combination with some means by which the thought is given physical expression, the combination is patentable, although the means may by itself show limited novelty, or even be such as that by itself it would not be patentable. *Aeolian Co. v. Cunningham Piano Co.*, (E. D. Pa. 1918) 251 Fed. 301.

**Product of mechanical skill.**—Mechanics who have only general mechanical skill, and who have had no part in the invention of the general organization of a machine, are called upon to remedy defects in details of construction, or to make, by application of their mechanical skill, improvements in the mechanical construction and operation of parts. For example: A mechanic who prevents overrotation of a numeral wheel in a counting machine by means of a stop does not invent a counting machine, even though he was first to use a positive stop in a counting machine. If an improved detail of construction is one within the knowledge and practice of mechanics, it does not matter that it was made by one who was also inventor of new combinations which he is justly entitled to claim as inventions. For what he does merely as a mechanic he stands exactly as other mechanics. *Scott v. Hemphill Mfg. Co.*, (D. C. R. I. 1917) 247 Fed. 540.

A mere mechanical adaptation of familiar materials and methods not rising to the dignity of invention was held to be shown by the patents under consideration in *Werk v. Parker*, (1919) 249 U. S. 130, 39 S. Ct. 197, 63 U. S. (L. ed.) —, affirming (C. C. A. 3d Cir. 1916) 231 Fed. 121, 145 C. C. A. 309.

**Improvement along lines suggested by engineering skill.**—A patent for an improvement of a shallow beam construction of a concrete floor will be declared invalid, where, apart from simplifying the engineering analysis in placing the reinforcement in regions of tension, it simply proceeds along lines suggested by engineering skill. *Condron Co. v. Corrugated Bar Co.*, (N. D. Ill. 1919) 256 Fed. 672.

**Improvement infringing prior patent.**—A device may be at the same time an infringement upon the relatively generic claim of a prior patent and also be a patentable improvement thereon, and there is no inconsistency—even presumptive—between these conclusions. *General Electric Co. v. Cooper Hewitt Electric Co.*, (C. C. A. 6th Cir. 1918) 249 Fed. 61, 161 C. C. A. 121.

**Change of size or proportion.**—To the same effect as the original annotation, see *Benjamin Electric Mfg. Co. v. Northwestern Electric Equipment Co.*, (C. C. A. 2d Cir. 1918) 251 Fed. 288, 163 C. C. A. 444.

**Increase in strength.**—"It is said that these patents relate to the means for doing a difficult thing, viz., inserting apparatus strong enough to withstand the increasing demands of railway service into that very contracted space between the sills of a car allowed by the Master Car Builders' Association for the insertion of draft-rigging. From this premise it is argued that those who furnish such increased strength in draft-rigging without increase of size should be deemed to have displayed invention by (as counsel put it) 'the solution of these difficulties.' This assertion is erroneous as matter of law. Mere increase in strength is not 'invention' (*Planing Machine Co. v. Keith*, 101 U. S. 490, 25 L. Ed. 939); and that no change in form, proportions, or degree so as to do the same thing in the same way, though with better results, is invention, has been recently reasserted in *Railroad Supply Co. v. Elyria, etc., Co.*, (May 21, 1917) 244 U. S. 285, 37 Sup. Ct. 502, 61 L. Ed. 1136." *Miner v. T. H. Symington Co.*, (C. C. A. 2d Cir. 1917) 247 Fed. 515, 160 C. C. A. 25.

**Improvement in degree.**—To same effect as original annotation, see *Huebner-Toledo Breweries Co. v. Mathews Gravity Carrier Co.*, (C. C. A. 6th Cir. 1918) 253 Fed. 435, 165 C. C. A. 177; *Willamette Iron, etc., Works v. Columbia Engineering Works*, (C. C. A. 9th Cir. 1918) 252 Fed. 594, 164 C. C. A. 510.

**The application of an old force "through known instruments, used in their accustomed manner to known objects and producing known effects," is not invention.** *Matteawan Mfg. Co. v. Emmons Bros. Co.*, (C. C. A. 1st Cir. 1918) 253 Fed. 372, 165 C. C. A. 154.

**Discovery of a previously unknown law of operation involved in a known method is not invention.** *Luten v. Whittier*, (C. C. A. 6th Cir. 1918) 251 Fed. 590, 163 C. C. A. 584.

**Omission of useless parts.**—The accomplishment of the same result by the deletion of one of the elements of another invention, without substitution, is not infringement. *Ritter v. Veneer Machinery Co.*, (C. C. A. 7th Cir. 1918) 251 Fed. 610, 163 C. C. A. 604.

**Substitution of equivalents.**—To same effect as second paragraph of original annotation,

see *Butler v. Pratt*, (C. C. A. 8th Cir. 1918) 253 Fed. 654, 165 C. C. A. 280; *W. S. Tyler Co. v. Ludlow-Saylor Wire Co.*, (C. C. A. 8th Cir. 1918) 254 Fed. 436, 166 C. C. A. 68.

**Combinations.**—Where there are two devices in the same machine, each successively doing its work precisely as it would if the other was altogether absent, they do not form a true combination, and in considering whether the machine is an infringement the claims relating to the two devices will be considered separately. *E. W. Bliss Co. v. Southern Can Co.*, (D. C. Md. 1918) 251 Fed. 903.

**Combination of old devices.**—To same effect as first paragraph of original annotation, see *Willard v. Union Tool Co.*, (C. C. A. 9th Cir. 1918) 253 Fed. 48, 165 C. C. A. 646.

**New combination of old elements.**—That the various elements entering into a mechanical combination, considered separately and apart from each other, are old and well known, does not negative patentability where through the exercise of the inventive faculty they are so assembled as to produce a new and useful result. Patentable invention is often displayed in the selection and adjustment of old and well-known devices to be used in combination to produce such a result. And by analogy the same is true of the various steps entering into a patented process. *Union Sulphur Co. v. Freeport Tex. Co.*, (D. C. Del. 1918) 251 Fed. 634.

If a new combination and arrangement of known elements produces a new and beneficial result never attained before, it is evidence of invention. *Lyon Non-Skid Co. v. Hartford*, (S. D. N. Y. 1917) 247 Fed. 524.

If invention is wholly lacking, a patent cannot be sustained even for the specific combination of specifically contrived elements. *Motion Picture Patents Co. v. Cahuff Supply Co.*, (C. C. A. 3d Cir. 1918) 251 Fed. 598, 163 C. C. A. 592.

Where all the elements of invention are old but one, and the addition of that one is not invention, even a combination claim is void. *Cutler Mail Chute Co. v. American Mailing Device Corp.*, (C. C. A. 2d Cir. 1917) 247 Fed. 508, 160 C. C. A. 18.

A combination of old elements so that each performs successively its customary function without coaction of the elements combined is not patentable. *Moore v. Saunders*, (C. C. A. 8th Cir. 1917) 247 Fed. 314, 159 C. C. A. 408.

If the thing is old, and is applied to perform its old functions, it remains in the prior art, and cannot be made novel, in the sense of the patent law, merely because used in new surroundings that do not affect its character or mode of operation. *Robinson v. Tubular Woven Fabric Co.*, (D. C. R. I. 1917) 248 Fed. 526.

**Changing position of old elements.**—And the question of invention is just this—was it of patentable novelty to reposition the

old parts of a well-known machine, if the change produced either a new or an improved result? The answer to this query depends on whether the result is new or merely an improvement, whether the difference obtained is one of kind or of degree. *Mayer v. Mutschler*, (C. C. A. 2d Cir. 1918) 248 Fed. 911, 161 C. C. A. 29.

**Combination with new element.**—To same effect as original annotation, see *Liquid Carbonic Co. v. Gilchrist Co.*, (C. C. A. 7th Cir. 1918) 253 Fed. 54, 165 C. C. A. 652.

**Extraneous combination.**—The patentee cannot claim as invention a combination that has nothing whatever to do with the purposes of the device, unless the patentee uses some clear language making the extraneous combination applicable. *F. N. Burt Co. v. Ritchie*, (E. D. N. Y. 1918) 251 Fed. 909.

**Combination producing new result.**—To same effect as original annotation, see *Knapp v. Will, etc., Co.*, (N. D. N. Y. 1918) 253 Fed. 191; *Disc Grader, etc., Co. v. Austin-Western Road Machinery Co.*, (C. C. A. 8th Cir. 1918) 254 Fed. 430, 166 C. C. A. 62.

**Merely bringing together old devices.**—To same effect as first paragraph of original annotation, see *Huebner-Toledo Breweries Co. v. Mathews Gravity Carrier Co.*, (C. C. A. 6th Cir. 1918) 253 Fed. 435, 165 C. C. A. 177.

**Old device separated into parts.**—A porcelain insulator knob duplicating in two parts a device previously made in one lacks invention. *Avery-Loeb Electric Co. v. Markel*, (C. C. A. 6th Cir. 1917) 247 Fed. 109, 159 C. C. A. 327.

**Practical value as criterion.**—The union of the selected elements may be an improvement upon anything the art contains, but if, in combining them, no novel idea is developed, there is no patentable invention, however great the improvement may be. *Turner v. Lauter Piano Co.*, (C. C. A. 3d Cir. 1918) 248 Fed. 930, 161 C. C. A. 48.

**Old process applied to analogous subject or use.**—To same effect as original annotation, see *Armstrong Seatag Corp. v. Smith's Island Oyster Co.*, (C. C. A. 4th Cir. 1918) 254 Fed. 821, 166 C. C. A. 267.

**Use of additional apparatus to accomplish particular purpose.**—In considering the charge of infringing a patent of an apparatus and process for mining sulphur, the court in *Union Sulphur Co. v. Freeport Tex. Co.*, (D. C. Del. 1918) 251 Fed. 634, said: "The charge of infringement cannot be avoided by some additional apparatus or operation necessitated by the difference between the formations containing the sulphur respectively at Bryan Mound and on the premises of the plaintiff, so long as such additional apparatus and operation do not change the nature or elements of the combination process under the patents in suit or the apparatus thereunder for the conduct of such process, but are resorted

to merely for the purpose of enabling the apparatus and process of the patents in suit to be used with effect."

**Reduction to practice.**—An invention may be patentable as possessing utility in the sense of the law, although an improvement may be necessary to its commercial success. *Union Sulphur Co. v. Freeport Tex. Co.*, (D. C. Del. 1918) 251 Fed. 634.

**Obtaining successful results.**—To the same effect as the original annotation, see *Union Sulphur Co. v. Freeport Tex. Co.* (D. C. Del. 1918) 251 Fed. 634, wherein the court said: "The extreme importance of effecting the raising of sulphur from great depths to the surface of the ground was widely felt and recognized. It had long claimed the attention of scientific men and mining engineers. Yet it was Frasch, and he alone, who reached the long sought goal. Under these circumstances the law requires that whatever question may exist as to patentability in the improved apparatus and process covered by the patents in suit should, so far as consistent with reason, be resolved in favor of patentability. The conclusion of patentability is not, however, exclusively to be based upon the presumption arising from the grant of letters patent, or from the meeting of a long-felt need, or the utility of mining sulphur under the improved methods of the patents in suit, but also upon the essential character of the improvements as respects invention, novelty and utility."

**Commercial success.**—"We are well aware of the risk of assuming that the mere success of an invention determines its patentability; but, when it follows a long history of failure, we think it puts upon one who challenges its originality a duty of showing that the success arose from advertising, exploitation, or the removal of external commercial conditions, which had nothing to do with the difficulties of invention." *Auto Pneumatic Action Co. v. Kinder*, (C. C. A. 2d Cir. 1917) 247 Fed. 323, 159 C. C. A. 417.

The presumptions from the issuance of the patent and from the commercial success in the sale of plaintiff's bracelet links are not sufficient to overbear the manifest equivalency of functions between the two patents, and the extent of sales is more directly traceable to the unique advertising the article has received (see *Eisenstadt Mfg. Co. v. J. M. Fisher Co.*, 241 Fed. 241, 154 C. C. A. 161) than to any patentable novelty. *Butler v. Pratt*, (C. C. A. 8th Cir. 1918) 253 Fed. 654, 165 C. C. A. 280.

To enter an art crowded with a multitude of similar forms and secure an immediate and notable success is in itself sufficient evidence of invention and conclusive evidence of novelty. The very fact that there are many similar devices generally resembling the new one, which have had only a brief success, or none at all, instead of indicating

a want of invention, is the best evidence to the contrary. Where many failed, one has succeeded, and in so brilliant a fashion as to suggest the presence of the magic touch which is invention. *Luminous Unit Co. v. Freeman-Sweet Co.*, (N. D. Ill. 1918) 249 Fed. 876.

"It is true that the books are full of cases in which courts have regarded the success of the plaintiff's patent as an important test of invention, and we are in no sense disposed to question its value in proper cases. Yet it is a hazardous rule, and one which is quite likely to result in confusing genuine invention with imagination in advertising and energy and business skill in promotion. Where the art presents a case of earlier efforts, unsuccessful because of the absence of what the patentee contributed, and followed by a wide success after that contribution was added, it is reasonable to infer that the art needed that feature, and that it was not so easy to invent as might seem to us, who necessarily have no proficiency in the art. It by no means follows that every successful exploitation of a patent complies with these conditions; there are many other reasons for success, which need not be detailed." *National Sweeper Co. v. Bissell Carpet Sweeper Co.*, (C. C. A. 2d Cir. 1918) 249 Fed. 196, 161 C. C. A. 232.

Commercial success is not a controlling factor where lack of novelty is clear. *Avery-Loeb Electric Co. v. Markel*, (C. C. A. 6th Cir. 1917) 247 Fed. 109, 159 C. C. A. 327.

In *Benjamin Electric Mfg. Co. v. Northwestern Electric Equipment Co.*, (C. C. A. 2d Cir. 1918) 251 Fed. 288, the court said: "Inasmuch, however, as the problem and its solution, in a mechanical sense and to those who look backward, seem very simple, while electrically there is no novelty at all, we consider it appropriate to invoke commercial success as evidence of invention, and a reason for broad construction of claims, if that be necessary. No instance is at present remembered of a more marked or rapid success achieved by a patented article which, to get a market, had to displace existing appliances made by skilled and powerful manufacturers. This is a feat very different from inducing the public to form a new habit, due quite as much to plausible advertising as intrinsic merit, or from obtaining a species of success for a patented adjunct to an existing and meritorious article. *Locklin v. Buck*, 159 Fed. at 436, 86 C. C. A. 414. Prompt and extensive use plus displacement of earlier devices is 'of itself' persuasive evidence of invention (*Minerals Separation v. Hyde*, 242 U. S. at 270, 37 Sup. Ct. 82, 61 L. ed. 286), a form of statement stronger, we think, than has before fallen from that court on this subject."

Acquiescence not only assists in finding invention, but justifies breadth of construction. *Benjamin Electric Mfg. Co. v. Northwestern Electric Equipment Co.*, (C. C. A. 2d Cir. 1918) 251 Fed. 288, 163 C. C. A. 444.

## VI. NOVELTY AND ANTICIPATION (p. 83)

**Pioneer patent.**—A pioneer patent is one which meets an old or plainly recognized want by an entirely new method of approach. *F. N. Burt Co. v. Ritchie*, (E. D. N. Y. 1918) 251 Fed. 909.

**Prior art.**—Although an invention has never been patented or described in any printed publication and is not known to a patentee of a similar invention, yet it is a part of the prior art with reference to which the character of the patentee's variation therefrom must be judged. *Jones v. Sykes Metal Lath, etc., Co.* (C. C. A. 6th Cir. 1918) 254 Fed. 91, 165 C. C. A. 501.

**Concealed invention.**—"It will not be usually easy to make sure that the first inventor or user had been successful in keeping that which he was doing or using an absolute secret. In spite of all his precautions, some hint, suggestion, or rumor of it may have come indirectly, if not directly, to the second Richmond. . . To find out the real truth in such matters is well-nigh impossible. The second inventor may have himself forgotten, or never clearly appreciated, what originally put the inventive idea into his head, and yet it may well have been something said or suggested by one who, all unknown to him, had some information as to the earlier device. Into such inquiries it will seldom be profitable to go. They will be unnecessary, if we hold fast to the letter of the statute, which forbids the patenting of anything before known or used by others in this country, admitting such exceptions to it only as are clearly recognized and precisely defined by decisions of courts of controlling authority. It is believed that if any such exception as that contended for by the plaintiff has been so established (and it is not intended to intimate that it has been), it is limited, so far as concerns inventions which are clearly anticipations and have been in continuous use, to cases in which (a) the first inventor had deliberately made up his mind to practice his invention secretly, because he thought he could thereby make out of a monopoly in fact more than he could obtain from one legally given by the patent laws, and (b) in which there was proved to demonstration that his efforts to keep the invention secret had been absolutely successful." *E. W. Bliss Co. v. Southern Can. Co.*, (D. C. Md. 1918) 251 Fed. 903.

**Reduction to practice**—*The first reducer.*—To same effect as original annotation, see *Hildreth v. Mastoras*, (D. C. Ore. 1918) 253 Fed. 68.

**Application as reduction to practice.**—To same effect as original annotation, see *Willard v. Union Tool Co.*, (C. C. A. 9th Cir. 1918) 253 Fed. 48, 165 C. C. A. 646.

Where several months prior to the plaintiff's application for a patent for the idea of rolls for cutting expanded metal, the defendants' predecessor perfected such a machine which was operated by hand sufficiently to

demonstrate its effectiveness, this is a sufficient reduction to practice of the idea involved to establish a claim of anticipation of the plaintiff's patent, and the fact that the rolls were not operated by power at that time, because they were intended to be only a part of the complete machine which should cut and expand, and the expanding part was not ready, is immaterial, as there was not necessary connection between the two parts. *Jones v. Sykes Metal Lath, etc., Co.*, (C. C. A. 6th Cir. 1918) 254 Fed. 91, 165 C. C. A. 501.

A patent for a device which is not practical and is never reduced to practice is not an anticipation. *U. S. Metal, etc., Co. v. American Keyless Kap Corp.*, (S. D. N. Y. 1918) 250 Fed. 1024. Compare *Dalton Adding Mach. Co. v. Rockford Milling Mach. Co.*, (N. D. Ill. 1918) 253 Fed. 187.

**Seniority of patents.**—To the same effect as the original note, see *Camp v. Portable Wagon Dump, etc., Co.*, (C. C. A. 7th Cir. 1918) 251 Fed. 603, 163 C. C. A. 597.

"When two patents for the same invention have been issued to independent inventors, the rule is that the dates of their inventions are: (1) The date of the patents; (2) the dates of the applications, provided the application sufficiently describes the invention; and (3) the dates of actual reduction to practice." *Willard v. Union Tool Co.*, (C. C. A. 9th Cir. 1918) 253 Fed. 48, 165 C. C. A. 646.

**Invention first patented in foreign country**—*Date of patent.*—Where an invention is first patented abroad and later in this country, the date of the foreign application is the effective date of the American patent. *Jay v. Weinberg*, (N. D. Ill. 1918) 250 Fed. 469.

**Imitation of another product.**—A "sample card" showing on paper the exact appearance of a fabric attached to paper is not patentable. "In one use of the word, its novelty consists wholly in the perfection of imitation. The new 'product' is the production of illusion; i. e., making the eye believe that actual pieces of cloth are in view. But patentable novelty must be more than this. Never can the patent law wholly divorce itself from the idea of 'means,' for that word suggests or implies the meritorious human effort which is the object of the law to reward. If successful imitation were per se patentable, the selection and use of a natural product for that purpose would be within the Act (compare *Denton v. Fulda*, 225 Fed. 537, 140 C. C. A. 521." *Simplex Lithograph Co. v. Renfrew Mfg. Co.*, (C. C. A. 2d Cir. 1918) 250 Fed. 863, 163 C. C. A. 177.

**Public disclosure or publication** to be effective as such must be a revelation of an invention so publicly published or disclosed as to raise a presumption that the public concerned with the art would know of it. Where application for a patent is filed, and no change therein is made in the Patent Office, the specifications as filed become part of the subsequently issued

patent. But where changes in the application are made after filing, particularly where a division is ordered, and pursuant thereto certain features of the original application are eliminated therefrom, there is nothing in the issued patent to show the specification as originally filed, nor, indeed, anything to indicate that any specification was ever filed, other than the one which appears as part of the patent as issued. The file wrapper alone will disclose what the original application was, and what, if any, changes in the application intervened before issuing of patent. It is within the domain of possibility that as to every patent which has been granted the original application disclosed some other invention unrelated to that for which the patent issued, and which only an examination of the file wrapper would reveal. If, therefore, disclosure of invention other than that for which the patent was issued, but which only the file wrapper would reveal, is to be considered as prior publication within the meaning of the law, no patentee could be certain that there had not been prior publication of his invention through its inclusion in some application as originally filed, unless every file wrapper in the Patent Office were searched to eliminate the possibility that the invention in question at some prior time had been in such manner disclosed. *Camp v. Portable Wagon Dump etc., Co.*, (C. C. A. 7th Cir. 1918), 251 Fed. 603, 163 C. C. A. 597.

**Date determined by application.**—To same effect as original annotation, see *Camp v. Portable Wagon Dump, etc., Co.*, (C. C. A. 7th Cir. 1918) 251 Fed. 603, 163 C. C. A. 597.

**Oral proof of anticipation.**—Written proof of anticipation "is not an invariable necessity." *Crone v. John J. Gibson Co.*, (C. C. A. 2d Cir. 1917) 247 Fed. 503, 160 C. C. A. 13.

**Degree of proof.**—Anticipation must be made out clearly and satisfactorily. The law requires not conjecture, but certainty. The burden of proof rests upon the defendants, and every reasonable doubt should be resolved against them. *Eddy v. Kramer*, (E. D. Pa. 1918) 247 Fed. 962.

## VII. PRIOR USE OR SALE (p. 117)

**Showing nature of sale.**—It is immaterial to the effect of a sale of a machine as a prior use that as between the parties it was intended as a mere chattel mortgage. *Mayer v. Mutschler*, (C. C. A. 2d Cir. 1918) 248 Fed. 911, 161 C. C. A. 29.

**Two years necessary.**—Prior use does not invalidate a patent, where the period of such use does not exceed two years prior to the application and the patentee was the first actually to make the invention. *Tiffany v. Paper Products Co.*, (C. C. A. 5th Cir. 1918) 253 Fed. 953, 165 C. C. A. 395.

**Computing time of use—amendment.**—An amendment relates back to the time of the filing of the original application, and in order that the claims may be defeated by reason of two years' prior public use that use must

have extended over a period of at least two years before the date of the original application. *Union Sulphur Co. v. Freeport Texas Co.*, (D. C. Del. 1918) 251 Fed. 634.

**Experimental use to defeat patent.**—To the same effect as the original annotation, see *Union Sulphur Co. v. Freeport Texas Co.*, (D. C. Del. 1918) 251 Fed. 634; *Eclipse Mach. Co. v. Harley-Davidson Motor Co.*, (C. C. A. 3d Cir. 1918) 252 Fed. 805, 164 C. C. A. 645; *General Electric Co. v. Continental Fiber Co.*, (C. C. A. 2d Cir. 1919) 256 Fed. 660, 168 C. C. A. 54.

The sale of an "experimental" machine makes the invention public. One sale is a public use of whatever is parted with (*Delemater v. Heath*, 58 Fed. 414, 7 C. C. A. 279; *Covert v. Covert*, [C. C.] 106 Fed. 183, *affirmed* 115 Fed. 493, 53 C. C. A. 225; *Toch v. Zibell*, etc., Co., 231 Fed. 716, 145 C. C. A. 597), even though what the purchaser got was imperfect, and subsequently greatly improved on (*Star, etc., Co. v. Crescent, etc., Co.*, 179 Fed. at 859, 103 C. C. A. 342); *Mayer v. Mutschler*, (C. C. A. 2d Cir. 1918) 248 Fed. 911, 161 C. C. A. 29.

**Burden of proving prior use.**—To the same effect as the original annotation, see *Inflexible Co. v. Megibow*, (D. C. N. J. 1918) 251 Fed. 924.

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# I. Application. III. Claims.

2. Construction.
3. Essentials and scope.
6. Amendment of claims.
8. Rejection of claim.

## I. APPLICATION (p. 146)

**Continuation of former application.**—An application on which no action was taken for a patent of gears composed of compressed "textile material" has been held to be a continuation of a prior application in which the material was described as "textile fabric." *General Electric Co. v. Continental Fibre Co.*, (C. C. A. 2d Cir. 1919) 256 Fed. 660, 168 C. C. A. 54.

## III. CLAIMS

### 2. Construction (p. 158)

**In general.**—"A patent is prima facie valid, and an inventor is presumed by the courts to be claiming a valid patent, rather than to be endeavoring to do wrong by claiming what does not belong to him, under the guise of general language. The inventor is seeking to include all that can legally be covered by that which he describes as his invention, and is limited only by the prior art, within the boundaries of that which can be said to have reasonably been intended, and to have been set forth or disclosed by the words of description which the inventor has chosen.

Thus, devices, not described, but plainly within the concept, in so far as it is patentable and is defined in the claims, infringe the patent, and, for that very reason, if earlier, would have taught the same principle with a similar application, and would thus have constituted an anticipation if properly claimed." *F. N. Burt Co. v. Ritchie*, (E. D. N. Y. 1918) 251 Fed. 909.

"The patentee is limited to his claims and the patent is no broader than the claims, and, if the language of claims of the patent is clear and distinct, the patentee is bound by the language he has employed." *Wilson, etc., Mfg. Co. v. Union Tool Co.*, (C. C. A. 9th Cir. 1918) 249 Fed. 729, 161 C. C. A. 639.

**Pioneer patent.**—The fact that a patent is a pioneer in the art entitles it to a broad construction, but of course it cannot be broader than the claim. *Hildreth v. Mastoras*, (D. C. Ore. 1918) 253 Fed. 68.

**Liberally construed.**—Where an applicant was the first to conceive and work out an idea of distant control for inking fountains in printing presses, marking a distinct and radical advance in the art, it was held that he was entitled to claims as broad as his invention, and should not be restricted to electric means for controlling the fountains, where competitors might, by substitution of other means, effect the same result and thus deprive the real inventor of the fruits of his discovery. *In re Bechman*, (1918) 47 App. Cas. (D. C.) 446.

An inventor, of course, is entitled to all the benefits of his invention, notwithstanding the fact that he may not have fully appreciated those advantages, especially in the early stages of an extremely difficult art. *Kintner v. Atlantic Communication Co.*, (S. D. N. J. 1917) 249 Fed. 73.

**Not limited to exact language.**—Where an inventor by the combination of old elements produces a new and useful device, he is not restricted to the exact language employed in the patent claims where he has referred to a specific drawing which in fact exhibits the real functioning element of the mechanism but omits its completeness. *Bethlehem Steel Co. v. U. S.*, (1918) 53 Ct. Cl. 348.

**Limiting claim.**—Where there have been earlier inventions of a similar nature, the patentee should be held to have limited intentionally the scope of his invention by the language of his claim. *Wonder Mfg. Co. v. Block*, (C. C. A. 9th Cir. 1918) 249 Fed. 748, 161 C. C. A. 658.

"It is unnecessary to do more than refer to the proposition that the claims must be so interpreted as to give them a valid meaning, if possible, and that, if they would be rendered invalid by an interpretation so broad as to cover the defendant's structure, it is to be presumed that the plaintiff, in using the language which he put in the claims and which was allowed by the Patent Office, was describing that which can be held patentable; in other words, that the

claims must be limited to the patentable invention, even though reference to the specifications, drawings, and prior art is had, in order to learn the limitations referred to. The courts have settled the proposition that broad claims will not be held invalid, if they are plainly intended to include by reference such specific limitations as would make the invention patentable." *F. N. Burt Co. v. Ritchie*, (E. D. N. Y. 1918) 251 Fed. 909.

"Since all claims must, according to the accepted rules of patent interpretation, be given as broad a scope as their language will bear, no court is justified in reading into a claim limitations not set forth to establish the invalidating force of a prior construction. *Westinghouse v. Boyden*, 170 U. S. 737, 18 S. Ct. 707, 42 U. S. (L. ed.) 1136; *McClain v. Ortmyer*, 141 U. S. 419, 12 S. Ct. 76, 35 U. S. (L. ed.) 800." *Lyon Non-Skid Co. v. Hartford*, (S. D. N. Y. 1917) 247 Fed. 524.

**Limitation in one claim omitted from others.**—To same effect as original annotation, see *Jones v. Sykes Metal Lath, etc., Co.*, (C. C. A. 6th Cir. 1918) 254 Fed. 91, 165 C. C. A. 501.

**Construction with concurrent patents.**—In construing a plaintiff's claims under patents, the court is required to consider the claims in view of the time and condition under which the patents were brought out. Where the patents are practically concurrent and co-pending, each one seeking to be contributory in some degree to the advance in the art which it is proposed to bring about, the court is not at liberty to ignore the express reference made in the several patent records to the pendency of the other patents and the general purposes sought to be accomplished by the various patents as a whole. *North American Chemical Co. v. Dexter*, (E. D. Wis. 1916) 252 Fed. 148.

**Reading in unspecified elements.**—The rule of construction that an element expressly specified in a claim of a patent should not be read into another claim which does not specify it, rests on the reason that each claim is supposed to have a distinguishing characteristic, and that no construction should be unnecessarily adopted which would cause two claims to be identical. From this reason, it follows that the prohibition is directed, not broadly against importing into one claim a specific limitation expressed in another, but, when stated with precision, is aimed against importing a limitation of that character when, by it alone, the two claims come to be different. *Jones v. General Fireproofing Co.*, (C. C. A. 6th Cir. 1919) 254 Fed. 970, 165 C. C. A. 662.

**Necessity of explanation of device.**—"A patentee is entitled to all the benefits of his invention whether he apprehends and states them or not. He must be given full protection in his claims whether he has explained the theory of the operation of his device correctly, erroneously, or not at all. Against an infringer he must be allowed a range of

equivalency that is commensurate with his actual contribution to the art. He is not to be limited to particular formation or location of parts, unless the limitations are embodied in the claims themselves or are necessarily imposed by the prior art." *Stromberg Motor Devices Co. v. Zenith Carburetor Co.*, (C. C. A. 7th Cir. 1918) 254 Fed. 66, 165 C. C. A. 478.

**Construction of claim for combination.**—"A combination claim must of course be treated as an integer. Its novelty may consist wholly in bringing together old elements." *Stromberg Motor Devices Co. v. Zenith Carburetor Co.*, (C. C. A. 7th Cir. 1918) 254 Fed. 68, 165 C. C. A. 478.

**Construction of claims for improvements.**—To same effect as second paragraph of the original annotation, see *Bindley v. Detroit River Tunnel Co.*, (E. D. Mich. 1918) 253 Fed. 751.

To same effect as last paragraph of original annotation, see *Waterbury Farrell Foundry, etc., Co. v. E. J. Manville Mach. Co.*, (D. C. Conn. 1917) 253 Fed. 59, *affirmed* (C. C. A. 2d Cir. 1918) 253 Fed. 59, 165 C. C. A. 658.

"An improvement patent may be relieved, in a measure, from the operation of the rule of limited or strict construction if the merit of the invention is such as to warrant it; . . . but the merit is not ordinarily accepted as sufficient to warrant it when the invention only slightly advances the art, thus carrying the claims only a little into the field of invention." *F. W. Rauskolb Co. v. Anthony Mfg. Co.*, (C. C. A. 1st Cir. 1918) 253 Fed. 650, 165 C. C. A. 276.

**"Means."**—A claim of a device "with means of operating" the same does not extend to all possible means, but only to those specified or their equivalents. "To permit a patentee to burden his claims by the use of indefinite language would lead to supporting him in a monopoly of a principle or result." *Henry v. Los Angeles*, (C. C. A. 9th Cir. 1919) 255 Fed. 769.

**Acquiescence** not only assists in finding invention, but justifies breadth of construction of the patent itself. *Benjamin Electric Mfg. Co. v. Northwestern Electric Equipment Co.*, (C. C. A. 2d Cir. 1918) 251 Fed. 288, 163 C. C. A. 444.

**Construction by successive judgments.**—"But there can be no doubt that whether a claim, as authoritatively construed in successive rulings, seems to contract or expand, the meaning given it by authority attaches instantaneously, and affects all pending matters within the jurisdiction of said authority. This is the more obviously true if the litigations are between the same parties or their privies. *Hart, etc., Co. v. Railroad, etc., Co.*, 244 U. S. 294, 37 Sup. Ct. 506, 61 L. Ed. 1148. If, therefore, there be any difference between the construction of claim announced in our first judgment and that given in the second, the latter must control upon this



accounting." *Oriental Tissue Co. v. Dejonge*, (C. C. A. 2d Cir. 1918) 250 Fed. 627, 162 C. C. A. 643.

### 3. *Essentials and Scope* (p. 161)

**Claim too broad.**—The rule that a claim which is broader than the invention is void does not invalidate a claim for an improvement which is addressed to improving the device along the lines stated in the original claim. *Hinman v. Starch Bros. Co.*, (W. D. Wis. 1917) 247 Fed. 346.

**Indefiniteness of claim.**—Whoever discovers that a certain useful result will be produced in any article, machine, or manufacture by the use of certain means is entitled to a patent therefor, provided he shall specify the means he so uses to produce the result in a manner so full and exact that any one skilled in the art or science to which it appertains can, by using the means so specified, without any addition thereto or subtraction therefrom, produce precisely the result so described, and if this cannot be done by the means so described the patent is void. *Strauger v. Phillip Bernard Co.*, (N. D. Ia. 1917) 247 Fed. 547.

**Less claimed than invented.**—An invention may be patentable, but before an applicant for letters patent can claim the right to their issue, he must not only disclose a patentable invention, but he must claim it, and what he discloses and what he claims must be patentable. If he discloses less or claims less than what he has invented, and which he might have disclosed and claimed, he is limited to that which has thus been disclosed and claimed, notwithstanding the fact that he might have claimed more. Even if he sets forth claims in his application, and these are rejected or voluntarily withdrawn or limited by amendment, he gets by his letters patent only what the letters cover, and his rights under the letters patent are restricted to what has been granted to him, and the grant does not expand to embrace more than is covered by the actual grant, because of the fact that the grant might have been more extensive than was made. All which is disclosed beyond what is granted is given to the public, and the public cannot be denied the use of anything which is not in the grant. *Aeolian Co. v. Cunningham Piano Co.*, (E. D. Pa. 1918) 251 Fed. 301.

**Range of equivalents.**—"All the patentee did was to suggest a way in which old mechanical means could be assembled for the purpose of doing something that had previously been done through different mechanical means. Under such circumstances, it would seem sufficiently settled that the inventor is only entitled to a range of equivalents commensurate with the scope of his invention." *Economy Fuse, etc., Co. v. Chose-Shawmut Co.*, (C. C. A. 1st Cir. 1918) 249 Fed. 872, 162 C. C. A. 106.

Any patent, however narrow, has some range of equivalents, unless form is made in-

dispensable, and this rule is especially applicable when an infringer takes the whole gist of the invention, but not all the mechanical details, even where all the combination elements are old. *U. S. Slicing Mach. Co. v. Wolf*, (N. D. Ill. 1918) 249 Fed. 245.

**Part of device.**—There is no inherent reason why a claim intended to reach the operation of one-half of a device considered by itself, may not be valid, though other claims deal with the device as a whole. *Jones v. General Fireproofing Co.*, (C. C. A. 6th Cir. 1918) 254 Fed. 97, 165 C. C. A. 507.

### 6. *Amendment of Claim* (p. 173)

**Scope of amendment.**—The rule that an applicant must not introduce a new invention cannot be applied with dialectical rigidity, or it would forbid any change in claims which introduced any new element, for all elements of a claim are necessary parts of the invention. The case at bar is no different from *Hobbs v. Beach*, 180 U. S. 383, 395, 21 S. Ct. 409, 45 U. S. (L. ed.) 586, where an entire element was omitted in an amended claim, which had been inserted in the original. If the whole disclosure remains unchanged and no intervening rights have arisen we do not cut so fine. It may be that the rule is no more than one of degree; but we know of no cases which forbid the omission of elements, even though they result in expansion, when the disclosure readily suggests the change. We think it no objection that the suggestion may arise from a further knowledge of the art which discloses that broader claims always were possible, so long as there are no intervening rights. In such cases the specifications suggest the change, but the applicant's mistake upon what preceded him has deceived him. This he may correct, at least when the departure is not too wide. *Auto Pneumatic Action Co. v. Kindler*, (C. C. A. 2d Cir. 1917) 247 Fed. 323, 159 C. C. A. 417.

### 8. *Rejection of Claim* (p. 175)

**Words inserted to meet a rejection** based on a prior patent thereby become words of limitation, and if they are clear and definite they must have their full meaning, even though it later appear that the patentee thereby measurably lessened the monopoly to which he was really entitled; but if these limiting words develop ambiguity, they should not be read any more broadly than is reasonably necessary to serve that purpose of differentiation for which they were adopted. *Jones v. General Fireproofing Co.*, (C. C. A. 6th Cir. 1918) 254 Fed. 97, 165 C. C. A. 507.

**Claims substituted after rejection** will not be given a construction which makes them the equivalent of the rejected claims. *Rund Mfg. Co. v. Long-Landreth-Schneider Co.*, (C. C. A. 7th Cir. 1918) 250 Fed. 860, 163 C. C. A. 174; *Spaulding v. Wannamaker*, (C. C. A. 2d Cir. 1919) 256 Fed. 530.

**Acquiescence in rejection of claim.**—Beyond question the owner of a patent has no standing to sue upon canceled claim 1 or to seek a construction of an allowed claim that would have the effect of reviving the canceled claim. But that, in our judgment, is the extent of the estoppel. The solicitor's subsequent election not to appeal from the rejection of claim 1 can be given no retroactive effect upon the negotiations leading up to the allowance of the claims in the patent so as to narrow those claims to less than they were entitled to at the time of their allowance. In those negotiations the solicitor always and consistently declared that claim 1 of the patent, for example, produced a new result, through a new mode of operation, by means of a new mechanical combination, and never for a moment conceded that the inventive concept in that claim amounted to nothing but adding to abandoned claim 1 (not then in existence or abandoned) means for controlling the communication between the reservoir and the auxiliary well. On his side the examiner receded from his original position, and allowed the claims in the patent without stating or demanding any limitation or condition not inherent in the claims themselves, or furnishing any contemporaneous glossary for their interpretation. In electing not to appeal from the rejection of claim 1 the solicitor did not agree that the examiner's action was correct; much less that an infringer should take abandoned claim 1, and not the prior art itself, as the measure of invention involved in the patent. *Stromberg Motor Devices Co. v. Zenith Carburetor Co.*, (C. C. A. 7th Cir. 1918) 254 Fed. 68, 165 C. C. A. 478.

**Vol. VII, p. 178, sec. 4892.** [First ed., vol. X, p. 251.]

**Omission of oath.**—What is disclosed and what is claimed must have the support of the required oath of the applicant, and no letters patent covering an invention which lacks this supporting oath are valid. *Aeolian Co. v. Cunningham Piano Co.*, (E. D. Pa. 1918) 251 Fed. 301.

**No new oath is needed to support an amendment made to meet an objection of the Patent Office.** *Motion Picture Patents Co. v. Calehuff Supply Co.*, (E. D. Pa. 1918) 248 Fed. 724.

**Where the amended application does not present a conception materially different from or enlarged over that shown by the application as filed, a new oath is not necessary.** *Camp v. Portable Wagon Dump, etc., Co.*, (C. C. A. 7th Cir. 1918) 251 Fed. 603, 163 C. C. A. 597.

**Insertion of new claim within invention.**—To the same effect as the original annotation, see *Solva Waterproof Glue Co. v. Perkins Glue Co.*, (C. C. A. 7th Cir. 1918) 251 Fed. 64, 163 C. C. A. 314.

**Vol. VII, p. 179, sec. 4893.** [First ed., vol. V, p. 488.]

**Effect of granting patent.**—To same effect as second paragraph of original annotation, see *Wonder Mfg. Co. v. Block*, (C. C. A. 9th Cir. 1918) 249 Fed. 748, 161 C. C. A. 658; *Willamette Iron Wks. v. Columbia Engineering Works*, (C. C. A. 9th Cir. 1918) 251 Fed. 594.

**Vol. VII, p. 181, sec. 4894.** [First ed., vol. V, p. 488.]

**Disregard of delay by commission.**—Failure to prosecute an application within the period fixed by the statute does not work an abandonment and the commissioner has power to act on the application after the expiration of that period. *Schram Glass Mfg. Co. v. Homer Brooke Glass Co.*, (C. C. A. 7th Cir. 1918) 249 Fed. 228, 161 C. C. A. 264.

**Vol. VII, p. 191, sec. 4903.** [First ed., vol. V, p. 497.]

**Scope of amendments.**—Amendments will only be permitted to relate back to the date of filing of the original application, where they can be clearly sustained on the claims and specification as originally made. An enlargement of the original specifications will not be permitted which will interfere with other inventors who have acquired intervening rights. *Ficklen v. Baker*, (1918) 47 App. Cas. (D. C.) 487.

**Amendment for explanation.**—The rule is that insertions by way of amendment in the description or drawing, or both, do not hurt the patent, if the insertions are only in amplification and explanation of what was already reasonably indicated to be within the invention for which protection was sought—"something that might be fairly deduced from the original application." *Hobbs v. Beach*, 180 U. S. 383, 395, 21 S. Ct. 409, 45 U. S. (L. ed.) 586; *Cleveland Foundry Co. v. Detroit Vapor Stove Co.*, (C. C. A. 6th Cir. 1916) 131 Fed. 853, 857, 68 C. C. A. 233; *Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co.*, (C. C. A. 6th Cir. 1904) 230 Fed. 120, 123, 144 C. C. A. 418; *Cosper v. Gold*, (1911) 36 App. Cas. (D. C.) 302. When we seek to apply this rule in this case, we first observe that the alleged new matter was not only permitted by the Patent Office, but was required, because an element claimed was not shown or sufficiently described. The Patent Office has a strict rule on this subject. It fully recognizes that new matter must not be permitted, and it is constantly engaged in defining what is and what is not new matter. The application of the rule must, of necessity, be more or less arbitrary, and the presumption of correctness which attends Patent Office rulings must apply with especial force to this class of ruling; and most peculiarly is that true when the applicant has only complied with the

demands which the Patent Office made. *General Electric Co. v. Cooper Hewitt Electric Co.*, (C. C. A. 6th Cir. 1918) 249 Fed. 61, 161 C. C. A. 121.

**Vol. VII, p. 193, sec. 4904.** [First ed., vol. V, p. 499.]

**Diligence of applicants.**—While work on an independent device does not constitute diligence, it does not necessarily follow that because one applicant has completed his invention within a given time the other will be charged with a lack of diligence if he exceeded that time in perfecting his embodiment of the invention, especially where his embodiment is more complicated than that of the other party. *Cragg v. Strickland*, (1918) 47 App. Cas. 433.

**Reduction to practice.**—In an interference the uncorroborated testimony of the junior party of a reduction to practice of the invention of the issue is insufficient to overcome the prior filing date of his adversary. *Malcom v. Richards*, (1918) 47 App. Cas. (D. C.) 582.

Where an interference involves an improvement in a well-developed art, and it is convincingly established that one of the parties is the prior inventor for the broad subject-matter of the improvement, the more specific counts of the issue should be interpreted in the light of the general disclosure. *Burt v. Coats*, (1917) 47 App. Cas. (D. C.) 185.

**Sole issue in interference.**—To same effect as original annotation, see *Wintroath v. Chapman*, (1918) 47 App. Cas. (D. C.) 428. Regarding the meaning of "priority," the court said: "Appellees assert that, however this may be, we have no right to consider laches in an interference proceeding; and they cite a number of decisions of this court to the effect that our jurisdiction in such proceedings 'is confined to a determination of the question of priority.' Undoubtedly that is the law. But what is meant by priority? Does it mean priority of conception or of reduction to practice with diligence, or reduction to practice without diligence, or all of these things and more? In determining the question of priority we have considered which party procured from the other the idea of the invention (*Milton v. Kingsley*, 7 App. D. C. 531); whether there had been a reduction to practice (*Stevens v. Seher*, 11 App. D. C. 245); lack of reasonable diligence (*Paul v. Johnson*, 23 App. D. C. 187; *Wickers v. McKee*, 29 App. D. C. 4); concealment (*Methnes v. Burt*, 24 App. D. C. 265); existence of reasonable diligence (*Yates v. Huson*, 8 App. D. C. 93); the effect of constructive reduction to practice (*Sherwood v. Drewson*, 29 App. D. C. 161); that one party was the agent of another (*Milton v. Kingsley*, 7 App. D. C. 531; *Huebel v. Bernard*, 15 App. D. C. 510); and the right of a party to make the claims of the issue (*Podlesak v. McInnerney*, 26 App. D. C. 399; *Wickers v. McKee*, 29 App. D. C. 4). Priority in an interference

proceeding is the ultimate question for determination; but before it can be reached it may be, and usually is, necessary to decide one or more incidental or ancillary questions, as is shown by the decisions just referred to and others which might be cited."

**Burden of proof.**—To same effect as original annotation, see *McAfee v. Gray*, (1918) 47 App. Cas. (D. C.) 237.

Where the applications of the parties to an interference are copending, the junior applicant ordinarily has only the burden of establishing his case by a preponderance of the evidence, and not beyond a reasonable doubt. *Lockett v. Staub*, (1918) 47 App. Cas. (D. C.) 379.

**Adjudication of priority in adverse party.**—In an interference proceeding under this section, the adverse party may be adjudged to have the priority of invention and therefore to be entitled to a patent. *Bird v. Elaborated Roofing Co.*, (C. C. A. 2d Cir. 1919) 256 Fed. 366.

**Res judicata.**—Where the parties to an interference took no testimony and stipulated that the testimony in a prior case adjudicated between them comprehending the same subject should be used, it was held that the questions of law and fact presented were res judicata. *Thompson v. Storrie*, (1918) 47 App. Cas. (D. C.) 383.

**Effect of dissolution of interference.**—An order sustaining a motion to dissolve an interference disposes of the interference, and leaves nothing on which to base a judgment of priority. *Field v. Colman*, (1917) 47 App. Cas. (D. C.) 189.

**Mandamus to compel vacation of interference order.**—Mandamus to compel the commissioner of patents to vacate an order declaring an interference, contrary to the general rule that his discretion in such cases cannot be controlled by mandamus, cannot be granted on the ground that the discontinuance of a prior interference is res judicata as to the present interference; but that defense can be raised and preserved at all stages of the interference proceeding. *U. S. v. Newton*, (1918) 47 App. Cas. (D. C.) 449.

**Vol. VII, p. 204, sec. 4915.** [First ed., vol. V, p. 507.]

**Nature of proceeding.**—To same effect as original annotation, see *Central Ry. Signal Co. v. Jackson*, (E. D. Pa. 1918) 254 Fed. 103.

**Testimony in Patent Office admissible.**—According to the decisions in the case of *Dover v. Greenwood*, reported in 154 Fed. 854 (C. C.), and in 177 Fed. 946 (C. C.), and in *Greenwood v. Dover*, 194 Fed. 91, 114 C. C. A. 169, the rule in this circuit is (1) that a proceeding in equity under section 4915 is not an appeal, but an original independent proceeding; (2) that testimony taken in an interference proceeding in the Patent Office, and out of which the subject-matter of a bill in equity, brought under sec-

tion 4915, arises, is not competent as evidence in the equity proceeding, in the absence of proof establishing the right to introduce secondary evidence; (3) that the record of the proceedings in the Patent Office is likewise not competent evidence, except that admissions of parties made in such proceedings may be received, and statements of witnesses made therein may be used for purposes of cross-examination; (4) that a plaintiff may show by the Patent Office proceedings that a judgment of priority has been entered against him for the purpose of showing his right to maintain a bill under section 4915; and (5) that to overcome the presumption that is to be given that judgment the proof must be clear and convincing. *Sutton v. Wentworth*, (C. C. A. 1st Cir. 1917) 247 Fed. 493, 160 C. C. A. 3.

**Necessity of introduction of new evidence.**—"In respect of actions like this, solely against the commissioner, the jurisdiction still existing under R. S. § 4915 is, to say the least, a singularity in law making. While the statute exists, jurisdiction must be exercised; but we entirely concur with the court below that, in order to advise or direct the commissioner to issue a patent which he has refused and had his refusal approved by the District Court of Appeals, there must be introduced substantially new and persuasive testimony, not adduced before the tribunals with which we are invited to differ. Here we have nothing but an argument, persuasive to a majority only of this court, and even that argument seems to have been the same throughout this long and tangled litigation. Further, a court appealed to under § 4915 must by the evidence shown it, whether new or old, be very fully and amply persuaded of plaintiff's merits before granting relief." *Gold v. Newton*, (C. C. A. 2d Cir. 1918) 254 Fed. 824, 166 C. C. A. 270.

### Vol. VII, p. 231, sec. 4917. [First ed., vol. V, p. 523.]

**Effect of disclaimer.**—Where the claimant of a generic invention disclaims as against a patentee of a new form he does not lose his right to claim the genus. *Standard Scale, etc., Co. v. Cropp Concrete Machinery Co.*, (C. C. A. 7th Cir. 1919) 256 Fed. 666, 168 C. C. A. 60.

**Subsequent suit for infringement of valid claims.**—A disclaimer with respect to those claims of a patent that have been held invalid by the Supreme Court cannot be said to be so delayed and so evasive in form as to prevent, under this section, a subsequent suit for the infringement of the valid claims, where the Supreme Court decision was rendered on December 11, 1916, and the disclaimer was recorded March 28, 1917, the owners residing in a foreign country, and war-time conditions of communication then prevailing, and where the wording of the disclaimer, though bordering on finesse, cannot be interpreted as giving any rights under

the patent greater than may be legitimately obtained under the claims held valid. *Minerals Separation v. Butte, etc., Min. Co.*, (1919) 250 U. S. 336, 39 S. Ct. 496, 63 U. S. (L. ed.) —, reversing in part and affirming in part (C. C. A. 9th Cir. 1918) 250 Fed. 241, 162 C. C. A. 377.

**Costs in pending suits.**—To same effect as original annotation, see *Liquid Carbonic Co. v. Gilchrist Co.*, (C. C. A. 7th Cir. 1918) 253 Fed. 54, 165 C. C. A. 652.

### Vol. VII, p. 242, sec. 9. [First ed., vol. V, p. 502.]

**Jurisdiction of appellate court.**—To same effect as first paragraph of original annotation, see *In re Carvalho*, (1918) 47 App. Cas. (D. C.) 584, also holding that the Court of Appeals of the District of Columbia is without jurisdiction to review the decision of the commissioner of patents refusing to reinstate an abandoned application for a patent.

The District of Columbia Court of Appeals is without jurisdiction to entertain an appeal in an interference case except from a judgment of priority. *Field v. Colman*, (1917) 47 App. Cas. (D. C.) 189.

**Scope of appeal.**—In an interference, the question whether a prior application of one of the parties constituted an anticipation of the invention of the issue cannot be raised. *Lautenschlager v. Glass*, (1918) 47 App. Cas. (D. C.) 444.

**Conclusiveness of decision of Patent Office.**—To same effect as original annotation, see *Creveling v. Jepson*, (1918) 47 App. Cas. (D. C.) 597; *Malcom v. Richards*, (1918) 47 App. Cas. (D. C.) 582.

The question of priority in an interference case is one of fact, and where the Patent Office tribunals all agree upon it, their decision will not be disturbed on appeal except for the most persuasive reasons. *Jobaki v. Johnson*, (1918) 47 App. Cas. (D. C.) 230. To same effect, see *Lautenschlager v. Glass*, (1918) 47 App. Cas. (D. C.) 443.

Where a patentable novelty has been denied by all of the tribunals of the Patent Office, it is incumbent upon one appealing therefrom to make out a clear case of error to obtain a reversal. *In re Kohler*, (1918) 47 App. Cas. (D. C.) 373.

### Vol. VII, p. 249, sec. 4898. [First ed., vol. V, p. 531.]

#### III. Assignments.

##### 5. Nature and effect.

#### IV. Licenses.

##### 5. Operation and effect.

#### III. ASSIGNMENTS

##### 5. Nature and Effect (p. 264)

**Right to future improvements.**—An agreement that an assignment shall cover future improvements does not include an invention of another and different machine accomplishing the same result as that for which

the patent was assigned. *American Cone, etc., Co. v. Consolidated Wafer Co.*, (C. C. A. 2d Cir. 1917) 247 Fed. 335, 159 C. C. A. 429, wherein the court said: "That some of the features are the same is not we think enough; it must appear that the old machine remains enough the same to preserve its identity. Under just what changes that identity would be lost, we cannot say and we need not. Any decision must appear arbitrary, where the test is the vague language of business, and not the precise terminology of logic. We must try rather to assume the posture of the parties at the time, and consider what most men would have thought such language covered. Their test would in some measure have certainly depended upon the extent of the change; they would have recognized that to recast the details of the whole machine might make it a different one, though some features remained in common. Perhaps we can do no more than to say that the extent of these changes in our judgment passes beyond the standard of identity which we think they would have accepted."

**Estoppel of assignor.**—The assignor is estopped from setting up the invalidity of the patent as to claims made in the original disclosure but not in the application. *Foltz Smokeless Furnace Co. v. Eureka Smokeless Furnace Co.*, (C. C. A. 7th Cir. 1919) 256 Fed. 847, 168 C. C. A. 193, wherein it was said: "The general rule of estoppel upon the assignor of a patent to deny its validity as against his assignee is too well established to require more than its statement. We see no reason for relaxation of the rule where the subject-matter of the assignment is a duly filed application, which eventuates in a patent. The rejection by the Patent Office of all the claims occurred in April, 1915, and up to the time of the assignment, nearly a year later, the file wrapper does not show any further proceedings. The application is of value only as it may form the basis for a patent grant thereon. Surely it was contemplated that something was here assigned, and plainly it must have been the right to present further claims under the application; for without claims there would be no patent. The salutary rule of estoppel by deed would be much impaired, if, as applied to assignments of applications for patents, it were held to be inoperative as against claims within the scope of the original disclosure, though not made in the application as filed."

**Assignment of reserved rights.**—Where a patentee gives to a licensee the sole right to enforce the patent and to grant licenses, reserving merely a personal right to make and sell, an assignment of the patent does not carry the reserved right. The only way to harmonize all the contract provisions is to regard the right of the patentees to assign as limited to the bare legal patent title and the right to royalties, accounting, and inspection, and that the words "to themselves", should read "to themselves only." *Webster Electric Co. v. Podlesak*, (N. D. Ill. 1919) 255 Fed. 907.

#### IV. LICENSES

##### 5. Operation and Effect (p. 279)

**Estoppel of licensee.**—To same effect as original annotation, see *Martin v. New Trinidad Lake Asphalt Co.*, (D. C. N. J. 1919) 255 Fed. 93.

**Immunity from injunction suits.**—"A licensee by the license obtains only immunity from injunction suits brought against him by the patentee or owner." *Webster Electric Co. v. Podlesak*, (N. D. Ill. 1919) 255 Fed. 907.

**Limitation of right to purchase from another.**—A railroad company licensed to manufacture and use upon its road patented cars is not liable to pay the royalty for cars purchased from another company having a license to manufacture and sell cars without restriction. The separate contract does not segregate the railroad company from the rest of the world with respect to the right to purchase. *Pressed Steel Car Co. v. Union Pac. R. Co.*, (S. D. N. Y. 1918) 254 Fed. 316.

**Vol. VII, p. 288, sec. 4919.** [First ed., vol. V, p. 552.]

II. Who liable for infringement.  
V. Recovery.

##### II. WHO LIABLE FOR INFRINGEMENT (p. 206)

**Contributory infringement.**—One who makes and sells one element of a patented combination with the intention and for the purpose of bringing about its use in such a combination is guilty of contributory infringement, and is equally liable with him who organizes the complete combination. *Salva Waterproof Glue Co. v. Perkins Glue Co.*, (C. C. A. 7th Cir. 1918) 251 Fed. 64, 163 C. C. A. 314.

In a suit for infringement of a patent for a fountain pen it appeared that one of the defendants delivered to the other defendant, the day after the patent was granted, and with knowledge that it was expected, several incomplete penholders which were made into the infringing pens. He also expressed an intention to deliver other holders under his contract with the other defendant. It was held that the defendant was guilty of contributory infringement. *Barrett v. Sheaffer*, (C. C. A. 7th Cir. 1918) 251 Fed. 74, 163 C. C. A. 324.

**Corporations with interlocking directors and stockholders.**—Community as to officers, directors and stock of two companies would not of itself be sufficient to render one company liable for acts of infringement committed on the premises occupied by another company, but where the evidence, direct and circumstantial, conclusively shows knowledge on the part of the defendant of the infringing acts committed on the premises in question without any repudiation of them by the defendant, and also active procurement by it of and participation by it in such infringing

acts, the defendant is liable for infringement. *Union Sulphur Co. v. Freeport Tex. Co.*, (D. C. Del. 1918) 251 Fed. 634.

**Liability of officer of corporation.**—"A director of a corporation, who as director by vote or otherwise specifically commands the subordinate of the corporation to engage in the manufacture and sale of an infringing article, is liable individually in an action at law for damages brought by the owner of the patent so infringed. As with other infringers, it is immaterial whether the director knew or was ignorant that the articles manufactured and sold did infringe a patent." *Eddy v. Kramer*, (E. D. Pa. 1918) 247 Fed. 962.

The doctrine of agency applies to patent infringements, and also the principle that one doing an act which naturally causes another to commit an infringement is responsible for it; and further, that where several persons co-operate in acts of infringement they are joint tortfeasors and as such jointly and severally liable in solido. *Union Sulphur Co. v. Freeport Tex. Co.*, (D. C. Del. 1918) 251 Fed. 634.

#### V. RECOVERY (p. 302)

**Counterclaim.**—In a suit for infringement the defendant by way of counterclaim asked to be relieved from its contract with the plaintiff, for the lease of the patented article, on the ground that such contract was obtained through misrepresentation, and that plaintiff account to defendant for rental paid in consideration thereof. The court said: "Whether the defendant's assent to the contract for the leasing of the forms was obtained through misrepresentation need not be here decided, it being conceded that defendant has used these forms and is continuing to do so to this time; and that he has not surrendered or restored them to the plaintiff, nor offered to do so. By the weight of authority such return or tender is a condition precedent to the filing of a bill in equity for rescission, or its equivalent, the filing of a counterclaim, as in this case." *Paramount Hosiery Form Drying Co. v. Moorhead Knitting Co.*, (M. D. Pa. 1918) 251 Fed. 897.

**Measure of damages.**—To same effect as original annotation, see *Jones v. Sykes Metal Lath, etc., Co.*, (C. C. A. 6th Cir. 1918) 254 Fed. 91, 165 C. C. A. 501.

### Vol. VII, p. 309, sec. 4920. [First ed., vol. V. p. 567.]

#### I. PLEADING AND PROOF IN GENERAL (p. 310)

**No presumption of noninfringement** arises from the issue of a patent for the infringing device. *Simplex Window Co. v. Hauser Reversible Window Co.*, (C. C. A. 9th Cir. 1918) 248 Fed. 919, 161 C. C. A. 37.

**Agreement not to contest validity.**—An agreement not to contest the validity of a patent does not preclude a party from contending that he does not infringe it, and for that purpose he may refer to the prior act

and the file wrappers. *Smith v. Southington Mfg. Co.*, (C. C. A. 2d Cir. 1917) 247 Fed. 342, 159 C. C. A. 436.

**Estoppel to deny validity.**—If the assignor of a patent, estopped to deny its validity, agrees with a third person to furnish money to make and sell a device designed to accomplish the same purpose as, and which is an infringement of, the patented device, such third person thereby becomes bound by the estoppel; and a corporation organized for the purpose of bringing out the new device and putting it on the market, and to which a patent thereon was assigned, is likewise estopped to deny the validity of the patent. All the parties are likewise bound by the rule in the seventh circuit, by the *prima facie* scope of the patent claims, and the prior art is not admissible in evidence in a suit involving infringement, unless there is ambiguity or uncertainty in the language of the description and claims, and then only so far as necessary to explain such ambiguity. The introduction by the plaintiff of evidence of certain patents earlier and later than the patent in suit, in order to throw some light on the question whether the defendant's invention is the equivalent of the plaintiff's, with the express disclaimer not to waive the estoppel relied upon, is not a waiver of the estoppel. *Martin Gauge Co. v. Pollock*, (W. D. Ill. 1918) 251 Fed. 295.

In a suit for infringement the plaintiff objected to the consideration of the validity of the patents upon the ground that the defendant, by his contract with the plaintiff, was estopped to deny their validity. It appeared that the defendant rented from the plaintiff a number of the patented articles under a writing, agreeing to pay for the use thereof a rental, or so-styled royalty. The contract also provided: "In any suit or suits which the lessor may institute against the lessee, the said lessee shall be stopped from infringing or attacking the validity of said patents, or any of them." It was held that there was no estoppel. *Paramount Hosiery Form Drying Co. v. Moorhead Knitting Co.*, (M. D. Pa. 1918) 251 Fed. 897, wherein the court said: "This estoppel provision, considered in connection with the preceding portion of the paragraph, must be restricted and limited to the condition therein covered as to payment of royalty or rental, etc. Then, also, it will be noted that the provision applies to the parties in their relation as lessor and lessee, or, in other words, in a suit between them upon the contract. In the case here presented, and now under consideration, the plaintiff elected to treat the defendant as an infringer, not by reason of anything growing out of their relations under the agreement between them, but on account of purchasing and using the Walter Snyder forms which are regarded by plaintiff as an infringement of its monopoly. The action here is one in tort, and not upon the contract, and is therefore not embarrassed by the estoppel here advanced."

**Judicial notice.**— Courts will take judicial notice of the following, among other matters: (1) All matters of general scientific knowledge; (2) all matters in common use and all matters of common knowledge; (3) such mechanical devices as are of common knowledge among all; (4) the nature of a patented invention. *Luten v. Allen*, (D. C. Kan. 1918) 254 Fed. 587.

**Burden of proof.**— Persons suing for infringement are required to substantiate the allegations set forth in their bill, the first and material one of which was that they "were the first, original, and sole inventor of a certain new and useful improvement in the method of ornamenting and preparing roofing," described in the patent, and, having failed to sustain this material allegation, the suit must be dismissed. The date of the patent will not meet this burden where a suit is pending to invalidate the patent. *West Coast Roofing, etc., Co. v. Elaborated Ready Roofing Co.*, (C. C. A. 7th Cir. 1917) 249 Fed. 221, 161 C. C. A. 257.

The rule of burden of proof in such cases is so well established and was so fully discussed by the learned trial judge, that elaboration is not necessary. Stated very briefly, it is this: In an attack upon a patent, the patentee may stand on the grant of letters patent, which is *prima facie* evidence of the patent's validity. In the beginning, no further burden is imposed upon him. The burden of overcoming this evidence of validity by proof of the patent's invalidity because of prior public use and sale, devolves upon the one attacking the patent. This he must sustain by evidence so clear that it leaves no room for doubt. *Coffin v. Ogden*, 85 U. S. 120, 124, 21 L. ed. 821; *Miller v. Handley*, (C. C.) 61 Fed. 101; *Interurban Co. v. Westinghouse Co.*, 186 Fed. 166, 108 C. C. A. 298; *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. ed. 657. If he proves sale of the patented device and use by the public more than two years before the application, by evidence of this character, the statute relieves him from proving the inventor's intention thereby to abandon his invention to the public, and establishes an inference of abandonment of the invention before the grant of the patent, which, unless successfully controverted by the patentee, invalidates the patent subsequently granted. But this inference may be controverted by the patentee, upon whom is then thrown the burden of establishing by full, unequivocal, and convincing proof that such use and sale was not of the completed and commercially operative device subsequently patented, and also that such use and sale was not absolute and unconditional, but was principally and primarily for the purpose of perfecting the incomplete invention by tests and experiments. *Wendell C. American Laundry Machinery Co.*, (C. C. A. 3d Cir. 1918) 248 Fed. 698, 160 C. C. A. 598.

That the patentee was not the inventor, is an affirmative defense and must be sustained

by a fair preponderance of credible evidence. *Procter, etc., Co. v. Berlin Mills Co.*, (C. C. A. 2d Cir. 1919) 256 Fed. 23.

**Oral testimony tending to show prior invention** as against existing letters patent is, in the absence of models, drawings, or kindred evidence, open to grave suspicion; particularly if the testimony be taken after the lapse of years from the time of the alleged invention. *T. H. Symington Co. v. National Malleable Castings Co.*, (1919) 250 U. S. 383, 39 S. Ct. 542, 63 U. S. (L. ed.) —.

**Expert testimony.**— In *Union Sulphur Co. v. Freeport Tex. Co.*, (D. C. Del. 1918) 251 Fed. 634, the court said: "If the evidence be of such a character that the court feels that it is able to render an intelligent and just decision without the assistance of patent experts I know of no principle of law or of common sense restraining the court from discharging its proper functions without requiring what it deems unnecessary. There may be exceptional cases involving such scientific or abstruse problems as to require a court for an enlightened exercise of its functions to have the benefit of witnesses technically known as patent experts, but the law regards substance and not shadow; and where witnesses from their experience and observation are competent to give an intelligent and adequate opinion and explanation of patented process or apparatus their testimony is not to be rejected because they are not labeled experts or hold degrees from institutions of learning."

## Vol. VII, p. 326, sec. 4921. [First ed., vol. V, p. 577.]

II. Joinder of causes of action.

IV. Injunctions.

V. Decree and award.

VI. Costs.

VII. Limitation and laches.

## II. JOINDER OF CAUSES OF ACTION (p. 332)

An exclusive licensee may join with the owner of the patent in suing an infringer. *Davey Tree Expert Co. v. Van Billiard*, (E. D. Pa. 1918) 248 Fed. 718.

**Persons contracting with infringer.**—A municipality which contracts for paving by an infringing process and a surety company which gives bond to indemnify the municipality from liability for infringement are liable with the infringing contractor. *Reliance Constr. Co. v. Hassam Pav. Co.*, (C. C. A. 9th Cir. 1918) 248 Fed. 701, 160 C. C. A. 601.

**Patents not owned by all plaintiffs.**— In *Low v. McMasters*, (E. D. Pa. 1919) 255 Fed. 235, the court stated the question and its conclusion as follows: "The real question involved is embraced in the following formulation of the facts and the question arising out of them: Three letters patent have issued, and the defendant has infringed the property

rights granted by each patent. One of the patents belongs to A, B, and C. The others belong to A and B. Can A, B, and C maintain a bill based upon the complaint of these three several infringements? . . . Our view is that all the causes of action joined in this bill are joint within the meaning of rule 26, and we are influenced to take this view because the bringing of the bill as it has been brought is in accord with the practice recognized before the promulgation of the present equity rules, and there is nothing in rule 26 which conflicts with the former practice in this respect. *Huber v. Myers*, (C. C.) 34 Fed. 752. Judge Ray's interpretation of the ruling there made confirms us in the view taken. *Kaiser v. Bortel*, (C. C.) 162 Fed. 902."

#### IV. INJUNCTIONS (p. 340)

**Discretion of court as to preliminary injunction.**—To same effect as original annotation, see *Vulcan Soot Cleaner Co. v. Amoskeag Mfg. Co.*, (C. C. A. 1st Cir. 1918) 255 Fed. 88, 166 C. C. A. 416.

**Dissolution of corporate defendant.**—A preliminary injunction against a corporate defendant in an infringement suit will not be denied because it has discontinued business, where it still remains in existence for liquidating its business. The injunction will not prejudice the defendant and may serve to guard the interests of the plaintiff. *Manton-Gaulin Mfg. Co. v. American Bottle Cap Co.*, (D. C. Del. 1918) 250 Fed. 865.

**Binding power of decree on third person.**—A person who is not a party in form to an infringement suit and is not shown to be technically a privy to it, although allied in interest with the defendant therein is not concluded by the decision therein. *Taigman v. Desure*, (C. C. A. 2d Cir. 1918) 253 Fed. 364, 165 C. C. A. 146; *T. L. Smith Co. v. Cement Title Machinery Co.*, (N. D. Ia. 1918) 249 Fed. 481; *Mecanno v. John Wanamaker*, New York, (C. C. A. 2d Cir. 1918) 250 Fed. 250, 162 C. C. A. 520.

**Supplementary injunction.**—A supplementary injunction to meet modifications in the infringing device may in the discretion of the court be issued. *Charles Green Co. v. Henry P. Adams Co.*, (C. C. A. 2d Cir. 1917) 247 Fed. 485, 159 C. C. A. 539.

**Cessation of infringement.**—"As to the alleged infringing devices heretofore manufactured by defendants and designated as plaintiff's exhibits A, B, and C, defendants disclaim they were making the same at the date this suit was instituted; hence said structures need not here be further considered, except it may be said such disclaimer, it is thought, will prevent neither the granting of the injunctive relief prayed by plaintiff nor the recovery on an accounting against defendants if one be ordered. *Deere & Webber Co. v. Dowagiac Mfg. Co.*, 153 Fed. 177, 82 C. C. A. 351, and cases cited." *Van Kannel Re-*

*volving Door Co. v. Uhrich*, (D. C. Kan. 1916) 247 Fed. 344.

Equity will not take jurisdiction where the infringement was slight and ceased before suit and there is no showing of probability of its being recommenced. *Munger Laundry Co. v. National Marking Mach. Co.*, (C. C. A. 8th Cir. 1918) 252 Fed. 144, 164 C. C. A. 256.

**Colorable change.**—Where the change is only colorable the court may proceed by contempt or issue a supplementary injunction. *Gordon v. Turco-Halvah Co.*, (C. C. A. 2d Cir. 1917) 247 Fed. 487, 159 C. C. A. 541; *Wire Rope Appliance Co. v. Eureka Tool Co.*, (D. C. Kan. 1919) 256 Fed. 677.

**Bond from defendant.**—"The plaintiff has also moved that the American Bottle Cap Company 'be ordered to file a bond, with sufficient surety to be approved by the clerk, in a sum not less than ten thousand dollars (\$10,000) to secure the payment to the plaintiff company of any execution which may be levied upon the defendant in this suit.' This motion also must be denied. This is a patent cause in which the relief prayed, aside from the recovery of profits and damages, is an injunction against acts of infringement. On the showing which has been made the plaintiff is entitled to a preliminary injunction, but not to an order against the American Bottle Cap Company in invitum for the giving of bond as moved for. After the awarding of a preliminary injunction, if the parties agree upon the giving of bond by the defendant in a given amount, to the end that it may be relieved from the possible hardship of an injunction, the court would not interpose any objection to the carrying into effect of such an arrangement. But such procedure is totally unlike that now proposed by the plaintiff." *Manton-Gaulin Mfg. Co. v. American Bottle Cap Co.*, (D. C. Del. 1918) 250 Fed. 865.

**Questions on appeal.**—"This court can consider only the question whether the court below erred in finding that there was infringement, and on the appeal from an interlocutory injunction in a patent case an appellate court will go no further than to ascertain whether or not the court below abused discretion in granting the injunction." *Wonder Mfg. Co. v. Block*, (C. C. A. 9th Cir. 1918) 249 Fed. 748, 161 C. C. A. 658.

#### V. DECREE AND AWARD (p. 355)

**Deduction for losses.**—As the infringing sales were of two classes, those creating profits and those carrying losses, the master's inquiry was directed to the amount of profits on the former, and the measure of damages on the latter, or on both. Against the defendants' contention that the complainant was entitled only to net profits on all sales after deducting losses on some from profits on others, the master held, we think correctly, that, as the complainant was not a quasi partner of the infringers, losses incurred by



the defendants through their wrongful invasion of the complainant's patent were not chargeable to the complainant. *McKee Glass Co. v. H. C. Fry Glass Co.*, (C. C. C. A. 3d Cir. 1918) 248 Fed. 125, 160 C. C. A. 285.

**Depreciation of machinery.**—An infringer is entitled to credit, in calculating profits, for depreciation in value of machinery used in manufacturing the infringing device. *Gordon v. Turco-Halvah Co.*, (C. C. A. 2d Cir. 1917) 247 Fed. 487, 159 C. C. A. 541, holding, however, that the evidence was insufficient to establish the amount of the credit claimed on this account.

**Commissions paid to salesmen.**—Commissions paid to salesmen for selling the infringing article, in addition to salary, are not to be deducted as expense in estimating profits. *Lee v. Malleable Iron Co.*, (E. D. Wis. 1918) 247 Fed. 795. The court said: "The master conceived the situation to present, not a payment of salaries, but in reality a division of profits. The large amount, the terms of corporate resolutions for their contingent award, their progressive increase with increased profits, and their treatment as such dividends or division upon the books, are alone sufficient to support the master's view. The resolutions, if lawful, while authority for their ultimate payment, nevertheless placed no obligation upon the beneficiaries not already comprehended within their contracts for service at stipulated salaries. In my judgment, a good way to test out the status of these payments in respect of cost or profits is to consider whether defendant, as a manufacturer, in endeavoring to make up a yearly budget upon any assumed volume of business, in any aspect of the matter, would have included these payments, or any estimate thereof, as an item of cost of manufacture. Obviously not. The arrangement or plan was but the introduction of the common co-operative idea between the employer and employee, in which the former agreed to give and did give to the latter a percentage of profits, if and when earned. The exceptions to the master's ruling upon this item are overruled."

**Expense of branch offices.**—The infringer is entitled in computing profits to a deduction of expenses in the guaranty of contracts through branch offices in marketing the infringing article. *Expanded Metal Co. v. General Fireproofing Co.*, (N. D. Ohio 1917) 247 Fed. 899, wherein it was said: "It may be true, as is now contended, that defendant's business methods were unwise; that, being an Ohio corporation, it had no right to guarantee construction contracts made by a branch office in which its own capital was not invested, or that its expenditures and losses on account thereof were unreasonable and unnecessarily large. The fact remains that such expenditures were made and such losses were incurred, and it is immaterial whether they were made or incurred under a contract to bear the losses, or whether the money was expended or advanced to these branch offices and thereby lost. Defendant is required to

account only for the profits actually made by its use of the infringing process. Complainant is not entitled to recover profits which the infringer might or should have made, had it conducted its business in a different manner. Criticism of this item reduces itself to an assertion that defendant's action was illegal; that it was unwise and unnecessary; that, had it acted otherwise, its profits would have been larger, and its losses would have been less; but this does not show that defendant made greater profits than the master has found, or that defendant did not make or sustain these expenditures or losses in a good-faith effort to promote and develop the use and sale of the infringing product in building construction."

**Advertising expenses.**—An infringer is entitled to credit, in calculating profits, for his expenditures in advertising the infringing device. *Gordon v. Turco-Halvah Co.*, (C. C. A. 2d Cir. 1917) 247 Fed. 487, 159 C. C. A. 541.

**Taxes and insurance** are proper credits to the defendant. *Oehring v. Fox Typewriter Co.*, (C. C. A. 2d Cir. 1918) 251 Fed. 584, 163 C. C. A. 578.

Where it is possible to estimate accurately the portion of the infringer's plant which is devoted to the manufacture of the infringing device, that proportion of the taxes and cost of insurance on the business should be credited in calculating profits. *Gordon v. Turco-Halvah Co.*, (C. C. A. 2d Cir. 1917) 247 Fed. 487, 159 C. C. A. 541.

**Interest.**—To the same effect as the original annotation, see *Oehring v. Fox Typewriter Co.*, (C. C. A. 2d Cir. 1918) 251 Fed. 584, 163 C. C. A. 578.

An infringer is not entitled to credit, in the computation of profits, for interest on the capital invested in his business. *Expanded Metal Co. v. General Fireproofing Co.*, (N. D. Ohio 1917) 247 Fed. 899.

When the amount of capital used by an infringer for the manufacture of the infringing devices is once ascertained, interest is a proper credit. *Oehring v. Fox Typewriter Co.*, (C. C. A. 2d Cir. 1918) 251 Fed. 584, 163 C. C. A. 578, wherein the court said: "Certainly a merchant cannot correctly determine what his profit is until he knows the amount of his investment together with interest thereon, whether the investment is made out of his own funds or borrowed capital."

"It is now recognized that, where profits are awarded, interest is not allowed until the amount has been judicially determined. On the other hand, interest is allowed from the date when infringer would have paid royalty, if licensed, where the damages are measured by established royalty. It is asserted, however, that the rule respecting interest is not well established in that class of cases where damages are based upon 'reasonable royalty.' We see no valid reason for withholding interest where the damages are based upon a

reasonable royalty. In fact, precedent, and not the logic of the situation (*Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. ed. 864), is all that prevents the allowance of interest in case of damages based on the infringer's profits. The allowance of interest, and the reasons for such allowance or rejection, have been announced in innumerable decisions where questions analogous in character to patent infringement suits have been under consideration. Such decisions are instructive and in the absence of other authorities may well be accepted as conclusive on the question. In this case the reasonable royalty is fixed, not for a single year, but for a period of ten years, and represents the average royalty for that entire period. It is therefore impossible to determine upon what sum appellant should have paid interest on this basis during any one year. We conclude, however, that interest should run on the amount thus found due from the end of the period." *B. F. Goodrich Co. v. Consolidated Rubber Tire Co.*, (C. C. A. 7th Cir. 1918) 251 Fed. 617, 163 C. C. A. 611.

**Profit on manufacture.**—Where an infringer both manufactures and sells the infringing article he is not entitled to a deduction for manufacturing profits. *Lee v. Malleable Iron Range Co.*, (E. D. Wis. 1918) 247 Fed. 795, wherein it was said: "If one who makes is entitled to a gain which shall be figured as an item of cost, why should not a seller likewise insist upon a preliminary seller's profit to be figured at cost? If the defendant can say to the patentee that the real gain never arose until the article was sold, wherefore the patentee should pay this so-called manufacturer's profit, why should not the defendant as seller likewise claim that the infringing articles, if the plaintiff himself had made them, would have to be sold by somebody, therefore a customary seller's profit should be charged to the patentee to reimburse the defendant as an item of selling cost, although it was really a gain?"

**Profit not attributable to infringement.**—The amount of profits derived from the sale of a device embodying the patent may be allowed, and no deduction is to be made from a comparison with the profits which might have been made by the use of something which would not have infringed. *Lee v. Malleable Iron Range Co.*, (E. D. Wis. 1918) 247 Fed. 795.

**Profits exceeding damages.**—It is only where the damages exceed the profits made by the infringer that damages can be added to profits. *Expanded Metal Co. v. General Fireproofing Co.*, (N. D. Ohio 1917) 247 Fed. 899.

**Comparison with profits from other devices.** An infringer is liable for the entire profit realized from the infringing device and not merely for the difference between those profits and the profits which might have been made by the sale of the device previously used by him. *Expanded Metal Co. v. General Fireproofing Co.*, (N. D. Ohio 1917) 247 Fed. 899.

**Profit resulting from improvement by infringer.**—A saving effected by an infringer by the substitution of materials in making the infringing device is not to be deducted from the profits for which it is liable to account. *Lee v. Malleable Iron Range Co.*, (E. D. Wis. 1918) 247 Fed. 795.

**Apportionment of profits.**—Where but a part of a device is an infringement, the profits due to the incorporation of the patented feature should be apportioned if possible. *Clark v. Schieble Toy, etc., Co.*, (C. C. A. 6th Cir. 1917) 248 Fed. 276, 160 C. C. A. 354.

Where an invention represented an entire revision of the entire machine and the creation of a new device in which all the operative parts contributed to produce the new result, it was held that there was no case for apportionment, as it was incumbent on the defendant, in any event, to prove what old element, if any, contributed to the profits, which, of course, it was unable to do. *Oehring v. Fox Typewriter Co.*, (C. C. A. 2d Cir. 1918) 251 Fed. 584, 163 C. C. A. 578.

**Royalty as criterion of damages.**—The royalty charged by the owner of the patent to persons exploiting the patented device in new territory under license is not conclusive as to the measure of damages for infringement. *Reliance Constr. Co. v. Hassam Pav. Co.*, (C. C. A. 9th Cir. 1918) 248 Fed. 701, 160 C. C. A. 601.

**Established royalty.**—In *Expanded Metal Co. v. General Fireproofing Co.*, (N. D. Ohio 1917) 247 Fed. 899, it was held that the evidence showed that a royalty had been established by licenses granted by the complainant and that this royalty was the fair measure of the complainant's damage.

In *B. F. Goodrich Co. v. Consolidated Rubber Tire Co.*, (C. C. A. 7th Cir. 1918) 251 Fed. 617, 163 C. C. A. 611, it was held that there was evidence in the case to justify the court in its determination to measure appellee's damages on the basis of a reasonable royalty. The court said: "We do not hesitate to say that the findings of the District Court, affirmed by the Circuit Court of Appeals for the Second Circuit, as to a reasonable royalty in a suit involving the same identical patent, covering practically the same period of time, is entitled to much weight and consideration by this court. Difficulty in determining the reasonable royalty does not alone bar the court from adopting this rule. *Dowagiac Mfg. Co. v. Minnesota Plow Co.*, [235 U. S. 641, 35 S. Ct. 221, 51 U. S. (L. ed.) 398]. Such a method of measuring damages doubtless widens the field of investigation, and makes possible a longer hearing; but if the fact determinative of the question here in issue is thereby more certainly established, and more satisfactorily reached, good reason exists for applying the rule."

**Royalty as affected by profits.**—"Now, if the idea of a reasonable royalty as a measure of damage to a patentee is at all

analogous to other situations where the law imports 'reasonableness' as an element, then the degree to which the act of the wrongdoer has been profitable or unprofitable to himself cannot be a controlling test. Wherefore the fact that defendant is shown to have made \$47,000 'profits,' apportioned as 'legally attributable' to the embodiment of the invention in the combination structures made by it, cannot limit the proofs in their legitimate tendency — as it may develop — to either a larger or smaller amount as reasonable royalty damage. True, profits actually made may be considered; but that their amount must be taken as the test of reasonableness, or that profitless infringing must negative damage by defeating the exaction of a reasonable royalty by a patentee, is no more possible in measuring damages in respect of infringement, than would be the attempt of a lessee at will or sufferance to limit or defeat reasonable recovery by proving his occupation of the tenement to have resulted in little or no profit to him." *Lee v. Malleable Iron Range Co.*, (E. D. Wis. 1918) 247 Fed. 795.

**Wilfulness of infringement as increasing damages.**—The court is justified in increasing the damages where the infringement was deliberate and intentional and was stubbornly persisted in. *Lee v. Malleable Iron Range Co.*, (E. D. Wis. 1918) 247 Fed. 795 (allowing 20 per cent. increase of damages).

**Infringement under advice of counsel.**—Where the infringer acted under advice of counsel and there were conflicting decisions as to the validity of the patent the damages should not be trebled. *Expanded Metal Co. v. General Fireproofing Co.*, (N. D. Ohio 1917) 247 Fed. 899.

#### VI. COSTS (p. 368)

**The allowance of costs on an accounting for infringement rests in the discretion of the court, and while in some instances the courts have considered it proper to require unsuccessful plaintiffs to pay the costs, yet each case must be disposed of upon its own merits.** *Individual Drinking Cup Co. v. Public Service Cup Co.*, (C. C. A. 2d Cir. 1918) 250 Fed. 620, 162 C. C. A. 636.

**Cost of minutes of contempt proceeding.**—The complainant is entitled to have the cost of the stenographer's minutes of evidence assessed against the defendant in a proceeding to punish the violation of an injunction against infringement. *Gordon v. Turco-Halvah Co.*, (C. C. A. 2d Cir. 1917) 247 Fed. 487, 169 C. C. A. 541.

#### VII. LIMITATION AND LACHES (p. 370)

**Delay after notice to infringer.**—"Another defense is laches. The argument is that plaintiff knew as early as 1905 that defendant was making machines containing removable plates in the form of the Peerless slicer, and offering them for sale as early as 1906. The trouble with this defense is that it does not appear that the Peerless had vertical

guides, so as to admit of the plate being vertically lifted from the table. The witness Modjeska admits that the Peerless guides were V-shaped, and the circulars G 1 and G 4 show them to be so. While some of the testimony tends to show that machines like the patents might possibly have been made by defendant about the time the first patent issued, it is not sufficient to prove the fact. It also appears that in 1909 an officer of the plaintiff told Mr. Sayer that he was infringing its patents on certain improvements, including the sharpener, and threatened an infringement suit if Sayer should copy any of plaintiff's improvements. Whether these improvements are covered by the patents in suit is not clear. On the whole, it is not shown that defendant, to its damage, relied on plaintiff's failure to sue, or that it was actually infringing a sufficient length of time before this suit was brought to constitute laches; no outlay or reliance on any act of the plaintiff; no encouraging a sense of security. There is simply a suggestion of facts showing laches; no real proof." *U. S. Slicing Mach. Co. v. Wolf*, (N. D. Ill. 1918) 249 Fed. 245.

#### Vol. VII, p. 372, sec. 4922. [First ed., vol. V, p. 598.]

**Refusal to file disclaimer.**—Where in an infringement suit, several of the plaintiff's claims are held valid and infringed, but a broad generic claim is held invalid and the plaintiffs refuse to file a disclaimer as to it, the court is not authorized under this section to dismiss the bill. *Davy Tree Expert Co. v. Van Billiard*, (C. C. A. 3d Cir. 1918) 255 Fed. 781, wherein the court, in discussing the plaintiff's liability for such refusal, said: "After due consideration had, we are of opinion the penalty imposed by the court below upon the plaintiff for not filing a disclaimer cannot be justified. Congress, by R. S. sec. 4922, has provided a statutory penalty on a patentee for failure to enter a disclaimer, namely, that unless he does so before he brings suit he cannot recover costs. But Congress has nowhere enacted that a refusal to enter a disclaimer should be punished by a dismissal of a patentee's bill. Of the plaintiff's right to review in this court the decree of a District Court adjudging a claim of his patent invalid, there can be no question. But if the order of the court forcing the plaintiff to file a disclaimer had been followed, it would have resulted in the extinction of the claim, and consequently of the right of the plaintiff to review in this court the question of the validity of such claim which he had been thus forced to disclaim, for it is quite evident that if the plaintiff once filed his disclaimer, that was the end of his claim, and he never could raise the question of its validity in the court below, in this court on appeal, or in any other jurisdiction. The claim simply would not exist. Moreover, the

practical effect of the decree below was that, while the opinion of the court held certain claims of the patent valid, dismissal of the bill prevented the defendant contesting the correctness of that conclusion."

**Vol. VII, p. 375.** [First ed., 1912 Supp., p. 286.]

**Effect on prior jurisdiction.**—The act granting jurisdiction to the Court of Claims in the matter of claims for infringement of patents subsequent to its passage did not disturb the prior jurisdiction of cases involving patents where the claim was based upon contract, nor did said act obliterate the distinction between actions based upon contract and actions for infringement. *E. W. Bliss Co. v. U. S.*, (1917) 53 Ct. Cl. 47.

**Right of licensee to sue.**—The act authorized suit by the owner, and a mere licensee who is not an assignee cannot maintain an action thereunder for infringement. *E. W. Bliss Co. v. U. S.*, (1917) 53 Ct. Cl. 47.

**Presumption from experiments by government.**—Where the government conducts experiments with certain regularly patented devices to ascertain their value with a view to the adoption of one of them in the manufacture of ordnance and does not attempt to construct a device of its own, the presumption arises that the government intended to use the property of another and to make payment to the lawful owner for its use. *Bethlehem Steel Co. v. U. S.*, (1918) 53 Ct. Cl. 348.

**Contract implied from use.**—Where the government uses a patented invention with the consent and express permission of the owner and does not repudiate the title of such owner, an implied contract to pay a reasonable compensation for such use arises. *Bethlehem Steel Co. v. U. S.*, (1918) 53 Ct. Cl. 348.

**No contract implied.**—No contract by the United States to pay for the use of a patented device will be implied unless the proof connects the government with the use in such a way as to show a recognition of the title of the patentee and an intention to pay for the use. The mere fact that Congress directs that work shall proceed in accordance with certain plans adopted by the contractor, who had a license to use the patented device, is not sufficient to imply a contract. *Haupt v. U. S.*, (1918) 53 Ct. Cl. 591.

**Invention by employee.**—A suit against the United States for compensation for the use of an invention perfected by the inventor during a period when he was in the government employ, but in hours when he was not actually on duty for the government, is excluded from the jurisdiction conferred upon the Court of Claims by the third proviso that it shall not apply to any device discovered or invented by a government employee "during the time of his employment or service." *Moore v. U. S.*, (1919) 249 U. S. 487, 39 S. Ct. 322, 63 U. S. (L. ed.) —, af-

*firming* (1917) 52 Ct. Cl. 532), wherein the court said: "The appellant was not actually in the employ of the government when he made his claim by bringing suit, but the Court of Claims dismissed his petition for want of jurisdiction on the ground that it showed on its face that the device was discovered during the time he was in the employment or service of the government, and that therefore the case fell within the third proviso of the act. This decision is so obviously right that discussion of it would be superfluous. The act of Congress must be read 'according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation.' *U. S. v. Temple*, (1881) 105 U. S. 97, 99 [26 U. S. (L. ed.) 967, 968]. No matter what the appellant may have done prior to May, 1914, it was in that month, he avers, that he completed his invention, and during the whole of that month he was in the employment or service of the Government. To give the effect contended for to the allegation that the appellant confined his work on his invention to the hours when he was not actually on duty, but while he was in the Government employ, would be to amend the statute, not to construe or interpret it."

**Vol. VII, p. 377, sec. 4929.** [First ed., vol. V, p. 600.]

**The test of invention in design patents** is precisely like that in mechanical, and the question is whether the design in question was beyond the powers of the ordinary designer to combine existing elements into the design in question. *Goudy v. Hansen*, (C. C. A. 1st Cir. 1917) 247 Fed. 782; *F. I. A. T. v. A. Elliott Ranney Co.*, (C. C. A. 2d Cir. 1918) 249 Fed. 973, 162 C. C. A. 171.

**Aesthetic value.**—A drinking glass with a bulge a short distance from the top was held not to be patentable under this section. *Ferd Messmer Mfg. Co. v. Pick*, (C. C. A. 8th Cir. 1918) 251 Fed. 894, 164 C. C. A. 110.

**Novelty.**—On the question whether a three-leaf clover design for embroidered lace lacked novelty, the court said: "The evidence shows that three-leaf clover designs were used in making laces for a number of years prior to the advent of the plaintiff's design. However, this does not in itself negative novelty in the plaintiff's design. Such earlier clover leaf patterns would have to be substantially identical in appearance to that of the plaintiff's in order to anticipate or forestall it." *Inflexible Co. v. Megibow*, (D. C. N. J. 1918) 251 Fed. 924.

The design of a font of type was held in *Goudy v. Hansen*, (C. C. A. 1st Cir. 1917) 247 Fed. 782, 159 C. C. A. 640, not to possess such novelty, beauty or attractiveness as to be the subject of a design patent.

In holding an electric light design to be without invention, the court, in *Bayley v. Standard Art Glass Co.*, (C. C. A. 2nd Cir. 1918) 249 Fed. 478, 161 C. C. A. 436, said: "It is urged in support of the decree below that the novelty of a design is to be tested as a whole and that invention is persuasively shown by the commercial success of 'Equalite.' Undoubtedly a design must be viewed in its entirety, its effect is optical, and it can no more be tested piecemeal than can a picture (*Dobson v. Dornan*, 118 U. S. 10, 6 Sup. Ct. 946, 30 L. Ed. 63); but novelty is not invention, nor can aid be found in the sales of 'Equalite.' That word covers the light and the fitting thereof, all the material as fastened together; and the evidence wholly fails to show whether success is due to the mechanical excellence of the whole article, or the pleasing shape of its 'canopy and bowl,' which (as shown above) has no necessary connection with the mechanics of the contrivance."

**Similar designs.**—Sameness of appearance to the eye of an ordinary observer, not mere difference of lines or slight variations in configuration, is the test that determines identity of design on the question of infringement. *Inflexible Co. v. Megibow*, (D. C. N. J. 1918) 251 Fed. 924.

## 1918 Supp., p. 578.

**Purpose and effect of act.**—In *Foundation Co. v. Underpinning, etc., Co.*, (S. D. N. Y. 1919) 256 Fed. 374, in denying an injunction against the use of a patented device on government work, it was said: "It may fairly be assumed that the amendatory act of July 1, 1918, was enacted to overcome the delays and difficulties which confronted the government in the use of patented articles and which were still possible under the act of 1910, as that act had been construed by the Supreme Court."

Comparing the act with that of 1910 the court said: "These important differences at once appear: (1) 'Used by the United States' is enlarged to (a) used by and for and (b) manufactured by and for; (2) such owner 'may recover reasonable compensation' against the United States, with no limitation upon the right to sue or recover against the infringing contractor, manufacturer, or other persons, is changed to confining 'such owner's remedy' to a suit against the United States for the recovery, not only of reasonable compensation, but of his 'entire compensation.'"

"In the case at bar, which is quite typical, one provision of the original proposals and specifications, 'because of the urgent need for the early completion of the building,' makes time an element in the consideration and determination of the award of the contract, and probably one of the reasons for the enactment of the act of July 1, 1918, was to obviate delays which injunctive relief would occasion."

"The sovereign power, therefore, which cannot be sued without its consent, has decided to protect itself by treating such a situation as that at bar as a claim, in effect, against itself for full money compensation, and has thus created, not only a cause of action against itself for reasonable compensation, but for whatever may be 'entire' compensation."

"Whether plaintiff has a cause of action against defendant is, however, not here for decision at the moment. It is, however, clear that the act of July 1, 1918, was intended to supply the inadequacies of the previous act, and gives complete remedy against the United States, in order to prevent delays injurious to the government which necessarily follow the restraining of any person from carrying out a contract to furnish patented articles, devices, et al., manufactured for or to be used by or for the United States."

## PENAL LAWS

Vol. VII, p. 396, sec. 1. [First ed., 1909 Supp., p. 405.]

### IV. ADHERING TO ENEMY; GIVING AID AND COMFORT (p. 412).

**Concurrence of intent and act.**—In addition to obviously necessary elements, treason embraces the existence both of a state of mind and the commission of overt acts, and prescribes how the latter shall be proven. The latter requirement demands a trial ruling and is not a demurrer question or in any proper sense a question of pleadings. Treason, as we are now concerned with it, assumes, as the proper attitude of all who are subject to this law, that of being well disposed toward the United States and of

being its well wisher, and brands as traitor one who adheres to its enemies and who also levies war upon the United States, or who, in adhering to its enemies, gives those enemies aid and comfort. It is conceivable that a defendant may have this condemned attitude of mind or be what is termed "traitor at heart," and yet not expose himself to the charge of legal treason because he has committed no traitorous act. It is also conceivable that one under the domination of folly or of factional feeling or directed by a perverted view of what he is doing, or even a wrong-headed conscience, may do what would otherwise be traitorous acts, and yet not expose himself to that charge because the acts, although carrying all the consequences of traitorous acts, were done with-

out traitorous purpose or intent. Such a man plays the part of a traitor, but is not a traitor at heart. *U. S. v. Werner*, (E. D. Pa. 1918) 247 Fed. 708.

**Overt act.**—It is not necessary that the overt act charged should be the accomplishment of the design of the conspiracy. Averment and proof of the conspiracy with any overt act in furtherance of it is sufficient, whether the result of the conspiracy was to accomplish the illegal end or not. *Phipps v. U. S.*, (C. C. A. 4th Cir. 1918) 251 Fed. 879, 164 C. C. A. 95.

**Words as treason.**—In *U. S. v. Werner*, (E. D. Pa. 1918) 247 Fed. 708, it was said by way of dictum: "It is confidently asserted that mere words, no matter how vilely disloyal nor how clearly they evidence 'the black heart of a traitor,' if accompanied by no other overt act than their utterance or publication, cannot be made the basis of a charge of treason. Such seditious utterances are misdemeanors at common law, and, of course, properly made statutory offenses; but the point made is they are not treason. For this the expression of the opinion of Judge Nelson in his charge to a grand jury, as reported in 5 Blatchf. 550, Fed. Cas. No. 18,271, is quoted as authority. The quotation is:

"Words oral, written or printed, however treasonable, seditious or criminal of themselves, do not constitute an overt act of treason, within the definition of the crime."

"We do not feel called upon at this time to announce in advance of trial what a proper trial ruling upon the suggested question would be. This can be made only after the evidence is in, and the whole scope and effect of the overt acts, which are charged in the indictment to be treasonable in intent, purpose, and effect, is known. Judgment can then be pronounced whether treason has been proven, if the facts as disclosed are found by the jury against the defendants. It is, of course, clear that if the law of treason be as thus stated, and (for the purpose of presenting the point upon which this demurrer is ruled) we will assume it is, and if, at the close of the case, the United States has proven against the defendants only the utterance of treasonable sentiments, the law of the case must be so pronounced. To so pronounce it now is to find, not only the law to be as stated, but to find also the charge to involve nothing more than the mere utterances quoted. The evidence might disclose more than this and enough more to justify a finding of the guilt of treason.

"The opinion expressed by Judge Nelson will bear the construction that although words, so long as they are mere words, 'do not constitute an act of overt treason,' yet, when 'printed in relation to an act or acts which if committed with a treasonable design might constitute such overt act,' they may be part of the treasonable act, in addition to being evidence of treasonable intent.

Letters written, or oral messages sent, to convey information of value to an enemy, could not be deemed otherwise than as treasonable, whether the former were sent by post or telegraph, and the latter by a messenger or a shout. If sent by the wireless operation of a publication, which would make the facts known through making them notorious, the essential character of the act would be in no wise changed. The ingenuity of the criminal cannot be permitted to hide the criminality of his act."

## Vol. VII, p. 423, sec. 6. [First ed., 1909 Supp., p. 406.]

**Sufficiency of indictment.**—An indictment is good on demurrer which charges that the defendants "did feloniously, unlawfully, willfully, and maliciously conspire together to seize, take, and possess certain property of the United States, contrary to the authority thereof, which said property consisted of certain arms, ammunitions, and equipment under the control of certain military forces of the United States stationed in Wise county, Virginia, and other places," and that they recruited soldiers "with the intent of engaging in armed hostility against the United States of America by attacking with force and arms the duly enlisted and organized military forces of the said United States." *Phipps v. U. S.*, (C. C. A. 4th Cir. 1918) 251 Fed. 879, 164 C. C. A. 95.

**Evidence—Acts of co-conspirator.**—In a prosecution under this section for a conspiracy to prevent, hinder, and delay by force the execution of the Selective Service Act (9 Fed. Stat. Ann. 1136), when a conspiracy has been shown, the act of one conspirator in furtherance of the common purpose is evidence against all, and this is so though the conspirator committing the act is not a defendant in the case being tried. *Isenhouer v. U. S.*, (C. C. A. 8th Cir. 1919) 256 Fed. 842, 168 C. C. A. 188.

**Sufficiency.**—In *Phipps v. U. S.*, (C. C. A. 4th Cir. 1918) 251 Fed. 879, 164 C. C. A. 95, the evidence was held sufficient to show that the defendant was guilty of a violation of this section in participating with another person in listing and pledging men under oath for the enterprise of resisting the military authorities by blowing up bridges and seizing arms in the possession of soldiers.

## Vol. VII, p. 460, sec. 13. [First ed., 1909 Supp., p. 408.]

### III. INGREDIENTS OF OFFENSE

#### 4. "Begins," etc.

#### f. Offense by Single Individual (p. 464)

To same effect as original annotation, see *U. S. v. Ram Chandra*, (N. D. Cal. 1917) 254 Fed. 635.

**Vol. VII, p. 484, sec. 19.** [First ed., 1909 Supp., p. 410.]

The political rights of citizens, and not the rights of citizens as mere persons, residents, or inhabitants are protected by this section. Accordingly, it is no violation of this section for several persons to conspire to deport from a certain state a number of citizens of the United States. *U. S. v. Wheeler*, (D. C. Ariz. 1918) 254 Fed. 611, holding further that the fact that some of the persons deported were registered under the Selective Service Act did not bring the case within the section.

**Vol. VII, p. 516, sec. 32.** [First ed., 1909 Supp., p. 414.]

**II. Construction and application.**

**3. Intent to defraud.**

**III. Prosecution for offense.**

**3. Indictment.**

**II. CONSTRUCTION AND APPLICATION**

**3. Intent to Defraud (p. 519)**

**Personating naval officer.**—A private detective engaged in apprehending deserters for the sake of obtaining the reward offered by the government, who represents to enlisted men that he is a naval officer, is guilty of a violation of this section, though no money or property is obtained by the deception. *Reed v. U. S.*, (C. C. A. 2d Cir. 1918) 252 Fed. 21, 164 C. C. A. 133.

**III. PROSECUTION FOR OFFENSE**

**3. Indictment (p. 521)**

It is sufficient to allege that the defendant assumed to be an officer acting under the authority of the United States and it need not be alleged that he pretended to be any particular officer. *Roberts v. U. S.*, (C. C. A. 9th Cir. 1918) 248 Fed. 873, 160 C. C. A. 631.

**Vol. VII, p. 534, sec. 37.** [First ed., 1909 Supp., p. 415.]

**I. Conspiracy in general.**

**1. Definition and nature of conspiracy.**

**II. Conspiracy to commit offense.**

**4. Capacity of conspirators to commit objective offense.**

**7. Particular offenses.**

**a. Violation of District of Columbia Code.**

**i. Violation of Bankruptcy Act.**

**l. Violation of postal laws.**

**p. Setting on foot military enterprise (new).**

**q. Attacking vessel with intent to plunder (new).**

**r. Violation of Selective Service Act (new).**

**III. Conspiracy to defraud.**

**1. Not limited to property rights.**

**4. Intent.**

**5. Impairing lawful functions of governmental department.**

**IV. Overt acts.**

**1. Necessary to complete offense.**

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**VII. Jurisdiction and venue.**

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**1. In general.**

**a. Joinder of offenses.**

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**2. Charging the conspiracy.**

**a. Sufficiency in general.**

**d. Names, dates and place.**

**3. Charging overt act.**

**4. For conspiracy to commit offense.**

**c. Description of offense contemplated.**

**k. Obstructing the mail.**

**5. For conspiracy to defraud.**

**c. Defrauding of internal revenue.**

**i. Influencing official conduct.**

**IX. Evidence.**

**5. Variance.**

**I. CONSPIRACY IN GENERAL**

**1. Definition and Nature of Conspiracy**

(p. 536)

"When offenses against the law are being committed, and are of such a character that they are necessarily the fruit of concert of action, all who participate in the things which are done, resulting in the act which is of this common product character, may, if the inference fairly arises out of everything which has been done, be found guilty of a conspiracy to do what has been done." *U. S. v. Stilson*, (E. D. Pa. 1918) 254 Fed. 120.

**II. CONSPIRACY TO COMMIT OFFENSE**

**4. Capacity of Conspirators to Commit Objective Offense (p. 538)**

To same effect as first paragraph of original annotation, see *Jelke v. U. S.*, (C. C. A. 7th Cir. 1918) 255 Fed. 264, 166 C. C. A. 434.

**7. Particular Offenses**

**a. Violation of District of Columbia Code (p. 541)**

In general.—To same effect as original annotation, see *Easterday v. McCarthy*, (C. C. A. 2d Cir. 1919) 256 Fed. 651, 168 C. C. A. 45, affirming (S. D. N. Y. 1918) 250 Fed. 800.

**A conspiracy to violate the "bucket shop" law.**—To same effect as original annotation, see *U. S. v. McCarthy*, (S. D. N. Y. 1918) 250 Fed. 800.

**i. Violation of Bankruptcy Act (p. 543)**

Partners may be indicted under this section for conspiracy, where they permit one part-

ner to withdraw assets from the firm and conceal them, after his individual bankruptcy, from his trustee. *Malvin v. U. S.*, (C. C. A. 2d Cir. 1918) 252 Fed. 449, 164 C. C. A. 373.

#### l. Violation of Postal Laws (p. 544)

**Bribery of post-office official.**—In *Kirkwood v. U. S.*, (C. C. A. 8th Cir. 1919) 256 Fed. 825, 168 C. C. A. 171, wherein it appeared that a detective bribed a post office official, it was held that the evidence was insufficient to show that the person who employed the detective agency conspired with him.

**Use of mails to defraud.**—Under a charge of conspiracy to use the mails to defraud it is not necessary to prove that the person defrauded has been, in the formation of the original conspiracy, selected as the victim. *Shea v. U. S.*, (C. C. 6th Cir. 1918) 251 Fed. 433, 163 C. C. A. 451.

#### p. Setting on Foot Military Enterprise (*new*)

**Offense by single individual.**—A single individual may set on foot a military expedition in violation of section 13 of the Penal Laws, and since the offense itself does not require a plurality of agents persons combining in its commission may be prosecuted under this section for conspiracy to commit such offense. *U. S. v. Ram Chandra*, (N. D. Cal. 1918) 254 Fed. 635.

#### q. Attacking Vessel with Intent to Plunder (*new*)

**Jurisdiction of offense.**—An indictment may be sustained for conspiracy to attack a vessel with intent to plunder on proof of the placing in the vessel of bombs designed to sink it in midocean, the attack being considered as taking place where the offender performs the last conscious act in whose train in the course of things he expects the loss to follow. *Daeche v. U. S.*, (C. C. A. 2d Cir. 1918) 250 Fed. 566, 162 C. C. A. 582.

In *Wierse v. U. S.*, (C. C. A. 4th Cir. 1918) 252 Fed. 435, 164 C. C. A. 359, it was held that the evidence was sufficient to show a conspiracy to sink a German merchant ship interned in the waters of the United States.

#### r. Violation of Selective Service Act (*new*)

**Conspiracy to aid and abet.**—What the count under consideration seeks to charge is plain enough, viz., it is an offense against the United States to evade the requirements of the Selective Service Act, therefore it is another offense under section 37 to conspire so to evade; but everyone who evades being a criminal, everyone who counsels evasion is also a criminal, under section 332, and those who unite for the purpose of so counseling are conspirators, and as such liable to the pains and penalties of section 37, though the wrongdoing is only reached by combining sections 37 and 332 to define the nature of the crime and pointing to the Service Act to discover the offense, which is the object of the criminal conspiracy.

It is said this goes beyond the law, and charges the accused with "conspiring to do something which is not made a crime by" the sixth section of the Service Act. Upon reason, we perceive no ground for the assertion that the offense which is the ultimate object of the conspiracy must be found in a single enactment; all conspiracies, whether to effect directly or by a procurement the most devious the commission of an offense against the nation, are essentially alike, and the very object of section 332 was to make a principal offender out of (*inter alios*) one who contrived to have another commit a crime which the contriver was not intending himself to run the danger of. If the contrivance takes the form of that mental combination for a common purpose which is conspiracy at common law, and is accompanied by the necessary overt act, it makes (under sections 37 and 332) no difference whether the object is to be attained directly or through others; and to say that the object is not, e. g., to evade the Service Act, but to procure or counsel others so to evade, is no more than juggling with words. *Frama v. U. S.*, (C. C. A. 2nd Cir. 1918) 255 Fed. 28, 166 C. C. A. 356.

### III. CONSPIRACY TO DEFAUD

#### 1. Not Limited to Property Rights (p. 545)

**Fraudulent clearance for vessel.**—A conspiracy to obtain a clearance by false manifests and false statement of destination is one to "defraud" the United States. *Hamburg American Steam Packet Co. v. U. S.*, (C. C. A. 2nd Cir. 1918) 250 Fed. 747, 163 C. C. A. 79.

The word "port" is used to designate a place where ships are accustomed to load and unload goods, or take on or let off passengers, and where persons and merchandise are allowed to pass into and out of the realm, and does not mean a place on the high seas, where ships are not accustomed to stop. But persons who, in violation of R. S. sections 4197-4201 (see vol. 9, p. 296 et seq.), requiring clearances of vessels to state the destinations of their cargoes, obtain clearances for vessels by statements that their cargoes are destined for certain named ports, whereas they are intended for German warships on the high seas, are guilty under this section of a conspiracy to defraud the United States, whether or not the German warships are to be regarded as ports. *Hamburg-American Steam Packet Co. v. U. S.*, (C. C. A. 2d Cir. 1918) 250 Fed. 747, 163 C. C. A. 79.

**Fraudulently securing approval to application of Chinese person.**—It is an offense under this section for two or more persons to conspire to defraud the government by fraudulently securing the approval of the Department of Labor of an application by a Chinese person, who desires to go abroad temporarily, for an investigation in advance of his departure of his status. *U. S. v.*



Fung Sam Wing, (N. D. Cal. 1918) 254 Fed. 500.

4. *Intent* (p. 546)

A conspiracy to obtain a clearance by presenting to the collector of customs sworn manifests falsely stating the destination is with "corrupt intent," though the purpose for which the clearance was desired, viz., the avoidance of capture by the vessels of a belligerent, was not of itself unlawful. *Hamburg-American Steam Packet Co. v. U. S.*, (C. C. A. 2d Cir 1918) 250 Fed. 747, 163 C. C. A. 79; holding further that it was not necessary that the parties should know of the illegality of their acts and that it was immaterial that the agents who swore to the manifests believed them to be true.

5. *Impairing Lawful Function of Governmental Department* (p. 547)

**Conspiracy to prevent registration under Selective Service Act.**—In *Firth v. U. S.*, (C. C. A. 4th Cir. 1918) 253 Fed. 36, 165 C. C. A. 56, an indictment for conspiracy to obstruct registration, it was said: "Counsel earnestly argued that, since the citizens who were called to register for military service had not commenced any service to the government, exhortation or persuasion to them not to register was not an obstruction of a function of the government. It is too plain for argument that preparation for war by registration for military service is as much a function of the government as the actual waging of war."

This section is applicable only to conspiracies, and therefore does not cover the case of one, acting alone, who induces another, subject to the provisions of the Selective Service Act, to fail to register, etc. *U. S. v. Prieth*, (D. C. N. J. 1918) 251 Fed. 946.

IV. OVERT ACTS

1. *Necessary to Complete Offense* (p. 550)

**At common law.**—To same effect as original annotation, see *McGinniss v. U. S.*, (C. C. A. 2d Cir. 1919) 256 Fed. 621.

**Under the statute.**—To same effect as original annotation, see *McGinniss v. U. S.*, (C. C. A. 2d Cir. 1919) 256 Fed. 621; *U. S. v. McHugh*, (W. D. Wash. 1917) 253 Fed. 224.

"In the charge of conspiracy at common law, the unlawful combination was said to be the crime, and it was not necessary to aver or to prove an overt act. Section 37 has gone beyond such rigid abstraction and prescribes as necessary to the offense not only the unlawful conspiracy but that one or more of the parties must do an act to effect its object, and provides that, when such act is done, all the parties to such conspiracy become liable. *Hyde v. United States*, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A 614." *McGinniss v. U. S.*, (C. C. A. 2d Cir. 1919) 256 Fed. 621.

2. *Act of One Act of All* (p. 551)

**The overt act of one conspirator is the act of all.**—To same effect as original annotation, see *Hamburg-American Steam Packet Co. v. U. S.*, (C. C. A. 2d Cir. 1918) 250 Fed. 747, 163 C. C. A. 79.

5. *Nature and Quality of Act* (p. 552)

**Any act designed to effectuate the purpose is sufficient.** In *Collier v. U. S.*, (C. C. A. 5th Cir. 1918) 255 Fed. 328, 166 C. C. A. 498, in construing this portion of the statute, the court said: "To complete the crime denounced by the statute there must be some action in addition to the mental one of jointly agreeing or assenting to participate in the commission of the crime. Nothing in the language of the statute indicates an intention to require that that additional action be calculated or have a tendency to accomplish the object of the conspiracy. It is enough if it is done with the purpose or intention of putting the unlawful agreement into operation, whether it is or is not effective towards that end."

VII. JURISDICTION AND VENUE (p. 556)

**Venue of federal prosecution.**—To same effect as fourth paragraph of original annotation, see *Easterday v. McCarthy*, (C. C. A. 2d Cir. 1919) 256 Fed. 651, 168 C. C. A. 45, affirming (*S. D. N. Y.* 1918) 250 Fed. 800.

VIII. INDICTMENT

1. *In General*

a. *Joinder of Offenses* (p. 558)

**Indictment not double.**—An indictment for a conspiracy to aid persons liable to the Selective Draft to evade the duties prescribed is not rendered double by an averment in general terms that the conspiracy was also "to defraud the United States." *Sugar v. U. S.*, (C. C. A. 6th Cir. 1918) 252 Fed. 79.

c. *Requisites and Sufficiency, in General* (p. 559)

To same effect as second paragraph of original annotations, see *Jelke v. U. S.*, (C. C. A. 7th Cir 1918) 255 Fed. 264, 166 C. C. A. 434.

2. *Charging the Conspiracy*

a. *Sufficiency in General* (p. 560)

An indictment attempting to charge conspiracy is sufficient if it follows the language of the statute and contains a sufficient statement of an overt act to effect the object of the conspiracy, excepting where the object of the conspiracy is in itself lawful, and in such case the means must be set forth with such particularity as to disclose their illegality and the intended criminal intent, and except also those cases where the conspiracy is to defraud the government in a manner that would not permit of the defendants being fairly and reasonably informed

of the character of the offense without such detailed statement of the means and the time and place being set forth. The antecedent crime, if any, which is the end and object of the conspiracy, need not be described with the same particularity in the conspiracy charge as in an indictment where the crime itself and not the conspiracy to commit it is the offense charged. *Jelke v. U. S.*, (C. C. A. 7th Cir. 1918) 255 Fed. 264, 166 C. C. A. 434.

**d. Names, Dates and Place (p. 562)**

**Place.**—To same effect as original annotation, see *Vane v. U. S.*, (C. C. A. 9th Cir. 1918) 254 Fed. 28, 165 C. C. A. 438.

**3. Charging Overt Acts (p. 563)**

**In general.**—The indictment need not show in what manner the overt act charged would tend to accomplish the object of the conspiracy. *De Lacy v. U. S.*, (C. C. A. 9th Cir. 1918) 249 Fed. 625, 161 C. C. A. 535, L. R. A. 1918E. 1011.

**4. For Conspiracy to Commit Offense**

**c. Description of Offense Contemplated (p. 567)**

To same effect as original annotation, see *U. S. v. Rosenwasser*, (E. D. N. Y. 1919) 225 Fed. 233; *Jelke v. U. S.*, (C. C. A. 7th Cir. 1918) 255 Fed. 264, 166 C. C. A. 434.

**k. Obstructing the Mail (p. 571)**

**Conspiracy to rob mail.**—In *Vane v. U. S.*, (C. C. A. 9th Cir. 1918) 254 Fed. 28, a conspiracy to rob the custodian of certain mail matter was held to be sufficient though it did not (1) state with technical accuracy the relationship of the named custodian to the mail; (2) specify the nature of the mail matter or its destination; (3) allege that the defendants knew the mail was part of the United States mail; (4) allege intent other than by the general averment of wilfulness, or (5) allege the place of the performance of the conspiracy.

**5. For Conspiracy to Defraud**

**c. Defrauding of Internal Revenue (p. 582)**

In *Jelke v. U. S.*, (C. C. A. 4th Cir. 1918), 255 Fed. 264, 166 C. C. A. 434, it was held that in a prosecution for a conspiracy to defraud the United States of the special tax imposed by section 8 of the Oleomargarine Act (4 Fed. Stat. Ann. 191), the failure of the indictment to negative the exception found in section 16 of the act did not subject it to demurrer. The court said: "The correct rule is laid down in *United States v. Denver & R. G. R. Co.*, 163 Fed. 519, 520, 90 C. C. A. 329, 330, as follows: 'The first of these [objections] is that the plaintiff does not negative the matter of the exception created by the proviso to section 6 of the Act of March 2, 1893, as amended by the Act of

April 1, 1896, which gives the right of action for the penalty. This objection must fail, because it is opposed to the settled rule that an exception created by a proviso or other distinct or substantive clause, whether in the same section or elsewhere, is defensive, and need not be negated by one suing under the general clause.'"

**i. Influencing Official Conduct (p. 591)**

An indictment alleging a conspiracy by an army officer and another to defraud the United States was held sufficient in *U. S. v. Gouled*, (S. D. N. Y. 1918) 253 Fed. 239, wherein the court, in passing upon the question of the particularity of the allegations of the indictment, said: "The offense charged in this case being conspiracy to defraud the United States government, entered into between an officer in the United States army, the defendant, Felix Gouled, and another, and the allegations of the indictment charging specifically that the conspiracy provided for its accomplishment the procuring of contracts which were to be submitted to and passed upon by Vaughan, the defendant officer, he at the time having a pecuniary interest in the same through the arrangements to be made in pursuance of the conspiracy, and the indictment further charging that the said Vaughan was to receive money 'with the intent of influencing his decision and action, and that of other officers in question, in the consideration and acceptance, the letting and awarding contracts for the manufacture of garments for the United States army,' the criticism to which the indictment is subject is not that of too little, but perhaps of too great, particularity. Certainly it would have been a sufficient indictment, had it merely alleged an agreement that Vaughan was to obtain an interest in garment contracts which it was his duty to pass upon as a representative of the government. The fact that the indictment, in much greater detail than the law requires, sets up the procedure which the conspirators agreed to adopt, and with far greater minutiae than necessary sets out the series of overt acts by which the conspiracy was to be effected, cannot enlarge the rights of the defendant."

**IX. EVIDENCE**

**5. Variance (p. 595)**

"The doing by one only of the parties to a previously formed conspiracy of an act to effect its object is as effective to complete the offense as the doing of that act by all of the conspirators. There being no difference in legal effect between the doing by one of the conspirators of the alleged act to effect the object of the conspiracy and the doing of that act by all of the conspirators, such a variance between allegation and proof as the one in question cannot properly be regarded as material." *Hardy v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 284.

**Vol. VII, p. 602, sec. 39.** [First ed., 1909 Supp., p. 416.]

**I. Construction and application in general.**

2. "Officer of the United States."
4. "Official function."

**1. CONSTRUCTION AND APPLICATION IN GENERAL**

**2. "Officer of the United States" (p. 604)**

**Member of local draft board.**—In *U. S. v. Bordonaro*, (W. D. N. Y. 1918) 253 Fed. 477, the court, in holding that a member of a local draft board was "an officer of the United States" within the meaning of this section, said: "The members of local boards appointed for carrying out the provisions of the Selective Draft Act are appointed by the President, and it is entirely immaterial that the appointments are made upon the recommendations of the governors of the various states in which the appointees perform their duties. The act in terms authorizes and empowers the President to designate local boards upon the recommendations of the governors of the states, and, furthermore, to utilize the services of officers and agents of the several states in the execution of the act. Indeed, the act substantially provides that any and all persons designated and appointed under the rules and regulations prescribed by the President, regardless of whether they are appointed by the governor, or any officer of any state, are required to perform their duties as ordered and directed by the President. Under the act, the President was specifically authorized to establish and create exemption boards, such boards to be appointed by him and to consist of three or more members, the boards to have power to determine questions of exemption under the act. Such provisions, in my judgment, support the view of the government that a member of a draft board is an officer of the United States, under article 2, § 2, of the Constitution, and, in any event, under the Selective Draft Act is required to perform an official duty for the United States, and is therefore a person acting in an official function within the meaning of section 39 of the Criminal Code."

**4. "Official Function" (p. 604)**

**A baggage porter** employed by a railroad under federal control is acting in an "official function" within the meaning of this section. *U. S. v. Krichman*, (S. D. N. Y. 1919) 256 Fed. 974. Regarding the construction of the term "official function," Hand, J., said: "It must be conceded that the section would as well cover the case if the words 'official function' were omitted, and that it is something of a strain upon the ordinary use of language to speak of a baggage porter's duties as 'official.' Yet the business of operating a railway is nothing more than that of moving persons and things from one place to another, and a baggage porter actually performs a part of

that movement. It is quite impossible to establish any consistent line, based upon the importance of his duties, which will make them any the less 'official.' Nobody, I should think, would say that a traffic manager had no official functions, or indeed a freight dispatcher, or a ticket seller. At least about them I can see no plausible doubt. . . . If we look at the purpose of the section, there seems to me every reason not to draw any line based upon the supposed inaptitude of the words 'official function.' The section is full of verbiage, no doubt, but its very presence shows its desire for comprehension. The draftsmen certainly wished to include all efforts by corruption to impede the success of the United States in any of its enterprises. All such enterprises are official as soon as the United States lawfully undertakes them, and any interference with them, by debauching those on whom any part of their execution is imposed, is a prejudice to the United States, whether the impediment be grave or trivial. This result is the evil against which the statute is clearly aimed, and it seems to be covered by the use of a phrase like 'official function,' without undue violence to common use. Indeed, if the importance of the duty delegated be a test, the custody and correct dispatch of valuable baggage is certainly not a trivial function."

**Vol. VII, p. 608, sec. 42.** [First ed., 1909 Supp., p. 417.]

**Arrest of deserter.**—Where in the year 1918 habeas corpus proceedings were instituted to effect the release from the custody of the sheriff of one charged with being a deserter from the United States army, the court did not err in dismissing the proceedings; it not appearing on the face of the petition that the party alleged to be deprived of his liberty and unlawfully detained in custody was not in fact a deserter. Where one is a deserter from the army of the United States, it is lawful for any sheriff or his deputy, constable, town marshal, and certain other officers to arrest such deserter, hold him in custody, and deliver him to the proper military authorities, and they can summarily effect this arrest. And where the custody of the person alleged to be thus detained is taken in effectuating these provisions of the United States statute, it is not unlawful. *Huff v. Watson*, (Ga. 1919) 99 S. E. 307.

**Vol. VII, p. 612, sec. 47.** [First ed., 1909 Supp., p. 418.]

**Sugar requisitioned by the government** under the Act of Aug. 10, 1917, ch. 53, sec. 10 (1918 Supp. Fed. Stat. Ann. 185), is within this section. *Thompson v. U. S.*, (C. C. A. 2d Cir. 1919) 256 Fed. 616.

**Property in transportation by express company** under government control under Act

March 21, 1918 (1918 Supp. Fed. Stat. Ann. 757), is within this section. *U. S. v. Kambeitz*, (N. D. N. Y. 1919) 256 Fed. 247.

**Property of Indian.**—A person who steals property belonging to an Indian, who is under the guardianship of the United States, is not guilty of a violation of this section. *Couture v. U. S.*, (C. C. A. 8th Cir. 1919) 256 Fed. 525. Commenting on whether such property might be regarded as "property of the United States" within the meaning of this section, the court said: "It must be conceded, we think, that the horse stolen from the possession of Takes-the-Shield was not the property of the United States within the meaning of section 47 of the Penal Code. Conceding that larceny may be committed from a trustee in possession of personal property, it does not help the case of the prosecution for two reasons. The horse was not in the possession of the United States if they were trustees when it was stolen, and no statute of the United States punishes the stealing of property from the United States when they simply occupy the position of guardian towards the owner thereof. The civil cases cited by the prosecution, where the courts have maintained suits by the United States to protect the property of Indians, have no application, because in those cases the court having jurisdiction has the whole field of law and equity to which it may resort. We are therefore of the opinion that, if the indictment charged the stealing of United States property, the proof failed. If it alleged that the property was held in trust by the United States, then the proof did not show an offense punishable under the laws of the United States."

**Vol. VII, p. 650, sec. 97.** [First ed., 1909 Supp., p. 430.]

**Clerk of District Court.**—Notwithstanding the provisions of section 99, *infra*, this section is applicable to the embezzlement of court funds by a clerk of a United States District Court. *U. S. v. Dodge*, (S. D. Fla. 1918) 251 Fed. 737.

**Vol. VII, p. 652, sec. 99.** [First ed., 1909 Supp., p. 431.]

**Clerk of District Court.**—See annotation to section 97, *supra*, under this heading.

**Vol. VII, p. 670, sec. 125.** [First ed., 1909 Supp., p. 437.]

**I. HISTORY AND SCOPE (p. 671)**

**Perjury in bankruptcy proceeding.**—False swearing in a proceeding in bankruptcy is punishable under section 29b (2) of the Bankruptcy Act and not under section 125 of the Penal Code. There can only be one prosecution and conviction for one offense, and

Congress undoubtedly was of the opinion that false swearing in bankruptcy proceedings is not equal in enormity to the crime of perjury, as the punishment for false swearing in a proceeding in bankruptcy is less severe, and the time within which the prosecution must be instituted two years less than that for the crime of perjury under section 125 of the Penal Code. *Rosenthal v. U. S.*, (C. C. A. 8th Cir. 1918) 248 Fed. 684, 160 C. C. A. 584.

**Vol. VII, p. 688, sec. 135.** [First ed., 1909 Supp., p. 440.]

**V. PENDENCY OF CAUSE (p. 690)**

Under this statute, if the unlawful act, done with reference to a particular cause pending or contemplated to be brought before a United States court, does not obstruct the administration of justice therein, no offense is committed, although the evil intent of the unlawful act may militate against the administration of justice in some other cause. *Shackelford v. Com.*, (Ky. 1919) 214 S. W. 788.

**Vol. VII, p. 701, sec. 141.** [First ed., 1909 Supp., p. 441.]

**Aiding fugitive after escape.**—When the physical control of officers over a prisoner has been ended by flight beyond immediate active pursuit, the escape is complete. After that aid to the fugitive is not aiding his escape within the meaning of this section. *Orth v. U. S.*, (C. C. A. 4th Cir. 1918) 252 Fed. 566, 165 C. C. A. 16. To same effect, see (C. C. A. 4th Cir. 1918) 252 Fed. 569, 165 C. C. A. 19.

**Indictment.**—An indictment charging the defendants with conspiring to aid and abet the escape of certain persons, arrested and held in custody as enemy aliens pursuant to an order of the President, need not aver that such imprisoned persons are enemy aliens, and where it alleges the sending of several letters as overt acts, it need not set them forth either verbatim or in substance. *De Lacy v. U. S.*, (C. C. A. 9th Cir. 1918) 249 Fed. 625, 161 C. C. A. 535, L. R. A. 1918E. 1011. The court said: "A demurrer was interposed to the indictment, one of the grounds of which was that it was not alleged therein that said Von Schack and Bopp were alien enemies of the United States, and it is now contended that for the omission of that allegation the indictment is fatally defective. The contention cannot be sustained. In charging a conspiracy to accomplish an unlawful rescue, it is not necessary that the charge go further than the language of the statute which defines the offense. Section 141 of the Criminal Code provides for the punishment of anyone who shall rescue or attempt to rescue from the custody of any officer any person arrested upon a warrant or other process issued under

the provisions of any law of the United States, or who shall aid, abet, or assist any person so arrested to escape from the custody of such officer. The indictment charges, in the language of this section, that Von Schack and Bopp were arrested and confined by virtue of an order issued by the President under the provisions of Rev. Stats., § 4067 et seq., and that they were arrested as alien enemies. *Commonwealth v. Malloy*, 119 Mass. 347; *Commonwealth v. Lee*, 107 Mass. 207; *Haupt v. State*, 100 Ark. 409, 140 S. W. 294, Ann. Cas. 1913C, 690; *People v. Murray*, 57 Mich. 396, 24 N. W. 118; *State v. Sutton*, 170 Ind. 473, 84 N. E. 824; *Smith v. State*, 76 Ala. 69."

**Vol. VII, p. 703, sec. 145.** [First ed., 1909 Supp., p. 442.]

**Indictment.**—The indictment need not allege that the person threatened was in fact guilty of an offense. *Roberts v. U. S.*, (C. C. A. 9th Cir. 1918) 248 Fed. 873, 160 C. C. A. 631.

**Indictment sufficiently specific.**—The offense is charged in the language of the statute, with the added detail that the defendants charged Yarborough with having violated the White Slave Act. The defendants are also charged with having committed fourteen separate and distinct overt acts to effect the object of the conspiracy. We are of opinion that the count sufficiently states the material circumstances of the offense. It clearly charges the illegal act complained of; that is to say, the conspiracy to commit an offense against the United States, and the requisite fraudulent intent—states the date and place of the commission of the act charged, and the statutory offense which the defendants charged Yarborough with having committed, and the demand for money under a threat of informing, and as a consideration for not informing, against him. There is no suggestion that there was a want of knowledge of the crime charged against the defendants, or of any surprise concerning the same upon the trial of the case. Nor is there any intimation that any request was made for a bill of particulars concerning the details of the offense charged. We must therefore hold that the count sufficiently charges the crime of which the defendant was convicted. *Roberts v. U. S.*, (C. C. A. 9th Cir. 1918) 248 Fed. 873, 160 C. C. A. 631.

**Vol. VII, p. 754, sec. 194.** [First ed., 1909 Supp., p. 457.]

1. *In General* (p. 755)

**Moral turpitude.**—The offense is one involving moral turpitude, so that a conviction thereof warrants the disbarment of an

attorney. *In re Thompson*, (Cal. App. 1918) 174 Pac. 86.

**Vol. VII, p. 773, sec. 197.** [First ed., 1909 Supp., p. 458.]

**Indictment of abettor as principal.**—Under Penal Code, section 332 (7 Fed. Stat. Ann. 984) a person not present at a robbery of the mail, but who aided and abetted the offense, may be convicted under an indictment charging a violation of section 197. *Vane v. U. S.*, (C. C. A. 9th Cir. 1918) 254 Fed. 32, 165 C. C. A. 442.

**Vol. VII, p. 784, sec. 206.** [First ed., 1909 Supp., p. 461.]

**Evidence.**—On the trial of a postmaster for a violation of this section in making a false account by reporting an excessive amount of postage cancellations, it was proper to permit a post office inspector to testify "That there are no plants or other things being operated there from investigation, as far as he could ascertain, whereby they would send stamps from other places to these local plants," and that "in the ordinary course of business of fourth-class post offices, the sales of postage exceed the cancellation of postage, and that such is the case in about 98 per cent of the fourth-class post offices." *Kenney v. U. S.*, (C. C. A. 5th Cir. 1918) 254 Fed. 262, 165 C. C. A. 550.

**Vol. VII, p. 788, sec. 211.** [First ed., 1909 Supp., p. 462.]

I. General considerations.

II. Mailing obscene matter.

1. Elements of offense.

2. Test of obscenity.

III. Letters.

V. Indictment.

VIII. Trial.

2. Question for jury.

I. GENERAL CONSIDERATIONS (p. 790)

"Few would, I suppose, doubt that some prevention of the mailing of lewd publications is desirable, and yet no field of administration requires better judgment or more circumspection to avoid interference with a justifiable freedom of expression and literary development. I have little doubt that numerous really great writings would come under the ban, if tests that are frequently current were applied, and these approved publications doubtless at times escape only because they come within the term "classics," which means, for the purpose of the application of the statute, that they are ordinarily immune from interference, because they have the sanction of age and fame, and usually appeal to a comparatively limited number of readers. It is very easy, by a

narrow and prudish construction of the statute, to suppress literature of permanent merit." *Anderson v. Patten*, (S. D. N. Y. 1917) 247 Fed. 382.

**Inciting to arson, etc.**—The clause of the statute relative to "matter of a character tending to incite arson, murder or assassination" is not void for indefiniteness. *Magon v. U. S.*, (C. C. A. 9th Cir. 1918) 248 Fed. 201, 160 C. C. A. 279.

## II. MAILING OBSCENE MATTER

### 1. *Elements of Offense* (p. 791)

**Knowledge or intent.**—If a person deposit matter in the mail, knowing its contents, the fact that he does not know or believe it to be nonmailable is immaterial. *Magon v. U. S.*, (C. C. A. 9th Cir. 1918) 248 Fed. 201, 160 C. C. A. 279.

### 2. *Test of Obscenity* (p. 791)

The rule by which to determine whether a writing comes within the meaning of the statute is whether its language has a tendency to deprave and corrupt the morals of those whose minds are open to such influences and into whose hands it may fall, by arousing or implanting in such minds obscene, lewd or lascivious thoughts or desires. *Griffin v. U. S.*, (C. C. A. 1st Cir. 1918) 248 Fed. 6, 160 C. C. A. 146.

In *Anderson v. Patten*, (S. D. N. Y. 1917) 247 Fed. 382, the court in referring to a story said: "The young girl and the relations of the man with her are described with a degree of detail that does not appear necessary to teach the desired lesson, whatever it may be, or to tell a story which would possess artistic merit or arouse any worthy emotion. On the contrary, it is at least reasonably arguable, I think, that the details of the sex relations are set forth to attract readers to the story because of their salacious character. I am, of course, aware that mere description of irregular things in relation to sex may not fall within the statute. Such was the case when a similar New York statute was discussed by the Court of Appeals of that state in *People v. Eastman*, 188 N. Y. 478, 81 N. E. 459, 11 Ann. Cas. 302. Here, however, there is ground for holding that portions of the short story in question have a tendency to excite lust, and, if this is so, it falls within the prohibition of the statute."

*That the entire contents* of the communication be objectionable in character is not essential to the commission of the offense. *Griffin v. U. S.*, (C. C. A. 1st Cir. 1918) 248 Fed. 6, 160 C. C. A. 146.

### III. LETTERS (p. 794)

**That the entire contents** of the communication be objectionable in character is not essential to the commission of the offense. *Griffin v. U. S.*, (C. C. A. 1st Cir. 1918) 248 Fed. 6, 160 C. C. A. 146.

## V. INDICTMENT (p. 795)

**Knowledge.**—If matter is alleged to have been "knowingly, wilfully, unlawfully and feloniously" deposited in the mails, it need not be further alleged that the defendant knew of its nonmailable character. *Magon v. U. S.*, (C. C. A. 9th Cir. 1918) 248 Fed. 201, 160 C. C. A. 279.

**Nonmailable character.**—It need not be averred in terms that the matter sent was "nonmailable" where it is alleged that it was obscene, etc. *Magon v. U. S.*, (C. C. A. 9th Cir. 1918) 248 Fed. 201, 160 C. C. A. 279.

**Name of addressee.**—It is sufficient to aver that the mail matter was deposited "to be transmitted by the post office establishment to many and divers persons; the names of which divers persons are unknown to the grand jurors." *Magon v. U. S.*, (C. C. A. 9th Cir. 1918) 248 Fed. 201, 160 C. C. A. 279.

**Description of obscene matter.**—An indictment for a violation of this section in mailing a magazine containing articles characterized as "obscene, lewd, lascivious and filthy" is not bad because it also adds the nonstatutory term "indecent." *Lockhart v. U. S.*, (C. C. A. 8th Cir. 1918) 250 Fed. 610, 162 C. C. A. 626.

**Setting out in extenso.**—Where the indictment sets out the substance of a circular giving information as to abortifacients, the indictment is not lacking in certainty because it fails to set out the exact words. *Pilson v. U. S.*, (C. C. A. 2d Cir. 1918) 249 Fed. 328, 161 C. C. A. 336.

**Necessity of innuendo.**—"It is also claimed that the objectionable words in the two articles are not indicated with particularity and their harmful meaning defined. This was unnecessary. The articles complained of were set out verbatim in the indictment. So far as the record informs us, the government claimed no hidden meaning nor innuendo making expressions, innocent upon their face, vile when understood in the setting surrounding their use. Such concealed significance necessarily arises from circumstances outside of the writing or publication, and if the government intends to show such significance through evidence of such circumstances, it must apprise the accused so that he may be informed and given an opportunity to combat such proof. Clearly no such necessity exists where the accusation, as here, is based upon only such meaning and inferences as the writing or publication would itself carry to any one reading it." *Lockhart v. U. S.*, (C. C. A. 8th Cir. 1918) 250 Fed. 610, 162 C. C. A. 626.

## VIII. TRIAL

### 2. *Question for Jury* (p. 802)

**Obscenity of letter.**—In *Parish v. U. S.*, (C. C. A. 4th Cir. 1917) 247 Fed. 40, 159 C. C. A. 258, it was held to be a question for the jury whether the act was violated by the mailing of a letter to a female school teacher

stating that the writer had seen her in a position indicative of immoral relations with a certain man, and that he would inform the school authorities unless she accorded him a private interview, advising her not to consult with the man in question and assuring her that not even the wife of the writer would know anything about the matter. The court said: "We are of opinion that the question as to whether this letter was susceptible of the interpretation that the defendant had conceived a scheme to have a private interview with the young lady, for the purpose of using the knowledge which he claimed to possess to coerce her to accede to his immoral demands, was properly submitted to the jury. Such being the case, the action of the lower court in permitting the jury to determine the character of the letter was eminently proper, and in expressing this view we are not in conflict with the law as announced in the cases of *United States v. Journal Co., Inc.*, (D. C.) 197 Fed. 415, and *Knowles v. United States*, 170 Fed. 409, 95 C. C. A. 579."

**Matter inciting arson, etc.**—Whether matter sent through the mails tends to incite arson, murder or assassination is a question for the jury. *Magon v. U. S.*, (C. C. A. 9th Cir. 1918) 248 Fed. 201, 160 C. C. A. 279.

**Vol. VII, p. 803, sec. 212.** [First ed., 1909 Supp., p. 463.]

**Postal card.**—A postal card containing communications and pictures in connection therewith, calculated to reflect injuriously upon the character and conduct of the person to whom addressed and containing language of a scurrilous and defamatory character, is within the provision of this section. *Griffin v. U. S.*, (C. C. A. 1st Cir. 1918) 248 Fed. 6, 160 C. C. A. 146.

**Vol. VII, p. 812, sec. 215.** [First ed., 1909 Supp., p. 464.]

III. Essentials.

1. In general.
3. Scheme or artifice to defraud.
  - a. What constitutes.
  - c. Person defrauded.
4. Use of mails.

IV. Procedure.

2. Indictment.
  - a. In general.
  - d. Intent.
  - h. Consolidation of indictments.
4. Trial.
  - b. Evidence and instructions.

III. ESSENTIALS

1. In General (p. 815)

**Intent.**—It is not necessary that when the scheme was formed the parties intended to execute it by the use of the mails, if it was in fact thus executed. *Depew v. U. S.*, (C.

C. A. 3d Cir. 1918) 255 Fed. 539, 166 C. C. A. 607.

3. Scheme or Artifice to Defraud

a. What Constitutes (p. 816)

To use the mails in order to carry out a scheme for getting money by the making of promises or agreements which, whether known to be impossible of performance or not, there is no intention to perform, is a forbidden use of the facilities of the post office department. *U. S. v. Comyns*, (1919) 248 U. S. 340, 39 S. Ct. 98, 63 U. S. (L. ed.) —, wherein the court said: "In brief, the indictment avers that the scheme of defendants was to induce their intended victims to part with their money by representing to them that certain land (not described except generally as being located in the western district of Washington) could be purchased from the United States under the Timber and Stone Act for less than its real value if the victims would employ defendants to secure such land and would pay a part of the proposed fee in advance; the defendants agreeing at the same time that in case of non-success the money thus prepaid would be refunded; whereas in truth, as defendants well knew, for some reason not specified they could not carry out the agreement, and the purpose of making it was to secure the payment of the initial fee by the intended victims, which defendants intended to appropriate to their own use and did not intend to refund in case of a failure to secure title in accordance with the agreement. In our opinion such a scheme is a 'scheme or artifice to defraud . . . by means of false or fraudulent pretenses, representations, or promises' within the meaning of § 215 of the Criminal Code."

In a prosecution for using the mails to defraud, where the victim gave a check in betting at a fake turf exchange, it was held that the court rightly submitted to the jury the question whether the use of the mails in collecting the check was not at least such a natural and probable consequence of the execution of the original scheme (taking into account the original use of the check for betting purposes) as that all the participants would naturally have foreseen the likelihood that such resort to the mails would be had whenever it appeared expedient so to do in aid of the common purpose. *Shea v. U. S.*, (C. C. A. 6th Cir. 1918) 251 Fed. 440, 163 C. C. A. 458.

c. Person Defrauded (p. 825)

**In general.**—To same effect as original annotation, see *Le More v. U. S.*, (C. C. A. 5th Cir. 1918) 253 Fed. 887.

It is not necessary that the government prove that the person defrauded was the victim originally selected by the conspirators. *Shea v. U. S.*, (C. C. A. 6th Cir. 1918) 251 Fed. 433, 163 C. C. A. 451. See to the same effect *Bonfoly v. U. S.*, (C. C. A. 8th Cir. 1918) 252 Fed. 802, 164 C. C. A. 642.

#### 4. Use of Mails (p. 825)

**Ordering materials for fraud.**—The ordering through the mails of chemicals to be sold under a false label is within the Act though the sales are not made through the mails or in interstate commerce. *Edwards v. U. S.*, (C. C. A. 6th Cir. 1918) 249 Fed. 686, 161 C. C. A. 596.

**Causing use by others.**—In *Shea v. U. S.*, (C. C. A. 6th Cir. 1918) 251 Fed. 440, 163 C. C. A. 458, it is held that the testimony would warrant a conclusion that plaintiffs in error consciously participated in bringing about the use of the mails for the purpose of inducing a person who had placed a check as a bet at a fake turf exchange to have the check collected by a bank by the use of the mails, and that such a bringing about of the use of the mails would be a "causing" of such use, even though neither of them personally made the arrangements with the bank.

### IV. PROCEDURE

#### 2. Indictment

##### a. In General (p. 828)

**Joinder and election.**—In *Sidebotham v. U. S.*, (C. C. A. 9th Cir. 1918) 253 Fed. 417, 165 C. C. A. 159, the court held that the offense created by this section and that of conspiracy to commit it were properly joined and that the refusal to compel an election was not prejudicial, the jury acquitting of the conspiracy charge.

##### d. Intent (p. 834)

Where the indictment clearly shows an intent to defraud, the failure to allege that the acts of the defendant were "willfully" done is not fatal. *Holsman v. U. S.*, (C. C. A. 9th Cir. 1918) 248 Fed. 193, 160 C. C. A. 271.

##### h. Consolidation of Indictments (p. 837)

To same effect as original annotation, see *Sidebotham v. U. S.*, (C. C. A. 9th Cir. 1918) 253 Fed. 417, 165 C. C. A. 159.

#### 4. Trial

##### b. Evidence and Instructions (p. 838)

**Use of false labels on drugs.**—Where, in a prosecution under this section, it appears that the defendant sold a common drug under a label indicating that it was a rare drug made in a foreign country, the jury may consider the labels in determining the defendant's intent, for if he intended "to bring about a sale by misrepresenting the quality or identity of the article in particulars which would be likely to have a persuasive effect upon the purchaser's mind, this may be a sufficient defrauding." And where it further appears that the drug was sold without stating its nature on the label, as required by the Pure Food and Drugs Act of June 30, 1906, § 8 (see vol. 3, p. 379), an instruction permitting the jury to take that

fact into consideration is proper on the question of the defendant's fraudulent intent, although all the sales were intrastate and the Act did not apply, since he must have known that the absence of the statement would mislead the ultimate consumer. *Edwards v. U. S.*, (C. C. A. 6th Cir. 1918) 249 Fed. 686, 161 C. C. A. 596.

**Decoy letters.**—Answers to decoy letters are admissible, but the conspiracy to defraud must have existed prior to the answering of those letters and cannot be based entirely on those answers. *Holsman v. U. S.*, (C. C. A. 9th Cir. 1918) 248 Fed. 193, 160 C. C. A. 271.

The act of one of several persons associated in the transaction of a common enterprise, and done in furtherance of the common object, is generally admissible as evidence against the others. This principle is applicable generally to existing schemes to defraud under this section. *Shea v. U. S.*, (C. C. A. 6th Cir. 1918) 251 Fed. 440, 163 C. C. A. 458.

**Gambling paraphernalia in office of co-conspirator.**—In a prosecution for using the mails to defraud, where the fraudulent transaction was completed by the use of fictitious "turf exchanges," it was held proper to admit in evidence against one conspirator paraphernalia found in the office of another conspirator, although the person against whom it was offered was not present when the paraphernalia was found, there being evidence to show his connection with the general scheme to defraud by fake betting. *Shea v. U. S.*, (C. C. A. 6th Cir. 1918) 251 Fed. 440, 163 C. C. A. 458.

**Res gestæ.**—A telegram sent by one of the conspirators to another victim the day after he lost his money was held admissible as part of the *res gestæ*, the general fraudulent scheme not having been abandoned at the time. *Shea v. U. S.*, (C. C. A. 6th Cir. 1918) 251 Fed. 440, 163 C. C. A. 458.

**Similar offenses.**—Proof of similar offenses, accomplished or attempted, which were the outgrowth of the same general fraudulent scheme, with which the evidence tended to connect the defendants, is admissible. *Shea v. U. S.*, (C. C. A. 6th Cir. 1918) 251 Fed. 440, 163 C. C. A. 458.

**Vol. VII, p. 846, sec. 217.** [First ed., 1909 Supp., p. 465.]

**Indictment.**—The indictment need not allege to whom the mail matter in question was addressed or to what post office. *Murray v. U. S.*, (C. C. A. 4th Cir. 1917) 247 Fed. 874, 160 C. C. A. 96.

**Duplicity of charge.**—An indictment charging that the accused "deposited and caused to be deposited" in the post office a letter within the statute is not double. *Murray v. U. S.*, (C. C. A. 4th Cir. 1917) 247 Fed. 874, 160 C. C. A. 96.

**Evidence sufficient.**—In *Murray v. U. S.*, (C. C. A. 4th Cir. 1917) 247 Fed. 874, 160



C. C. A. 96, the evidence was held to be sufficient to show that the poison exhibited at the trial was the identical substance sent through the mail.

**Vol. VII, p. 847, sec. 218.** [First ed., 1909 Supp., p. 466.]

**Sentence.**—A defendant who pleads guilty to eight counts charging separate forgeries may be sentenced to ten years' imprisonment "to run concurrently on all counts of the indictment" though the penalty for such a single offense is but five years. *Brenkman v. Morgan*, (C. C. A. 8th Cir. 1918) 253 Fed. 553, 165 C. C. A. 223, wherein it was said: "We can conceive of no sound legal objection to a single sentence for several offenses charged in one indictment, if it does not exceed the statutory maximum for all. We have held such a sentence valid. *Myers v. Morgan*, 139 C. C. A. 641, 224 Fed. 413. It is true that the word 'concurrently' is generally used when terms of imprisonment are imposed separately for each of two or more offenses charged in the same indictment, and to indicate that while the convicted prisoner is serving one he is serving all. When so used, the sentence is the opposite of cumulative. But that use is not exclusive. Concurrently is also defined as 'in combination or unity.' When found in a sentence like that before us, the reasonable construction is that the years of imprisonment specified run as a unit upon all the counts in the indictment; that is to say, not upon each of the counts severally, but all of them in the aggregate."

**Vol. VII, p. 851, sec. 225.** [First ed., 1909 Supp., p. 468.]

**What constitutes shortage.**—Proof that a postmaster had issued money orders to himself to pay for whisky, without paying for them, was competent. Under the counts under which he was convicted, proof of an amount due the government in that way, and not accounted for by him, would be a shortage, on which the statutory embezzlement could be predicated. It was not essential for the government to show under those counts that he had actually received the money he failed to account for. *Foster v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 207. In that case it was further said: "The defendant also contends that the money received by him on C. O. D. parcel post packages, to be remitted to the sender, did not constitute money order funds, and could not be considered by the jury in determining the shortage. The evidence showed that the post office regulations provided that the C. O. D. tags should be treated as applications for money orders, and that the delivering postmaster should fill out a money order on the sending post office to remit the amount col-

lected from the addressee. The department treated such moneys as money order funds, and they clearly might be properly so treated, and this fixed their character as such. Again, the funds of this character were but a small part of the conceded balance due from defendant to the government, and not explained by him, and the ruling could have made no difference to the defendant on whom no fine was imposed."

**Indictment—Intent.**—No specific intent being required by the statute, an averment that a postmaster "wilfully" failed to turn over funds is sufficient. *Foster v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 207.

**Authority of depository or officer.**—In an indictment for failure to turn over funds averments that Shreveport "was then and there the designated depository of the said post office at Shongaloo, La.," and of the fourth count, that the defendant failed to turn over to the post office inspector "upon demand and order of the Postmaster General, made through the said A. C. Caldwell, post office inspector, the said A. C. Caldwell, post office inspector, being then and there a duly authorized officer and agent of the Postmaster General," are good against the objection made to them that they do not say by what means the depository was designated and the post office inspector made the authorized agent of the department. "The manner in which or the means by which these things were done are matters of evidence rather than of averment. The defendant could have obtained a more particular description by demanding a bill of particulars. No prejudice could have resulted to the defendant from the alleged imperfect averment, and, if imperfect, it was cured by section 1025 of Revised Statutes, especially when, as in this case, objection was first interposed upon the trial of the cause. *Benson v. U. S.*, 240 Fed. 413, 153 C. C. A. 339; *Evans v. U. S.*, 153 U. S. 590, 14 S. Ct. 934, 38 U. S. (L. ed.) 830." *Foster v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 207.

**Evidence—Authority of depository.**—The oral testimony of the inspector that the Shreveport post office was the designated depository for money order funds for another post office, together with the fact that the defendant himself had in habitually made remittances of money order funds to Shreveport during his incumbency, was evidence sufficient for the submission of that issue to the jury in a prosecution of a postmaster of the latter office for failure to turn over funds. *Foster v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 207.

**Judicial notice of officer's authority.**—"The post office inspector's authority to demand and receive money order funds is a matter of post office departmental rules and regulations, of which the courts take judicial notice. *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415." *Foster v. U. S.*, (C. C. A. 5th Cir. 1919) 256 Fed. 207.

**Vol. VII, p. 863, sec. 238.** [First ed., 1909 Supp., p. 472.]

**Necessity of delivery to accused.**—In *McKnight v. U. S.*, (C. C. A. 5th Cir. 1918) 252 Fed. 687, 164 C. C. A. 527, wherein it appeared that the accused, one Herskowitz and certain employees of an express company conspired to violate this section, it was said: "It is claimed by counsel for defendant that the offense described in section 238 requires that some person shall receive the intoxicating liquor in order to complete the offense committed by the officer, agent or employé of the common carrier, as the officer, agent or employé may not knowingly deliver or cause to be delivered to any person other than the person to whom it has been consigned, without that other person aiding and abetting the officer, agent or employé in the commission of the offense, and, as the law makes an aider or abettor guilty as a principal, the offense denounced by the statute requires the participation of two persons and concert of action between them, and if the evidence shows that the offense denounced by the statute has been completed, then an indictment for a conspiracy to commit the offense will not lie, nor will a conviction be upheld if the evidence shows such a state of facts. There is very respectable authority supporting the contention of counsel for defendant in error. *U. S. v. N. Y. C. & H. R. Ry. Co. et al.* (C. C.) 146 Fed. 298; *U. S. v. Dietrich & Fisher* (C. C.) 126 Fed. 664; *Chadwick v. U. S.*, 141 Fed. 225, 72 C. C. A. 343; *U. S. v. Burke* (D. C.) 221 Fed. 1014; *Miles v. State*, 58 Ala. 390; *Shannon v. Commonwealth*, 14 Pa. 226; *Whart. Crim. L.*, § 1339. An examination of the record has convinced us, however, that the evidence does not show that McKnight received any of the intoxicating liquor; on the contrary, it shows that it was all received by Herskowitz. If McKnight took no part in the actual commission of the offense, he still could be indicted and convicted for a conspiracy to commit the offense, and he would not be within the rule contended for by his counsel, if he did not participate in the commission of the offense itself, and we do not think the doctrine of agency can be relied upon to show such participation." See to same effect *Grant v. U. S.*, (C. C. A. 8th Cir. 1918) 252 Fed. 692, 164 C. C. A. 532.

**Vol. VII, p. 864, sec. 239.** [First ed., 1909 Supp., p. 473.]

**Purpose of statute.**—"Without question the practice of collecting the purchase price at the point of destination as a condition to delivery was the thing at which this section was aimed." *Danciger v. Cooley*, (1919) 248 U. S. 319, 39 S. Ct. 119, 63 U. S. (L. ed.) —, *affirming* (1916) 98 Kan. 38, 484, 157 Pac. 453, 158 Pac. 1119.

"Any other person" means that this section is not confined to carriers and their agents. *Danciger v. Cooley*, (1919) 248 U. S. 319, 39 S. Ct. 119, 63 U. S. (L. ed.) —, *affirming* (1916) 98 Kan. 38, 157 Pac. 453, 484, 158 Pac. 1119, wherein the case as stated by the court was as follows: "*Danciger Brothers*, who conducted a mail-order liquor business in Kansas City, Missouri, brought this suit in a Kansas court to recover from *Cooley* certain moneys collected by him, under an arrangement with them, as the purchase price of intoxicating liquors sold by them in interstate commerce, and also to enforce a similar claim assigned to them by another liquor dealer. After issue and trial *Cooley* prevailed and the judgment was affirmed; the appellate court holding that the arrangement under which the moneys were collected involved a violation of § 239 of the Criminal Code of the United States, c. 321, 35 Stat. 1136, and that, applying the settled rule of the Kansas courts, a principal who employs an agent to make collections in violation of a criminal law cannot compel the agent to account for what he collects. 98 Kansas. 38 and 484. The case is here on writ of error sued out prior to the Act of September 6, 1916, c. 448. 39 Stat. 726.

"These are the facts: During the year 1910 *Danciger Brothers* received through the mails several orders for whisky from customers in Topeka, Kansas, and in each instance shipped the liquor from Kansas City, Missouri, to Topeka, as freight. Each package was consigned to the shipper's order and was to be delivered by the carrier only on the surrender of the bill of lading properly endorsed. A sight draft was drawn on the customer for the purchase price and this with the bill of lading attached was sent to *Cooley* under an arrangement whereby he was to collect the draft, was then to hand the bill of lading suitably endorsed to the customer to enable the latter to get the package from the carrier, and ultimately was to remit to *Danciger Brothers* the amount collected less a commission for the service rendered. Before this arrangement was made the banks had refused to make such collections. The assigned claim need not be separately described, for it was essentially like the other. As the transactions occurred before the passage of the Webb-Kenyon Act, c. 90, 37 Stat. 699, we are not concerned with it, but only with the situation theretofore existing. Whether § 239 of the Criminal Code reaches and embraces acts done by an agent such as *Cooley* was in this instance, or is confined to acts of common carriers and their agents, is a question about which there has been some contrariety of opinion, and it is now before this court for the first time. Of course, the chief factor in its solution must be the words of the statute. . . .

"The words 'any railroad company, express company, or other common carrier,' comprehend all public carriers; and the words 'or any other person' are equally broad.

When combined they perfectly express a purpose to include all common carriers and all persons; and it does not detract from this view that the inclusion of railroad companies and express companies is emphasized by specially naming them. To hold that the words 'or any other person' have the same meaning as if they were 'or any agent of a common carrier' would be not merely to depart from the primary rule that words are to be taken in their ordinary sense, but to narrow the operation of the statute to an extent that would seriously imperil the accomplishment of its purpose. The rule that where particular words of description are followed by general terms the latter will be regarded as applicable only to persons or things of a like class is invoked in this connection, but it is far from being of universal application, and never is applied when to do so will give to a statute an operation different from that intended by the body enacting it. Its proper office is to give effect to the true intention of that body, not to defeat it. *United States v. Mescall*, 215 U. S. 26.

"Without question the practice of collecting the purchase price at the point of destination as a condition to delivery is the thing at which the statute is aimed. Through that practice the sale of liquor in interstate commerce was rapidly increasing. But, as before shown, such collections were not confined to carriers and their agents, but often were made by others. In principle and result there was no difference; the evil was the same in either event. Besides, if the statute were made applicable only to carriers and their agents, it could be evaded so readily by having other collectors that it would accomplish nothing. The volume of the business and the attending mischief would be unaffected. Doubtless all this was in mind when the statute was drafted and accounts for its comprehensive terms. That the words 'or any other person' are intended to include all persons committing the acts described is, as we think, quite plain."

"In connection with the transportation of liquor.—To be within this section it is essential that the act of collecting the purchase price be done "in connection with the transportation of" the liquor. The statute does not say "in the transportation," but "in connection with" it. Transportation is not completed until the shipment arrives at the point of destination and is there delivered, and a person who is at the point of destination of liquor and holds a bill of lading which carries with it control over delivery, and conforming to his principal's instructions requires the purchase price to be paid before passing to the vendee, such bill occupies the position of being closely connected with the transportation of the liquor and violates this section. *Danciger v. Cooley*, (1919) 248 U. S. 319, 39 S. Ct. 119, 63 U. S. (L. ed.) —, *affirming* (1916) 98 Kan. 38, 484, 157 Pac. 453, 158 Pac. 1119.

**Recovery of money collected.**—Where in an action in a state court for the recovery by liquor dealers of moneys collected by an agent as the purchase price of liquor, the agent sets up this section as a defense in that the transaction violated it, and the state court applying the settled rule of that state sustains the defense, holding that a principal who employs an agent to make collections in violation of a criminal law cannot compel the agent to account for what he collects, the Supreme Court of the United States will refuse to re-examine the ruling as it turns on a question of local law. *Danciger v. Cooley*, (1919) 248 U. S. 319, 39 S. Ct. 119, 63 U. S. (L. ed.) —, *affirming* (1916) 98 Kan. 38, 484, 157 Pac. 453, 158 Pac. 1119.

**Vol. VII, p. 865, sec. 240.** [First ed., 1909 Supp., p. 473.]

**Definitions**—"Consignee."—To same effect as original annotation, see *Great Northern Pac. Steamship Co. v. Rainier Brewing Co.*, (C. C. A. 9th Cir. 1919) 255 Fed. 762.

**Marking packages**—*Sufficiency*.—In *Jacob Schmidt Brewing Co. v. U. S.*, (C. C. A. 8th Cir. 1918) 254 Fed. 695, 166 C. C. A. 193, it was contended that the marking of an interstate shipment of beer with the name of the brewing company, the trade-name of the beer "Select," and a serial number, was a sufficient compliance with the provisions of this section. Answering this contention and holding that the marking was insufficient, the court said: "What defendant did was this: It shipped certain packages containing beer from St. Paul, Minn., to customers in Minot, N. D., on which the only external marks indicating the nature of the contents were, 'Return to Jacob Schmidt Brewing Co.,' with street address in St. Paul; the trade-name 'Select'; and 'Serial No. 33.' The name of defendant and the trade-name it adopted for its product may be put aside. An inference might, perhaps, be drawn from them by some persons that the packages contained beer, instead of a nonintoxicating beverage, but the Act of Congress has not left the matter to such inconclusive inferences. Nor is defendant in any better position with its expression, 'Serial No. 33.' It appears that defendant's 'Select' beer, so called, was registered with officials of North Dakota under a pure food law of that state, and that the designation 'Serial No. 33' was assigned to it. But that was done merely for the local purposes of the state law. It was not designed to give a new or additional name to a well-known article, when outside the purview of that law or in relations with which that law has no concern.

"Defendant invokes the rule that that is certain which can be made certain. The rule does not apply to a case like this. The Act of Congress says that the nature of the contents of the package shall be plainly shown and shown on the outside cover. The requirement is a definite one, very easily

complied with. It means that the marks must be of manifest, self-evident import, and must appear at the place indicated. It clearly excludes the idea of reference elsewhere for information, or of a general knowledge of the trade-names or brands adopted by particular merchants for their business, which have not gained a place in the common vocabulary of the country. What has been said also precludes resort to bills of lading issued by the carrier."

**Costs and expenses of seizure.**—"Looking to the pleadings, we find that the plaintiffs in error were the original violators of the law, rendering the seizure proper and necessary, and through their intervention the proceedings were delayed nearly 10 months, thereby largely increasing all the costs and expenses incurred for the preservation of the property pending the final judgment of the court, and we conclude that the plaintiffs in error were properly held responsible for all the costs and expenses incurred from the beginning of the suit. See *Clara O. Burns, Adm'x, et al. v. Julius W. Rosenstein et al.*, 135 U. S. 449, 10 Sup. Ct. 817, 34 L. Ed. 193." *Williams v. U. S.*, (C. C. A. 5th Cir. 1918) 254 Fed. 48, 165 C. G. A. 458.

**Vol. VII, p. 886, sec. 268.** [First ed., 1909 Supp., p. 480.]

**Scope of section.**—The provisions of this section and sections 269–271, *infra*, are expressly limited to the constitutional authority of Congress to legislate against slavery, involuntary servitude, and peonage under the Thirteenth and Fourteenth Amendments to the Constitution. This amounts to a legislative declaration that kidnapping, not so limited, was left to be dealt with by the states under their police power. *U. S. v. Wheeler*, (D. C. Ariz. 1918) 254 Fed. 611.

**Vol. VII, p. 886, sec. 269.** [First ed., 1909 Supp., p. 480.]

**Peonage defined.**—"Peonage has been defined by the Supreme Court of the United States as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness, and indebtedness is the cord by which the victim is bound to the master's service. It matters not that the service was begun voluntarily by contract, for, if it is enforceable by criminal prosecution instead of a civil action for damages, it is nevertheless peonage. See *Bailey v. Alabama*, 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191, and the authorities therein cited." *State v. Oliva*, (1918) 144 La. 51, 80 So. 195.

**State laws punishing breach of labor contracts.**—A state law making it an offense to entice away a laborer under contract is valid. *Johns v. Patterson*, (Ark. 1919) 211 S. W. 387, wherein it was said: "Peonage is based upon a condition of compulsory service by the debtor for the payment of his debt.

The state statute under consideration has no such purpose but was enacted for the purpose of fixing the criminal and civil liability of a third party for the violation of contracts of service."

A state punishing "whoever shall willfully violate a hire . . . contract, conditioned on the cultivation of land in this state, upon the faith of which contract money or goods have been advanced, by leaving the employ of the person . . . without first tendering to the person by whom said money or goods was advanced, the amount of money, or the value of goods obtained," is invalid because in conflict with the federal statute. *State v. Oliva*, (1918) 144 La. 51, 80 So. 195, wherein the court said: "An analysis of the law as hereinabove quoted and under which the defendant is being prosecuted shows at a glance that it comes within the inhibition of the Thirteenth Amendment and the legislation adopted by Congress in pursuance thereof, as interpreted by the United States Supreme Court. It does not pretend to enforce a contract of hire except where money or goods have been advanced on the faith of the contract, and then only in the instance where the laborer leaves without first tendering the return of the money or the value of the goods. This indebtedness becomes the cord by which the laborer is bound to the master's service, and the service is enforceable by most potent means, the instrumentalities created by the state to punish lawlessness and crime."

**Vol. VII, p. 890, sec. 272.** [First ed., 1909 Supp., p. 481.]

III. THIRD PARAGRAPH

1. *Lands Reserved or Acquired*

a. *In General* (p. 896)

Public land acquired as a homestead by an Indian under the Act of July 4, 1884, ch. 180 (3 Fed. Stat. Ann. 820) is not within the meaning of this section. *U. S. v. Lewis*, (S. D. Cal. 1918) 253 Fed. 469. The court said: "It seems to me perfectly plain that the land upon which this murder was committed was not reserved for the exclusive use of the United States, simply by reason of the fact that there is a trust provision in the patent. The United States held it in trust for the use of the Indian, and not for the use of the United States. The mere fact that the Indian is a ward of the government does not change the reasoning in the slightest."

**Vol. VII, p. 905, sec. 273.** [First ed., 1909 Supp., p. 481.]

IV. PROSECUTION FOR OFFENSE

4. *Indictment*

b. *Jurisdictional Averments* (p. 913)

The word "feloniously" need not be used in an indictment for murder. *Myres v. U. S.*

(C. C. A. 5th Cir. 1919) 256 Fed. 779, 168 C. C. A. 125.

**Vol. VII, p. 954, sec. 296.** [First ed., 1909 Supp., p. 487.]

**Necessity of specific intent.**—In *Doeche v. U. S.*, (C. C. A. 2d Cir. 1918) 250 Fed. 566, 162 C. C. A. 582, wherein a conspiracy by Germans to destroy munition ships was shown, the court said: "We think that there was no case made out under the indictment for conspiracy to injure underwriters. Section 296 of the Criminal Code. The proof was of a purpose to raise the rates of insurance, a purpose not involving the existence of any insurance upon the vessels injured, and as well fulfilled if the increased dangers were made manifest upon those uninsured as upon those insured. Where the crime involves, as here, a specific intent, the existence of the intent must be proved as an independent fact, the state of mind prescribed in the statute. That state of mind is not proved by showing that the defendants had reason to suppose that the ships attacked might well be insured. Such knowledge would, it is true, be enough to charge them with the consequences of their acts, though the definition of the crime included those consequences, but it is not the equivalent of an intent to produce those consequences. Such an intent involves the belief that the consequences will in fact follow upon the acts. This the government made no attempt to prove."

**Vol. VII, p. 957, sec. 298.** [First ed., 1909 Supp., p. 487.]

**Conspiracy to attack vessel,** see Penal Laws, § 37, supra.

"Despoil" as here used includes "fruitless injury" and covers as well what would be malicious mischief in law as what would be larceny. *Doeche v. U. S.*, (C. C. A. 2d Cir. 1918) 250 Fed. 566, 162 C. C. A. 582, holding that placing bombs in merchant ships with intent to sink them at sea was within the section.

**Vol. VII, p. 984, sec. 332.** [First ed., 1909 Supp., p. 495.]

**Misdelivery of liquor.**—In *Billingsley v. U. S.*, (C. C. A. 9th Cir. 1918) 249 Fed. 331, 161 C. C. A. 339, an indictment for conspiracy to deliver liquor to persons other than the conspirers in violation of section 238 of the Penal Law, supra, it was said: "William H. Pielow and William Frazier are charged along with the Billingsleys as co-conspirators. Pielow was an officer, agent, and employé of a transfer company, or common carrier, and Frazier was also an employé of a transfer company, which companies had a part in the transportation of intoxicating liquors unlawfully brought into the state of Washington from the state of California. So it may be seen that the Billingsleys were at least aiding and abetting in the unlawful transportation of intoxicants into the state of Washington. While the Billingsleys were not officers or employés of a common carrier, they conspired with such officers to commit the offense denounced by the Penal Code."

## PORTO RICO

**Vol. VII, p. 1271, sec. 31.** [First ed., vol. V, p. 771.]

**Congressional approval of laws.**—Where the legislative assembly of Porto Rico enacts that the secretary of the island should promulgate all laws enacted by the legislative body, it is to be presumed, in the absence of proofs or suggestion to the contrary, that the local Porto Rican legislation was reported to Congress, or, at least, that Congress was cognizant of such legislation, and in the absence of affirmative action by that body, that there was congressional acquiescence. *Porto Rico v. American R. Co.*, (C. C. A. 1st Cir. 1918) 254 Fed. 369, 165 C. C. A. 589.

**Vol. VII, p. 1272, sec. 32.** [First ed., vol. V, p. 772.]

**Railroad rates.**—Under this section the power to control local rates of railroads operating on the island of Porto Rico is in

the legislative assembly rather than in the Interstate Commerce Commission. *Porto Rico v. American R. Co.*, (C. C. A. 1st Cir. 1918) 254 Fed. 369, 165 C. C. A. 589, wherein it was said regarding this Act: "Under the circumstances, and considering the Organic Act as a whole, we think the intended and comprehensive congressional delegation of legislative power in respect to local conditions would include subject-matter like that of local railway rates, and would control as against the contention that the Interstate Commerce Commission was clothed with exclusive jurisdiction through the force of the general terms of the same act, which are without any suggestion of a particular intent to carry such jurisdiction to the railroad affairs of the insular situation.

"Indeed, the original idea of federal control and federal regulation was based upon physical interstate and interterritorial relations and upon connecting lines, conditions under which local interruptions impair the

efficiency of the paramount federal right to regulate commerce between the states and territories. There is no such federal right or federal responsibility as between the people of the island of Porto Rico and their local railroads, and upon this general view, in respect to the question of the intention of Congress under the Organic Act, and after misunderstandings and discussion had arisen as to its scope, and as to the jurisdiction of the Interstate Commerce Commission, it is quite significant and something that must be considered that, through subsequent legislation, Congress declared, through the Act of March 2, 1917, c. 145 (39 Stat. p. 1, p. 964), § 38, that the Interstate Commerce Act shall not apply to Porto Rico."

### 1918 Supp., p. 620, sec. 34.

**Subject and title of bill.**—In *Benedicto v. Porto Rican Am. Tobacco Co.*, (C. C. A. 1st Cir. 1918) 256 Fed. 422, the title of the Act there under consideration was as follows: "An act to amend an 'act entitled an act to protect Porto Rican cigars from fraudulent misrepresentation, by providing for adequate expert inspection, and the issue of stamps of guarantee covering the origin of tobacco used in the manufacture of such cigars, intended for exportation and for other purposes,' approved March 11, 1915." It was held that this title did not cover the following provision: "The denomination of each guarantee stamp for original boxes or packages containing cigars for export or consumption in Porto Rico shall be one cent each, and twenty-five cents each for packages containing leaf tobacco, scraps or stripped tobacco for export."

### 1918 Supp., p. 624, sec. 38.

**Application of Interstate Commerce Act.**—The provision of this section that the Interstate Commerce Act and its amendments shall not apply to Porto Rico, does not apply to cable lines. *Benedicto v. West India, etc.*, Tel. Co., (C. C. A. 1st Cir. 1919) 256 Fed. 417. The court said: "The conclusion is that, while Congress, under its plenary power, had the unquestionable right to do so, it never has delegated to the legislative assembly of Porto Rico authority to regulate interpossessional, interterritorial, interstate, or foreign cable rates, and that the local legislative body, therefore, was without authority to create a commission for that purpose, and that, while the Interstate Commerce Commission may not exercise jurisdiction in respect to Porto Rican intra-island rates, that it has jurisdiction over her interpossessional and foreign instruments of commerce. We think, therefore, that the District Court of the island was right in holding that the assembly was without authority over the subject-matter of cable rates."

### 1918 Supp., p. 626, sec. 41.

**Injunction of actions.**—The grant to the District Court for Porto Rico of "jurisdiction of all cases cognizable in the District Courts of the United States," is not limited by Judicial Code, section 286, relating to injunction against the prosecution of actions brought under the laws of the states. *Benedicto v. West India, etc.*, Tel. Co., (C. C. A. 1st Cir. 1919) 256 Fed. 417.

## POSTAL SERVICE

### Vol. VIII, p. 21, sec. 398. [First ed., vol. VI, p. 7.]

**Nature of postal convention.**—The postal conventions cannot be deemed treaties, because they are not adopted by the Senate, and they cannot be deemed statutes, because Congress alone has power to adopt statutes, and that power cannot be delegated. They cannot be considered treaties, because the treaty-making power is confined in the President and the Senate by the Constitution. They are but provisions which determine what merchandise may be received in the mail. *U. S. v. Four Packages of Cut Diamonds*, (S. D. N. Y. 1917) 247 Fed. 354, (C. C. A. 2d Cir. 1918) 255 Fed. 314, (C. C. A. 2d Cir. 1919) 256 Fed. 305.

### Vol. VIII, p. 68, sec. 3. [First ed., vol. V, p. 796.]

**Interpleader by injured person.**—The owner of money stolen from the mails by a postal

employee is not entitled to interplead in a suit by the government on the employee's bond, his remedy being by application to the Postmaster General under section 143 of the Postal Laws and Regulations of 1913. *U. S. v. U. S. Fidelity, etc., Co.*, (C. C. A. 8th Cir. 1918) 247 Fed. 16, 159 C. C. A. 234.

**Amount of recovery.**—Where a postal clerk steals registered mail the liability on his bond is not limited to the sum which the government has paid to injured persons but extends to the full penalty of the bond, limited only by the amount of the actual injury suffered, not merely by the government itself, but by its patrons, and the government holds the amount recovered, above the amount it has paid, upon a trust for the benefit of its injured patron. This right of recovery is rested, not only on the legal right of an ordinary bailee for hire to recover the full value of the subject of the bailment from one who has wrongfully converted it, but upon the right of the United States, as *parens patrie*, and upon principles of public policy, in the

performance of its moral duty to protect the patrons of its post office establishment against theft by its unfaithful employees. *U. S. v. U. S. Fidelity, etc., Co.*, (C. C. A. 6th Cir. 1918) 247 Fed. 16, 159 C. C. A. 234.

**Vol. VIII, p. 108, sec. 2.** [First ed., 1914 Supp., p. 315.]

**Statement of paid circulation.**—The statement of daily newspapers required to be filed by this section should cover the whole bona fide paid circulation, however attained, whether sold over the counter, distributed through news agencies and news routes, or disposed of in any other way. (1914) 30 Op. Atty.-Gen. 244.

**Vol. VIII, p. 109, sec. 8.** [First ed., 1914 Supp., p. 319.]

**The executive departments and the officers of the government** are entitled to the benefit of this section, and penalty envelopes or labels may be used in sending by parcel-post fourth-class matter not exceeding eleven pounds in weight. (1913) 30 Op. Atty.-Gen. 112.

**Vol. VIII, p. 163, sec. 3962.** [First ed., vol. V, p. 893.]

**Reduction of compensation for delay.**—Sections 3962 and 4002 Revised Statutes, and the Act of June 26, 1906, 34 Stat. 467, contemplate the transportation of the mails with due frequency and speed with especial reference to the published time tables, and the Post Office Department in entering into contracts for the carrying of the mails is not precluded from asserting its right to have the mails transported accordingly and to make deductions from the pay of contractors for failure to perform service according to contract and impose fines upon them for their delinquency. *Louisville, etc., R. Co. v. U. S.*, (1918) 53 Ct. Cl. 238.

**Vol. VIII, p. 188.** [*Public roads as highways.*] [First ed., vol. V, p. 901.]

**Violation of street regulation by mail carriers.**—The fact that certain streets are post routes does not prevent a mail carrier from being liable for the violation of reasonable street regulation. *Com. v. Classon*, (1918) 229 Mass. 329, 118 N. E. 653, L. R. A. 1918C 939.

**Vol. VIII, p. 188, sec. 3997.** [First ed., vol. V, p. 915.]

**Section not repealed.**—The Act of March 3, 1873, did not repeal sections 210 and 212 of the Act of June 8, 1872 (R. S. secs. 3997, 3999). *Kansas City, etc., R. Co. v. U. S.*, (1918) 53 Ct. Cl. 258,

**Vol. VIII, p. 189, sec. 3999.** [First ed., vol. V, p. 915.]

**Section not repealed.**—The Act of March 3, 1873, did not repeal sections 210 and 212 of the Act of June 8, 1872 (R. S. secs. 3997, 3999). *Kansas City, etc., R. Co. v. U. S.*, (1918) 53 Ct. Cl. 258.

**Vol. VIII, p. 194, sec. 4001.** [First ed., vol. V, p. 917.]

**Powers of Postmaster General.**—The Acts of June 8, 1872, 17 Stat. 283, and March 3, 1873, 17 Stat. 558, and the several Acts amendatory thereof charge the Postmaster General with the duty of engaging in contracts with railroads carrying the mails within specified maximum rates and clothe that official with full discretionary powers to determine the character of service to be performed and the compensation to be made therefor, "so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed." *Kansas City, etc., R. Co. v. U. S.*, (1918) 53 Ct. Cl. 258.

**Other railroads participating in haul; deduction.**—Where a contract is entered into by a railroad with the United States for transportation and the contract is fulfilled in accordance with the contract provisions, the railroad is entitled to the full amount specified in the contract without deductions by reason of any claim by another railroad participating in the haul, and without regard to any amount the United States may have paid the other railroad for so participating. *Cincinnati, etc., R. Co. v. U. S.*, (1917) 53 Ct. Cl. 25.

**Vol. VIII, p. 195, sec. 4002.** [First ed., vol. V, p. 919.]

**Previous Acts not repealed.**—The Act of March 3, 1873, did not repeal sections 210 and 212 of the Act of June 8, 1872 (R. S. secs. 3997, 3999). *Kansas City, etc., R. Co. v. U. S.*, (1918) 53 Ct. Cl. 258.

**Effect of subsequent Acts.**—Neither the Act of March 3, 1905, 33 Stat. 1088, nor the Act of March 2, 1907, 34 Stat. 1212, affected the powers and duties of the Postmaster General in any regard, whether such powers were statutory or discretionary, mandatory or directory, except to require weighings for not less than ninety successive working days. *Kansas City, etc., R. Co. v. U. S.*, (1918) 53 Ct. Cl. 258.

**Act as directory only.**—The Act, in providing for an average weight of mail, according to which compensation was to be readjusted and under which contracts for transportation should be made, was directory merely, in that it gave the Postmaster General directions which ought to be followed, but not such as limited the power with respect to which the directions were given that it could not effectually be exercised without observing

them. *Kansas City, etc., R. Co. v. U. S.*, (1918) 53 Ct. Cl. 258.

**Discretion of Postmaster General.**—The Act lodges in the Postmaster General the discretion of determining the details to be followed in the weighing of the mails "not less than once in every four years," and he alone was to determine the average weight of the mails carried and how such average should be obtained. *New York, etc., R. Co. v. U. S.*, (1918) 53 Ct. Cl. 222.

**Alteration of departmental practice.**—Since the Act may be treated as directory merely and as clothing the office of the Postmaster General and not the incumbent with the powers and duties therein found, usage alone could not make it mandatory, and an alteration of a long-continued departmental practice thereunder cannot be prevented by parties whose claims arise after full notice of the change. *Kansas City, etc., R. Co. v. U. S.*, (1918) 53 Ct. Cl. 258.

**Insufficient rate not taking of property without compensation.**—No claim for the taking of private property under the Fifth Amendment of the Constitution can be predicated upon a contract to carry the mails, even though it appear that the compensation received was unreasonable and to that extent confiscatory, when the contract was entered into voluntarily and the railroad was under no duress to continue the service. *New York, etc., R. Co. v. U. S.*, (1918) 53 Ct. Cl. 222.

**Reductions in compensation for delay.**—Sections 3962 and 4002 Revised Statutes, and the Act of June 26, 1906, 34 Stat. 467, contemplate the transportation of the mails with due frequency and speed with especial reference to the published time tables, and the Post Office Department in entering into contracts for the carrying of the mails is not precluded from asserting its right to have the mails transported accordingly and to make deductions from the pay of contractors for failure to perform service according to contract and impose fines upon them for their delinquency. *Louisville, etc., R. Co. v. U. S.*, (1918) 53 Ct. Cl. 238.

**Carrying mail after declaration of terms as contract.**—Where a railroad executes a distance circular and contemporaneously refuses to accept the amount there stated as full compensation and the Postmaster General then informs the railroad that said compensation is all that will be paid, and the railroad continues to carry the mails, there was a "meeting of the minds" and said road is bound by the terms offered for such service. *New York, etc., R. Co. v. U. S.*, (1918) 53 Ct. Cl. 222.

**Vol. VIII, p. 204, sec. 1.** [First ed., vol. X, p. 336.]

**Effect on previous Acts.**—The Act did not affect the powers and duties of the Postmaster General in any respect except to require weighings for ninety successive work-

ing days. *Kansas City, etc., R. Co. v. U. S.*, (1918) 53 Ct. Cl. 258.

**Vol. VIII, p. 205.** [*Readjustment of rates, etc.*] [First ed., 1909 Supp., p. 523.]

**Effect on earlier Acts.**—The Act of March 2, 1907, did not in any manner affect the powers and duties of the Postmaster General under earlier Acts. *Kansas City, etc., R. Co. v. U. S.*, (1918) 53 Ct. Cl. 258.

**Reweighing** is not a prerequisite to putting this Act into effect. "The references to average weights are not enough to require reweighing." *Delaware, etc., R. Co. v. U. S.*, (1919) 249 U. S. 385, 39 S. Ct. 348, 63 U. S. (L. ed.) —, *affirming* (1916) 51 Ct. Cl. 426.

A reduction in the rates for carrying the mails could be made by the Postmaster General in pursuance of this Act, where the government had originally fixed the compensation "subject to future orders," although the Postmaster General may have had no power to change the rates when the original contract was made. *Delaware, etc., R. Co. v. U. S.*, (1919) 249 U. S. 385, 39 S. Ct. 348, 63 U. S. (L. ed.) —, *affirming* (1916) 51 Ct. Cl. 426.

**Vol. VIII, p. 206.** [*Weighing of mails, etc.*]

**Withdrawal of empty mail bags.**—Congress by the Act of May 27, 1908, 35 Stat. 412, empowered the Postmaster General to withdraw from the mails empty mail bags and to transmit the same by freight, and by their withdrawal said bags ceased to be a part of the mails for any purpose of weighing, and thereafter plaintiff was not entitled to have their weight added to the average weight of the mails, and the Act in no wise impaired the obligation of the contract theretofore made. *St. Louis, etc., R. Co. v. U. S.*, (1917) 53 Ct. Cl. 45.

**Vol. VIII, p. 208, sec. 1.** [*Steel cars required.*] [First ed., 1914 Supp., p. 313.]

**Cars with steel underframes.**—Congress, in providing that no pay shall be allowed for the use of "wooden full railway post office cars run in any train between adjoining steel cars" did not intend that the term "steel cars" should include cars with steel underframes. *Missouri Pac. R. Co. v. U. S.*, (1917) 53 Ct. Cl. 12.

**Vol. VIII, p. 212.** [*Compensation for increased weight of mails, etc.*]

**Duty of Postmaster General to increase compensation.**—It is discretionary with the Postmaster General whether he will act under



this statute. *U. S. v. Atchison, etc., R. Co.*, (1919) 249 U. S. 451, 39 S. Ct. 325, 63 U. S. (L. ed.) — (*reversing* (1917) 52 Ct. Cl. 338), wherein the court said: "Considering history of the legislation and intent of Congress supposed to be indicated thereby the Court of Claims held that the act 'required the Postmaster General to add 5 per cent. to the compensation being paid on all of said routes, and he having failed to do so that the plaintiff is entitled to recover the difference sued for.' (1917) 52 Ct. Cl. 338, 361.

"We are unable to agree with this conclusion. The language of the enactment is clear and we think it vested in the Postmaster General a discretion which, so far as shown by the record, has not been abused. We are not unmindful of the burden imposed upon appellee nor of the circumstances which lend color to a different conclusion; but these are not sufficient to justify a disregard of the plain import of the words which Congress deliberately adopted."

**Compensation for increased weights caused by parcel post.**—Plaintiff having continued to carry the mails with the increased weights occasioned by the institution of the parcel post service under the Act of August 24, 1912, 37 Stat. 539, 557, and by its failure to avail itself of the privilege of refusing to perform its contract and the acceptance of compensation under the Act of March 4, 1913, thus further reaffirmed its contract and cannot now claim an additional allowance for such service. *New York, etc., R. Co. v. U. S.*, (1918) 53 Ct. Cl. 222.

**Vol. VIII, p. 244, sec. 9.** [First ed., 1912 Supp., p. 296.]

**Emergency credit.**—The practice of excluding the emergency credit from the regular quota of funds assigned to a postal savings bank depository, is not in conflict with the requirement of this section that such funds shall be deposited substantially in proportion to the capital and surplus of each bank. (1913) 30 Op. Atty.-Gen. 162.

**Vol. VIII, p. 254, sec. 4058.** [First ed., vol. V, p. 956.]

**Person indemnifying owner.**—Priorities as between persons indemnifying the sender of registered mail which is stolen to the benefit of a recovery on the bond of the guilty postal employee are to be determined by the Postmaster General under section 143 of the Postal Laws and Regulations of 1913. *U. S. v. U. S. Fidelity, etc., Co.*, (C. C. A. 6th Cir. 1918) 247 Fed. 16, 159 C. C. A. 234.

**Interpleader to recover stolen money.**—In *U. S. v. U. S. Fidelity, etc., Co.*, (C. C. A. 6th Cir. 1918) 247 Fed. 16, 159 C. C. A. 234, the court stated that section 143 of the Postal Laws and Regulations of 1913, based on Revised Statutes § 4058, requires the immediate forwarding to the chief inspector not only of all moneys received from mail robbers or other offenders against the postal laws, but also "moneys recovered by suit, or otherwise, on account of moneys taken from the mail or losses therein," and for the daily deposit of such moneys with the superintendent division of finance, office of the third assistant postmaster general, and that the "chief inspector shall determine, upon satisfactory evidence, the proper persons or owners to whom the moneys shall be restored," and requires the superintendent division of finance above mentioned to make payments in accordance with the schedules furnished and approved by such chief inspector under the authorization of the Postmaster General. The remedy thus provided is held to be exclusive and to preclude interpleader by the owner of the stolen money in a suit by the government on the bond of a postal employee.

**1918 Supp., p. 648, sec. 5.**

**Situation prior to statute.**—It is settled that the railroad companies were, until the Act of July 28, 1916, 39 Stat. 425, free agents in contracting with the Postmaster General in the transportation of the mails. *Kansas City, etc., R. Co. v. U. S.*, (1918) 53 Ct. Cl. 258.

## PRESIDENT

**1918 Supp., p. 667.** [*Threats against President—punishment.*]

**What constitutes threat.**—In *U. S. v. Stobo*, (D. C. Del. 1918) 251 Fed. 689, the words alleged to have been spoken were as follows: "The President ought to be shot and I would like to be the one to do it." Upon consideration of a demurrer to the indictment, the court said: "The act denounces a threat, and does not distinguish between an absolute threat and one which is conditional. A threat is a threat whether conditional or absolute, and may have an

equally sinister effect upon the minds of those hearing it. Further, the circumstances under which the words were uttered, the manner and tone of the utterance, what else was said on the occasion, and, in short, the *res gestæ*, may or may not be determinative of the question whether they were intended to operate or operated as a threat. In the absence of any other and sufficient ground of demurrer the words should be submitted to a jury with proper instructions from the court. I am not prepared and think it would be improper at this time to hold the uttered words did not constitute a threat against the

life or limb of the President." See to the same effect *U. S. v. Jasick*, (E. D. Mich. 1918) 252 Fed. 931, wherein the accused was charged with saying "if he could get to President Wilson he would shoot the blinded eye" and "if he got a chance he would shoot President Wilson." See also *U. S. v. Metzdorf*, (D. C. Mont. 1918) 252 Fed. 933, where the language was "if I got hold of President Wilson I would shoot him."

**Oral threat.**—The statute is broad enough to include oral threat. *U. S. v. Stobo*, (D. C. Del. 1918) 251 Fed. 689, wherein the court said: "It is contended that the words 'otherwise makes any such threat' in the latter part of the act refer to a written or printed threat, and not to an oral one. This position I regard as clearly untenable. The word 'such' has no reference to print or writing, but to 'any threat to take the life of or to inflict bodily harm upon the President of the United States.' The context leaves no reasonable doubt on this point. The word 'otherwise' as used in the latter part of the section is broad enough to include not only a written or printed threat other than one deposited or caused to be deposited for conveyance in the mail or for delivery from a post office or by letter carrier, but also an oral threat. I perceive no grounds on which the meaning of 'otherwise' can legitimately be so restricted as to exclude an oral threat against the President of the United States. To so limit the term would not only violate the language of the act but largely defeat its broad policy."

But the oral threat must have been made in the hearing of some person. *United States v. Stobo*, supra, wherein the court said: "In an oral threat contemplated by the statute there are two essential elements: first, the utterance of the words, and, secondly, the hearing of the words by some person or persons other than the utterer. The use of the threatening words in an unheard soliloquy, whatever may be the intent or purpose with which they are uttered, is not an offense punishable under the act. Its manifest purpose was to punish the use by one of threatening words calculated to inflame or have a sinister influence upon the minds of others, and in the case of an oral threat the offense is not complete unless the words are uttered in the hearing of some other person or persons." See to the same effect *U. S. v. Metzdorf*, (D. C. Mont. 1918) 252 Fed. 933.

**Communication of threats to President.**—It is not necessary that a threat to kill or do bodily harm to the President, in order to be punishable, must be communicated or intended to be communicated to him. *U. S. v. Stobo*, (D. C. Del. 1918) 251 Fed. 689, wherein the court said: "It is argued that a threat, punishable under the act, must be a menace of such a character as to be calculated to 'unsettle the mind of the person on whom it operates, and to take away from his

acts that free, voluntary action which alone constitutes consent'; and that the language imputed to the defendant could not have 'any of the effects or influences upon the mind of the person threatened which are necessary ingredients of a threat.' The counsel for the defendant fails to distinguish between threats made for the purpose of inducing action or non-action on the part of the person against whom they are directed, and threats not made for that purpose, but calculated to breed disloyalty or hostility in the community to the constituted authorities and incite a spirit of unrest and sedition. A large number of authorities have been cited to show that in the case of threats of the former class it is necessary that they should be communicated or intended to be communicated to the person against whom they are directed. But these authorities are wholly inapplicable to the case of threats denounced by the act in question. Whatever prior to the passage of the act may have been the essential nature of a criminally punishable threat or its technical significance or description, that act recognizes as punishable an oral as well as a written threat, though not communicated or intended to be communicated to the President. The question whether the threat has a tendency to cause action or non-action on his part is wholly foreign to any proper consideration of a given case. The vital inquiry under the act is whether the threat is of such a nature as to create or tend to create sedition or disloyalty, or to stir up violence toward or resistance to the lawful authority of the President, as commander-in-chief of the army and navy, or as chief executive of the nation." See to the same effect, *U. S. v. Jasick*, (E. D. Mich. 1918) 252 Fed. 931; *U. S. v. Metzdorf*, (D. C. Mont. 1918) 252 Fed. 933.

**Necessity for communication of threats to particular person.**—It is not a sufficient ground for a demurrer to an indictment under this Act that the language imputed to the defendant is not averred to have been addressed or spoken to any particular person. *U. S. v. Stobo*, (D. C. Del. 1918) 251 Fed. 689, wherein the court said: "It is unnecessary that the oral threat should be addressed or spoken to any person. If spoken in the hearing of any person or persons it is denounced by the act. It is not solely the effect which the spoken threat may have upon the mind of the person to whom the threat is uttered, but the effect which it may have upon the mind of any one who hears it. The purpose and policy of the act are to guard and shield from improper and dangerous influences not only the minds of those to whom the threat is uttered but equally the minds of all who may hear the words as and when uttered."

**Intent.**—It is not necessary that the person making the threat actually intends to

execute his threat. *U. S. v. Stobo*, (D. C. Del. 1918) 251 Fed. 689, wherein the court said: "If one willfully in the hearing of others makes a threat against the life or bodily welfare of the President he is punishable under the act whether he uses the words lightly or with a set purpose to kill or maim. The effect upon the minds of the hearers, who cannot read his inward thoughts, is precisely the same and equally within the scope and obnoxious to the provisions of the act in either case. In view of the policy and broad scope of the act no one who willfully utters in the hearing of others a threat against the life or limb of the President and thereby inflames or seeks to inflame other minds against constituted authority can shield himself by the plea that the words were uttered lightly or without intent to do bodily harm. If he willfully utters a threat in the hearing of others he must be held to intend its necessary or probable effect upon other minds."

**"Knowingly and willfully."**—A threat is knowingly made, if the maker of it comprehends the meaning of the words uttered by him; a foreigner, ignorant of the English language, repeating these same words without knowledge of their meaning, may not knowingly have made a threat. And a threat is willfully made, if in addition to comprehending the meaning of his words, the maker voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution. *Ragansky v. U. S.*, (C. C. A. 7th Cir. 1918) 253 Fed. 643, 165 C. C. A. 269. Construing further the meaning of "willfully" as here used, the court said: "While under some circumstances the word 'willfully' in penal statutes means not merely voluntarily, but with a bad purpose, . . . nothing in the text, context, or history of this legislation indicates the materiality of the hidden intent or purpose of one who, in the presence of others, voluntarily uses language known by him to be in form such a threat, and who thus to some extent endangers the President's life."

**Sufficiency of indictment.**—In *U. S. v. Jasick*, (E. D. Mich. 1918) 252 Fed. 931, the indictment charged that the defendant, at a time and place specified, "willfully, feloniously, and knowingly did make certain threats to take the life of the President of the United States and against the life of said President, and certain threats to inflict great bodily harm upon the said President of the United States, to wit, the Honorable Woodrow Wilson, in the verbal use of certain threatening language." The language alleged to have

been used was set out. The court said: "The indictment follows the language of the statute in alleging the crime charged, and clearly and fully informs the defendant of the nature thereof, even setting forth the exact language of defendant which it is charged constituted such crime. The objection that the indictment lacks the necessary definiteness is plainly without merit and must be overruled."

This Act applies only to threats against the President in his public character and capacity, that being the limit of the congressional power. Hence an indictment which merely alleges a threat against "the President of the United States" is insufficient. *U. S. v. Metzdorf*, (D. C. Mont. 1918) 252 Fed. 933, wherein it was said: "In the matter of the defense's second contention, the indictment, merely alleging the threat was against 'the President of the United States,' is open to the construction that the threat was against the President on account of his private character and capacity, and so does not charge an offense. Statutory language is not sufficient in cases where, as here, it may apply to innocent as well as to guilty acts. The indictment must add to the statutory words enough to directly and positively charge the offense denounced by the statute, so that, if all be proven, the defendant cannot be innocent. Otherwise, the presumption of innocence requires construction favorable to the accused. In this respect the indictment is fatally defective. That accused used the word 'President' does not demonstrate the threat was on account of the office. The title is commonly used in references to the President in private as well as public character and capacity."

Similarly an indictment under this Act which alleges that the defendant stated: "If I got hold of President Wilson, I would shoot him," is insufficient in that "it is as open to the construction that it relates to a situation past, and so is not an avowed determination to injure presently or in the future, as it is to the construction that it relates to a future situation, and so is an avowed determination to injure in the future. *U. S. v. Metzdorf*, (D. C. Mont. 1918) 252 Fed. 933.

**Defenses.**—It is no defense that the defendant made the remarks as a joke, where it is not shown that those present understood that he was joking. The mere fact that the defendant did not intend to carry out his threat is immaterial. *Ragansky v. U. S.*, (C. C. A. 7th Cir. 1918) 253 Fed. 643, 165 C. C. A. 269.

## PRISONS AND PRISONERS

**Vol. VIII, p. 283, sec. 5546.** [First ed., vol. VI, p. 41.]

**Authority of Attorney-General.**—To the same effect as original annotation, see *Kelher v. Mitchell*, (D. C. Mass. 1916) 250 Fed. 904, wherein it was further said: "The authority to transfer under this statute is explicitly limited to cases where 'at any time during the term of imprisonment there may be no penitentiary or jail suitable for the confinement of convicts or available therefor' in the district in question. This restriction seems not to have arisen from mistaken language or inaccuracy of expression. It was in the statute when first passed many years ago, and has been consistently retained through all the subsequent amendments. It is expressly repeated in that part of the section which provides for the expense of transportation, and in that connection has been given its literal meaning by the Supreme Court. *U. S. v. McMahon*, 164 U. S. 81 at 86, 17 Sup. Ct. 28, 41 L. ed. 357. . . The limitation under discussion on the right of transfer is not of a merely directory or technical character, in which case it might perhaps be disregarded, but is substantial,

and was intended by Congress to protect prisoners against unnecessary transfers to prisons remote from the place of sentence. The legislation in connection with the establishment of the federal prisons did not, apparently, enlarge the Attorney General's power to make transfers, but only increased the number of places to which transfers might, in authorized cases, be ordered. The further question whether there is any statutory authority to transfer to another prison within the district is not involved in the present case."

**Persons convicted by United States court in China—Place of confinement.**—The Philippine Islands are a territory within the meaning of this section, and as there is no suitable prison at Shanghai, China, for the confinement of convicts sentenced to imprisonment for long terms, the Bilibid Prison at Manila will therefore be designated as the place of confinement for United States prisoners who have been or may be in future convicted and sentenced by the United States Court for China, at Shanghai, to terms of imprisonment exceeding three years. (1915) 30 Op. Atty-Gen. 462.

## PUBLIC CONTRACTS

**Vol. VIII, p. 336, sec. 3709.** [First ed., vol. VI, p. 93.]

III. Public exigency.  
VI. Acceptance.

### III. PUBLIC EXIGENCY (p. 340)

**Contracts for military movement of troops.**—The Navy Department cannot enter into a contract for the military movement of troops without previously advertising for proposals as required by this section. (1915) 30 Op. Atty-Gen. 381.

### VI. ACCEPTANCE (p. 343)

**Effect of acceptance.**—A proposal to furnish stamped envelopes and newspaper wrappers in accordance with an advertisement by the Post Office Department for bids, followed by the acceptance by the department of such proposal and the entry of a formal order to that effect, the bidder being the lowest, and having been found upon investigation to be financially responsible, creates a contract of the same force and effect as though such

contract were formally signed and the bond formally approved. *U. S. v. Purcell Envelope Co.*, (1919) 249 U. S. 313, 39 S. Ct. 300, 63 U. S. (L. ed.) —, *affirming* (1916) 51 Ct. Cl. 211, and *following* *Garfield v. U. S.*, (1876) 93 U. S. 242, 23 U. S. (L. ed.) 779.

**Vol. VIII, p. 357, sec. 3737.** [First ed., vol. VI, p. 123.]

**A joint agreement to procure and perform a public contract** is not within the prohibition of the statute though the public contract when procured is made in the names of a part only of the joint adventurers. *Anderson v. Blair*, (Ala. 1918) 80 So. 31.

**Vol. VIII, p. 361, sec. 3744.** [First ed., vol. VI, p. 132.]

**Warranty implied by law.**—This section does not preclude reliance upon a warranty implied by law. *U. S. v. Spearin*, (1918) 248 U. S. 132, 39 S. Ct. 59, 63 U. S. (L. ed.) —, *affirming* (1916) 51 Ct. Cl. 155.

Vol. VIII, p. 374. [*Bonds of contractors, etc.*] [First ed., vol. VI, p. 125.]

- I. Construction.
  - 1. In general.
  - 2. Persons included.
  - 4. Labor and materials included.
- IV. Assignability of claim.
- V. Jurisdiction.
- VI. Action on bond.

## I. CONSTRUCTION

### 1. In General

**Liberal construction.**—To the same effect as the original annotation, see *Robinson v. U. S.*, (C. C. A. 2d Cir. 1918) 251 Fed. 461, 163 C. C. A. 637; *U. S. v. Lowrance*, (C. C. A. 8th Cir. 1918) 252 Fed. 122, 164 C. C. A. 234.

**"Completion."**—"The word 'completion' in view of the purposes of the statute, and the attitude of the courts in giving those purposes effect, must be construed as meaning that the contract was completed in the sense that the United States was satisfied that enough had been done to discharge the surety as to the United States. Any other construction would inevitably lead to the defeat of some of the essential purposes for which the statute was enacted. A subcontractor who had performed his work would be compelled to wait for some indefinite period because some other subcontractor, or the main contractor himself by reason of some default or dispute made necessary the reservation of a certain sum to make good that default or dispose of that dispute. It can readily be seen that in a contract involving, as did the contract at bar, over a million dollars, a subcontractor could be kept out of his money because of a dispute over a comparatively small sum, notwithstanding the fact that the government was satisfied to the point where it no longer looked to the surety bonds. Remembering that the purpose of the statute in this regard was to protect the United States, it follows that there is no merit in the contention that the subcontractor must wait to begin his action until disputes as to completion are finally settled, notwithstanding that the government on its part is entirely satisfied and approves the final settlement of the contract." *Robinson v. U. S.*, (C. C. A. 2d Cir. 1918) 251 Fed. 461, 163 C. C. A. 637.

### 2. Persons Included (p. 377)

**Person injured by work.**—The United States is not entitled to sue on the bond for the benefit of an adjacent proprietor whose property is injured by blasting incident to the work contracted for. *U. S. v. C. A. Rifle Co.*, (W. D. Pa. 1917) 247 Fed. 374, wherein it was said: "I think these propositions may be safely asserted:

"First. The right to recover in this action stands as if the above-recited acts of Congress had never been passed.

"Second. The United States is not liable to the Institute for the damages occasioned by its contractor in the negligent execution of the work which the latter contracted to perform.

"Third. For such negligence, resulting in injury, the Institute could maintain an action against the contractor.

"Fourth. The provisions in the contract between the United States and the Rifle Company were intended for the benefit of the United States and no other person. If the action were on the contract, and not on the bond, the Institute, not being a party to that contract, would have no standing.

"Fifth. The action being brought upon the bond securing the faithful performance of the conditions of the contract gives the Institute no other or higher rights. There is no covenant or promise in that instrument, made by the United States, to pay third parties any damages suffered, if the contractor fails to pay. It follows that, not being a party to the obligation, the Institute could maintain no action on the bond in its own name, and making itself use plaintiff did not change its status. These principles are sustained in *First M. E. Church v. Isenberg*, 246 Pa. 221, 92 Atl. 141; *Foundry Co. v. National Surety Co.*, 92 Fed. 549, 34 C. C. A. 526; *Eberhart v. United States*, 204 Fed. 884, 123 C. C. A. 180.

"Sixth. The United States, having sustained no damage, could maintain no action in its own name, and this action, being for the benefit of the Carnegie Institute of Technology on a contract to which the latter was not a party, and in which it has no legal interest, cannot be maintained."

### 4. Labor and Materials Included (p. 379)

**Board for workmen.**—Where the contract is to be performed at a place far from human habitation the cost of lodging and food for the workmen is included in a bond to pay for "labor and materials in the prosecution of the work." *McPhee v. U. S.*, (Colo. 1918) 174 Pac. 808.

**Teams** used by a subcontractor and feed for them are materials within the meaning of the statute. *U. S. v. Lowrance*, (C. C. A. 8th Cir. 1918) 252 Fed. 122, 164 C. C. A. 234, *reversing* (E. D. Ark. 1916) 236 Fed. 1008, in original annotation. The court said: "In the case at bar the contractors undertook, not only to complete an embankment or levee according to specifications, but also to furnish the necessary 'plant' to the satisfaction of a government official; and power was reserved to the latter to employ additional plant, if progress under the contract was not satisfactory. Although the complaint does not set forth the actual situation at the levee, it may be reasonably inferred on a motion to

dismiss that the plant to be assembled for the work included teams as well as wagons, scrapers, axes, stump pullers, and the like. Teams brought together for such work are more naturally classified with implements than with workmen, and feed for the teams so employed with fuel for power than with the board of men whom the circumstances of employment leave free to exercise an independent choice. It is said that it would have been necessary to feed the teams, whether they were working or not. But that is not the test, as is shown by *Brogan v. National Surety Co.* In that case the location of the work made it necessary for the contractor to provide board and lodging for the men on the ground. He did so under an arrangement by which he was to deduct a stated amount monthly from their wages. Protection under the statutory bond was given one who furnished him with groceries and provisions. It was held that the supplies had a proximate relation to performance of the contract work. Though the circumstances of the case before us are not fully stated, we do not think it can be said from the face of the complaint that the furnishing of the feed for the teams was a casual transaction, but indirectly related to the performance of the levee contract. It is averred that the feed was "used and consumed . . . in the prosecution and execution of the earth-work."

#### IV. ASSIGNABILITY OF CLAIM (p. 382)

**Assignment of claims.**—To same effect as original annotation, see *Bartlett v. Dings*, (C. C. A. 8th Cir. 1918) 249 Fed. 322, 161 C. C. A. 330.

#### V. JURISDICTION (p. 383)

**Federal courts.**—An action will not lie in a state court against a state receiver of an indemnity company on a claim against it as surety on a public contractor's bond. The federal courts alone have jurisdiction. *MacDonald v. Aetna Indemnity Co.*, (Conn. 1919) 105 Atl. 470.

#### VI. ACTION ON BOND (p. 384)

**General scope of action.**—A creditor who fails to present his claim cannot sue thereafter on the contractor's bond. *U. S. v. Welles*, (M. D. Pa. 1919) 256 Fed. 545, wherein it was said: "The statute in its general scope contemplates one trial or submission for adjudication of all the intervening claims, in order that its provisions may be harmoniously carried into effect. The action provided is on the bond for the recovery of the penalty which stands primarily for the protection of the government, and then for distribution among the creditors of the remaining part of the penalty after the satisfaction of the government's demand. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due to the

United States, the remainder shall be distributed pro rata among said interveners. It is quite clear that it was intended that the rights of all parties intervening should be determined and adjudicated in one trial and by one judgment; otherwise the rights of the several plaintiffs and defendants could not be determined and adjudicated as provided."

**Who may sue.**—The limitation of time in the statute was intended for the benefit of the United States, and as soon as the rights of the United States on the bond are out of the way the subcontractors have the right to sue, assuming, of course, that their own contracts give them rights against the main contractor. In other words, when it appears that the United States, through its proper officials, has indicated a determination not to sue on the bond by final settlement, and six months have elapsed, then the security becomes open to those who have trusted to the credit of the main contractor. *Robinson v. U. S.*, (C. C. A. 2d Cir. 1918) 251 Fed. 461, 163 C. C. A. 637.

**Time of bringing suit on bond.**—Under this Act the time limit for an intervening creditor is the same as in the case of an original party complainant. *Pederson v. U. S.*, (C. C. A. 9th Cir. 1918) 253 Fed. 622, 165 C. C. A. 248.

"The one-year statute of limitation begins to run from the time of settlement by the government with the contractors." *Bartlett v. Dings*, (C. C. A. 8th Cir. 1918) 249 Fed. 322, 161 C. C. A. 330.

**Final settlement of the contract.**—To same effect as first paragraph of original annotation, see *U. S. v. Title Guaranty, etc., Co.*, (C. C. A. 7th Cir. 1918) 254 Fed. 958, 166 C. C. A. 320, wherein it was further said: "In the present case the building had been completed and the government had accepted the work and occupied the building prior to the date the final voucher was made out. The voucher was prepared by the public works officer who represented the government in the construction of the building. He termed his statement a 'final voucher.' Before sending it to the government he secured from the contractor a certificate of its correctness. It was then examined and approved by the acting chief of the bureau in charge of the construction.

"Made under these circumstances, when the building was fully completed, accepted, and occupied by the government, at a time when the parties were concerned only in a final settlement of the contract, it is difficult to avoid the conclusion that the date of the approval of this voucher constituted the date from which the six months period ran."

**"Complete payment."**—Where a subcontractor's contract provided that the final payment on his contract was to be made within ten days after the "final approval and complete payment" of the work by the government it was held that the "complete payment" mentioned in the subcontracts is

The final payment to be made by the United States in accordance with its final settlement, whereby is meant the final amount acknowledged by the United States to be due. *Robinson v. U. S.*, (C. C. A. 2d Cir. 1918) 251 Fed. 461, 163 C. C. A. 637, wherein the court said: "As between the United States and Robinson, the latter may not be satisfied, and may contest the position of the United States, as he is now doing in the Court of Claims; but such controversy on the facts in this case, the construction of the statute, the main contract, and the subcontracts, does not in any manner affect the rights of the subcontractors as against Robinson. So to hold is not to rewrite the contracts as between Robinson and the subcontractors, as counsel earnestly contend, but is merely to give the language of the parties the meaning which they intended it should have, for they were referring directly to the contract with the United States, with its necessary security, and it is clear that the language thus used in the subcontracts could never have been intended, in effect, to require the subcontractors to waive their rights upon the bond, or to be postponed indefinitely after the United States had so acted as to discharge all liability on the bond against it, and after the necessary six months had elapsed."

**Contract or notice exempting contractor is unavailing.**—"The claim that by reason of the contract between appellant and Gunder & Co., the subcontractors, the appellant is not liable, is untenable, and cannot affect the materialmen and laborers. The act of Congress creates a direct liability on the surety to these persons. The posting of notices by Bartlett & Kling that it would not be responsible to the employees for its subcontractors does not release it from liability. If that were permitted, the law would be a snare and a delusion, because every contractor would avail himself of it, and deprive the material-

men and laborers of the benefits of the act." *Bartlett v. Dings*, (C. C. A. 8th Cir. 1918), 249 Fed. 322, 161 C. C. A. 330.

**Suit on defective bond.**—Where a bond of a contractor for public work is defective in that it does not impose "the additional obligation" to make payments to all persons supplying labor and material, a suit on it cannot be maintained under this Act for the benefit of such persons. *U. S. v. Montgomery Heating, etc., Co.*, (C. C. A. 5th Cir. 1919), 255 Fed. 683, 167 C. C. A. 59. The court said: "All of the cases construing the original act and the amendment (the provision with reference to materialmen and laborers being substantially the same) assume that the specific provision gives to the bond an effect which would not result from the provision of an ordinary penal bond. Whether this be true or not, Congress had the right to determine what should be the provisions of a bond, the execution of which would confer jurisdiction upon the federal courts which they might not otherwise have. The exact point involved was decided by the Circuit Court of Appeals for the Eighth Circuit in *Babcock & Wilcox v. American Surety Co.*, 236 Fed. 340, 149 C. C. A. 472, and is in accordance with the opinion which has been reached upon a consideration of the statute itself, and of the opinions of the Supreme Court, to the effect that the statutory bond not having been executed, and the court not otherwise having jurisdiction, the case was properly dismissed."

**Interest.**—A materialman recovering on the contractor's bond is entitled to interest from the time his demand accrued. *Pederson v. U. S.*, (C. C. A. 9th Cir. 1918) 253 Fed. 622, 165 C. C. A. 248.

An assignee intervening to prosecute labor claims is entitled to interest from the date of his intervention. *Bartlett v. Dings*, (C. C. A. 8th Cir. 1918) 249 Fed. 322, 161 C. C. A. 330.

## PUBLIC LANDS

**Vol. VIII, p. 491, sec. 453.** [First ed., vol. VI, p. 212.]

**Jurisdiction of courts pending decision by Land Office.**—"Nothing in our public land laws is more firmly settled than that the sale and disposal of the public lands has been placed by statute under the control of the Land Department, at the head of which is the Secretary of the Interior, and which includes a bureau headed by the Commissioner of the General Land Office, to whom, as a special tribunal with quasi judicial powers, Congress has confided the execution of the laws which it has enacted for the sale and disposal of the various kinds of public lands. As was

said in *Cosmos Exploration Co. v. Grey Eagle Oil Co.*, (C. C.) 104 Fed. 20, no court can lawfully anticipate what the decision of that department may be in respect to any contest arising before it, nor direct in advance what its decision should be, even in matters of law, much less in respect to matters of fact. After, however, the proceedings in the Land Department have come to an end by the issuing of the government title, that the courts are open for the control of such title, either by the government, in the event that its title has been procured either by fraud or in any other illegal way, or at the suit of any private party equitably entitled thereto, is established by almost in-

numerable decisions." *Devil's Den Consol. Oil Co. v. U. S.*, (C. C. A. 9th Cir. 1918) 251 Fed. 548, 163 C. C. A. 542.

**Vol. VIII, p. 497, sec. 458.** [First ed., vol. VI, p. 216.]

**Notice from record.**—The record of a patent in the General Land Office is notice to the taxing officers of the county where the land is situated. *Bell v. George*, (1918) 275 Mo. 17, 204 S. W. 516.

**Vol. VIII, p. 528, sec. 2.** [*Reimbursements for excessive payments.*] [First ed., 1909 Supp., p. 549.]

**Jurisdiction.**—The Court of Claims has jurisdiction of a claim arising under this section. *U. S. v. Laughlin*, (1919) 249 U. S. 440, 39 S. Ct. 340, 63 U. S. (L. ed.) —, *affirming* (1917) 52 Ct. Cl. 292.

**Vol. VIII, p. 543, sec. 2889.** First ed., vol. VI, p. 285.]

II. Who may enter homestead.  
IV. Requisites to valid entry.

II. WHO MAY ENTER HOMESTEAD (p. 545)

**Head of the family.**—An application while disclosing that the applicant was a minor and unmarried asserted in a general way that he was the head of a family and therefore a qualified applicant by reason of having adopted a minor child is insufficient to show that applicant was head of a family, as there was no statement respecting the time, place or mode of adoption or the identity of the child. *Fisher v. Rule*, (1919) 248 U. S. 314, 36 S. Ct. 122, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 8th Cir. 1916) 232 Fed. 314, 147 C. C. A. 55.

**Ownership of other land.**—A person disqualified to take a homestead because of the ownership of more than 160 acres of land may qualify himself by transferring such land provided the transfer is made on good faith and conveys the legal title. *Brown v. Almasie*, (1919) 91 Ore. 928, 178 Pac. 928; holding pretended transfer to be fraudulent.

IV. REQUISITES TO VALID ENTRY (p. 550)

In *U. S. v. Howard*, (C. C. A. 8th Cir. 1917) 247 Fed. 455, 159 C. C. A. 509, entry and occupation were held to be insufficient, the facts being stated as follows: "The defendant was a single man when he applied for this homestead, but was married about two years before he made final proofs. The undisputed proof shows that during the five-year period his true residence was five miles distant from this land, on other land which he rented and cultivated, where he kept his horses and farm implements, his household furniture and supplies. He prepared a rude

dugout on the land claimed as a homestead, in which he placed a bed, a stove, and a table; but his attempts at occupation of this as a dwelling were limited to occasional visits for one night at a time, and these visits were made not oftener than three or four times in any six months period during this five years. On these occasional visits he would take from his home on the rented land enough provisions for one or two meals on the homestead. No crops were raised on the land, nor did the claimant ever attempt to cultivate the land. The only other improvement than the dugout was some wire fencing."

**Vol. VIII, p. 557, sec. 2291.** [First ed., 1914 Supp., p. 336.]

I. Alienation.  
VI. Patent.  
VII. Decease of entryman.

I. ALIENATION (p. 559)

**Agreement to sell.**—To the same effect as the second paragraph of the original annotation see *Hale v. McGraw*, (Ala. 1918) 78 So. 214, wherein the court said: "It is insisted by counsel for appellees that, as this was a homestead entry, under these circumstances, any conveyance by McGraw, although by deed with covenants of warranty, would be absolutely void as against public policy—citing *Anderson v. Carkins*, 135 U. S. 483, 10 Sup. Ct. 905, 34 L. Ed. 272; *Millikin v. Carmichael*, 134 Ala. 623, 33 South. 9, 92 Am. St. Rep. 45; *Mulloy v. Cook*, 101 Ala. 178, 10 South. 349, 17 South. 89; *Woodstock I. Co. v. Strickland et al.*, 121 Ala. 616, 25 South. 818; to which may be added *Hartman v. Butterfield Lbr. Co.*, 199 U. S. 335, 26 Sup. Ct. 63, 50 L. Ed. 217; *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; *Adams v. Church*, 193 U. S. 510, 24 Sup. Ct. 512, 48 L. Ed. 769; *K. C. Lbr. Co. v. Moores*, 212 Fed. 153, 129 C. C. A. 1; *McCollum v. Edmonds*, 109 Ala. 322, 19 South. 501.

"Counsel for appellants rely upon the well-recognized rule that when a patent is issued it inures at once to the grantee of the patentee under the deed containing covenants of warranty of title, and relates back to the date of entry—citing *Croft v. Thornton*, 125 Ala. 391, 28 South. 84; *Birmingham Coal & I. Co. v. Arnett*, 181 Ala. 621, 62 South. 26; *Smart v. Kennedy*, 123 Ala. 627, 26 South. 198; *Veith v. Hard*, 75 75 South. 405, among other authorities. This doctrine is of course not controverted in the present case, and was recognized by this court in its earliest history in *Kennedy v. McCartney*, 4 Port. 141. That case, however, recognized as an exception to the rule those instances where the grantor was prohibited from selling either by the letter, spirit, or policy of a legislative act using the following language: 'Where one sells



land to which he has no right, with warranty of title, and he afterwards acquires a good title, it passes instantly to his vendee, and he is estopped from denying that he had no right at the time of his sale. This rule only applies where the vendor had no valid title at the time of executing the deed, and not where he is inhibited from selling, by the letter, spirit or policy of a legislative act.'

"The insistence here is that, as the land in question was acquired by homestead entry, any conveyance or contract to convey made by the entryman before perfecting his rights to a patent was violative of the policy of the homestead statute, and was therefore invalid and incapable of enforcement. This contention is upheld in the case of *Anderson v. Carkins*, supra, which seems to be the leading authority upon that question, and which has not been disturbed by any subsequent decisions of the United States Supreme Court. The opinion fully discusses sections 2290 and 2291 of the United States Revised Statutes relating to homestead claims, and the legislative policy in regard thereto. In the more recent case of *Adams v. Church*, supra, the court makes reference to the *Anderson* Case, using the following language: 'In this state of the law, this court, in the *Anderson* Case, in an opinion by Mr. Justice Brewer, sustained the contention in behalf of *Anderson* that the homestead is a gift from the government to the homesteader, conditioned upon his occupation for five years, and upon his making no disposition or alienation during such term; that the affidavit of nonalienation is as clear an expression of legislative intent as a direct prohibition; that the whole policy of government in this respect would be thwarted if the homesteader were permitted to alienate prior to the expiration of the five years; that a successful alienation could be accomplished only by perjury, and an attempted alienation would only offer a constant inducement to the homesteader to abandon his occupation, and thus deprive the purchaser of any possibility of acquiring title to the land; that a contract whose consummation necessarily rests on perjury is illegal; and that courts of equity would not enforce the performance of such contracts "founded upon perjury and entered into in defiance of a clearly expressed will of the government."' The case was again brought into view in *Hartman v. Butterfield Lbr. Co.*, 199 U. S. 335, 26 Sup. Ct. 63, 50 L. Ed. 217, and in the very recent case of *K. C. Lbr. Co. v. Moores*, 212 Fed. 153, 129 C. C. A. 1 (a case here directly in point), the court relies upon the *Anderson* Case as sustaining the conclusion there reached. In *Shorman v. Eakin*, 47 Ark. 351, 1 S. W. 559, cited by this court in *Carroll v. Draughon*, 173 Ala. 327, 56 South. 207, there is found a very interesting discussion on this question. This court in *Millikin v. Carmichael*, supra, following the lead of the

*Anderson* Case, also declared such contracts void as against public policy, and what was there said may be considered decisive of the question here involved."

**Mortgage as alienation.**—The question whether a mortgage upon land made before the issuance of a receiver's certificate constitutes an alienation prohibited by this section does not need to be answered where it appears that the mortgage has long since been foreclosed. *Quinn v. Tennessee Coal, etc., R. Co.*, (Ala. 1917), 77 So. 340, wherein the court said: "The great weight of authority seems to be that a mortgage upon the land, even before the issuance of the receiver's certificate, is binding and is not such an alienation as is prohibited by the federal statute. See *Stark v. Morgan*, (1906) 73 Kan. 453, 85 Pac. 567, 6 L. R. A. (N. S.) 934, and note, 9 Ann. Cas. 930, for a full discussion of this subject. It is true that in those jurisdictions so holding, a mortgage is regarded as merely a security for a debt, while with us it has a dual capacity, 'a conveyance of an estate in lands and a security for a debt, bearing one character in a court of law and another in a court of equity.' *Welsh v. Phillips*, (1875) 54 Ala. 309, 25 Am. Rep. 679. We are relieved, however, from having to decide whether or not this would make said cases applicable to this jurisdiction when the mortgage was executory, as the facts in this case show that the mortgage has long since been foreclosed, and has become fully executed, and this being the case this point was not available to these appellants. *Gamble v. Caldwell*, (1893) 98 Ala. 577, 12 So. 424; *Farrior v. New Eng. Mortg. Security Co.*, (1889) 88 Ala. 275, 7 So. 200; *Cranor Co. v. Miller*, (1906) 147 Ala. 268, 41 So. 678. It was expressly held in the case of *Hartman v. Butterfield Lumber Co.*, (1905) 199 U. S. 335, 26 S. Ct. 63, 50 U. S. (L. ed.) 217, that this defense was not available against an executed contract, wherein the case of *Anderson v. Carkins*, supra, was explained and differentiated and the cases of *Madden v. Floyd*, (1881) 69 Ala. 221, and *Gordon v. Tweedy*, (1881) 71 Ala. 202, are cited in support of the holding. The case of *Anderson v. Carkins*, supra, dealt with a bill to specifically perform a contract violative of public policy and the federal statutes, but not with a mortgage after it had been foreclosed and had become fully executed. The case of *Smart v. Kennedy*, (1898) 123 Ala. 629, 26 So. 198, deal with a mortgage after the issuance of the receiver's certificate and upheld same, and did not deal with the effect that the federal statute would have upon a mortgage after it was foreclosed, although made before the issuance of the certificate. As the defendant's evidence showed that the mortgage had been foreclosed the trial court did not commit reversible error in not sustaining plaintiff's objection to same upon the ground that it was prior in date to the final certificate."

## VI. PATENT (p. 566)

**Cancellation.**—In order to obtain a patent, the entryman was required by section 2291 of the Revised Statutes to present final proofs after the expiration of five years, and before the expiration of seven years, from the date of entry, showing that the entryman had resided upon and cultivated the land for a term of five years immediately succeeding the initiation of the homestead entry. To earn the grant of a patent under this section of the statute, the entryman must maintain his residence upon and must cultivate the land for the next five years after he makes his initial entry. As the defendant did not comply with this statute, but obtained a patent by fraudulent representations that he had followed its provisions, he may not avoid a cancellation of the patent by showing that he resided upon the land for three years after his patent was obtained, and has made some improvements and cultivated a portion of the land. *U. S. v. Howard*, (C. C. A. 8th Cir. 1917) 247 Fed. 455, 159 C. C. A. 509.

**Return of value of improvements.**—On the cancellation of a patent the government is not bound to place the entryman in statu quo. *U. S. v. Howard*, (C. C. A. 8th Cir. 1917) 247 Fed. 455, 159 C. C. A. 509, *following* *Causey v. U. S.* (1916) 240 U. S. 399.

**Fastening trust on patent.**—In a suit to have a person holding a patent to land declared a trustee for the plaintiff of the title to the land, the plaintiff to succeed must show a better right to the land than the patentee. It is not sufficient to show that the patentee ought not to have received the patent. *Fisher v. Rule*, (1919) 248 U. S. 314, 36 S. Ct. 122, 63 U. S. (L. ed.)—, *affirming* (C. C. A. 8th Cir. 1916) 232 Fed. 861, 147 C. C. A. 55.

## VII. DECEASE OF ENTRYMAN (p. 568)

**Alien heirs.**—An infant heir born in the United States is a citizen within the meaning of this section and it is immaterial that the parents were foreign born and unnaturalized. *Nyman v. Erickson*, (1918) 100 Wash. 149, 170 Pac. 546.

If after final proof and final certificate issued to "the heirs of Erick Nyman, deceased," the final proof is suspended for the benefit of all the heirs of the deceased entryman, alien heirs who become citizens pending such suspension and prior to the ordering of a patent to issue to the "heirs of decedent" are within the terms of the patent. *Nyman v. Erickson*, (1918) 100 Wash. 149, 170 Pac. 546, wherein the court said: "It is true that, under the statutes and decisions of the Supreme Court of the United States, the heirs succeeded to such rights, not by inheritance, but by virtue of the law, which merely grants to them preference rights. *Towner v. Rodegeb*, (1903) 33 Wash. 153, 74 Pac. 50, [99 A. S. R. 936]. But the preference rights so granted are to the lawful heirs of the deceased entryman.

Those rights are governed generally as of the time when the title passed from the United States, and it is generally held that title passes from the United States when the final certificate issues from the land office to the person or persons who made final proof on the entry. But here that final proof and final certificate were suspended for the benefit of all the heirs of the deceased entryman. Upon finally ordering patent to issue to the 'heirs of decedent,' it was not necessary to order a new final certificate to issue, as the original one was issued to 'the heirs of Erick Nyman, deceased.' Although that order required that patent issue in accordance with the final certificate, and the final certificate was dated July 1, 1909, that final certificate had been suspended and ineffectual from July 1, 1909, until the order for the patent issued. At that time, as heretofore stated, the two children of the deceased entryman and the grandchildren were qualified under the homestead law to acquire the preference rights, and at that time under the laws of the state of Washington they were heirs, and the only heirs, of the deceased entryman who were entitled to take title."

**Succession of widow to inchoate homestead right.**—Under this section and section 2292 no rights accrue to the entryman who dies before the entry is perfected, and nothing passes under the inheritance law of a state. But where the wife survives the entryman and becomes his widow she acquired a right to the land, whether the entry was made before or after her marriage to the entryman. And where the widow complies with the provisions of the homestead law and submits proof thereof at the local office, she acquires a vested interest in the land, to the exclusion of the heirs of the entryman. *Ford v. Edenborn*, (1918) 142 La. 927, 77 So. 851.

## Vol. VIII, p. 571, sec. 2292. [First ed., vol. VI, p. 303.]

**Construction and purpose of section.**—To the same effect as the original annotation see *Nyman v. Erickson*, (1918) 100 Wash. 149, 170 Pac. 546.

## Vol. VIII, p. 575, sec. 2296. [First ed., vol. VI, p. 307.]

**Constitutionality of exemption.**—In *Ruddy v. Rossi*, (1918) 248 U. S. 104, 39 S. Ct. 46, 63 U. S. (L. ed.)— (reversing on other grounds (1916) 28 Idaho 376, 154 Pac. 977), the court said: "Did Congress have power to restrict alienation of homestead lands after conveyance by the United States in fee simple? This question undoubtedly presents difficulties which we are not disposed to minimize. In *Wright v. Morgan*, 191 U. S. 55, 58, a similar point was suggested but not decided. The Constitution declares 'The Congress shall have power to dispose of and make all needful rules and regulations respecting the

territory or other property belonging to the United States'; and it is settled that Congress has plenary power to dispose of public lands. *United States v. Gratiot*, 14 Pet. 526, 537. They may be leased, sold or given away upon such terms and conditions as the public interests require. Instead of granting fee simple titles with exemption from certain debts, long leases might have been made or conditional titles bestowed in such fashion as practically to protect homesteads from all indebtedness.

"The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *McCulloch v. Maryland*, 4 Wheat. 316, 421.

"Acting within its discretion, Congress determined that in order promptly to dispose of public lands and bring about their permanent occupation and development it was proper to create the designated exemption; and we are unable to say that the conclusion was ill-founded or that the means were either prohibited or not appropriate to the adequate performance of the high duties which the legislature owed to the public."

**Mechanic's lien.**—Under this section, which provides that no lands acquired under the homestead laws of the United States shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor, a mechanic's lien which arises by operation of law upon the filing of a lien statement for building materials furnished does not attach to land acquired under the homestead laws, where the debt was contracted and the materials furnished before the patent was issued. *Bovey-Shute Lumber Co. v. Erickson*, (N. D. 1918) 170 N. W. 628, wherein the court said: "While the courts are all agreed as to the validity of the section, and the duty of the courts to enforce it, they have differed as to the construction to be placed upon it. Some courts have held that 'the issuing of the patent refers to the time when the patent ought to issue, and not to the mere clerical work of issuing it, and hence that the homestead is liable for debts contracted after the right to a patent became complete, although before it was actually issued.' But other courts have held 'that the date of the actual issuance of the patent fixes the time when the liability of the land begins, and it is not liable for debts contracted before that time, although after the right to the patent was complete.' . . . With all due respect for the authorities to the contrary, we are of the

opinion that section 2296, *supra*, means what it says. Its language is plain and unequivocal. It says that lands acquired under the provisions of the homestead laws shall in no event 'become liable to the satisfaction of any debt contracted prior to the issuance of the patent therefor.' If Congress had intended that the exemption should apply only to debts contracted prior to the issuance of the receiver's final certificate, it would doubtless have said so. In order to ascertain the legislative intention, the primary rule is that a statute is to receive that meaning which the ordinary reading of its language warrants, and, if the language is clear and admits of but one meaning, the lawmaking body should be deemed to have meant what it has plainly expressed, and in such case there is no room for construction."

**An indebtedness which accrued after a final entry** and before the issuance of a patent is affected by this section as well as an indebtedness which accrued before the final entry. *Ruddy v. Rossi*, (1918) 248 U. S. 104, 39 S. Ct. 46, 63 U. S. (L. ed.) —, *reversing* (1916) 28 Idaho 376, 154 Pac. 977.

**Enlarged homesteads** are "lands acquired under the provisions of this chapter." *In re Auge*, (D. C. Mont. 1916) 238 Fed. 621.

**Collateral attack on sale.**—The confirmation of a sheriff's sale on execution is not such an adjudication that the sale is lawful as to bar an action for damages for selling a homestead for a debt contracted prior to the issuance of the patent. *Brewer v. Warner*, (1919) 105 Kan. 168, 182 Pac. 411. As to the effect of an adjudication the court said obiter: "The federal statute is open to interpretation. Under certain circumstances a government homestead may be sold to satisfy debts contracted before patent, notwithstanding the declaration that 'no lands . . . shall in any event become liable,' etc. In applying the statute questions of fact arise: When was the debt created, and when was the patent issued? There is abundant room, therefore, for exercise of the judicial function, and if, in exercise of that function, it has been adjudicated that homestead land was subject to sale on execution, it is of no consequence that the court erred. The adjudication cannot be attacked except by direct proceeding in the same court or by appeal."

**Vol. VIII, p. 585, sec. 2302.** [First ed., vol. VI, p. 321.]

**Annulment of patent on mineral land.**— "To justify the annulment of a homestead patent as wrongfully covering mineral land, it must appear that at the time of the proceedings which resulted in the patent 'the land was known to be valuable for mineral;' that is to say, it must appear that the known conditions at the time of those proceedings were plainly such as to engender the belief that the land contained mineral deposits of

such quality and in such quantity as would render their extraction profitable and justify expenditures to that end. If at that time the land was not thus known to be valuable for mineral, subsequent discoveries will not affect the patent. The inquiry must be directed to the situation at that time, as were the applicant's proofs and the finding of the land officers. If the proofs were not false then, they cannot be condemned, nor the good faith of the applicant impugned, by reason of any subsequent change in the conditions." *U. S. v. Porter Fuel Co.*, (C. C. A. 8th Cir. 1917) 247 Fed. 769, 159 C. C. A. 627, holding evidence to be insufficient to warrant annulment.

**Vol. VIII, p. 627, sec. 2357.** [First ed., vol. VI, p. 333.]

**Land grant to Northern Pacific Railroad Company.**—In the absence of special provision the minimum price for lands in the odd-numbered sections within the primary limits of the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864 (13 Stat. at L. 365, chap. 217), was fixed by this section at \$1.25 per acre, and under section 2259 a qualified pre-emptor was entitled to purchase at the minimum price. *U. S. v. Laughlin*, (1919) 249 U. S. 440, 39 S. Ct., 340, 63 U. S. (L. ed.) —, *affirming* (1917) 52 Ct. Cl. 292.

**Vol. VIII, p. 629, sec. 2364.** [First ed., vol. VI, p. 337.]

**"Reservation of public lands."**—A withdrawal on general route of the odd-numbered sections within the primary limits of the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864 (13 Stat. at L. 365, chap. 217), did not, where the line was never definitely located, amount to a "reservation of public lands" within the meaning of this section, providing that "whenever any reservation of public lands is brought into market" the Commissioner of the General Land Office shall fix a minimum price, not less than \$1.25 per acre, nor could the sale of such sections be regarded as a bringing into market of this part of the reservation, within the meaning of that statute. *U. S. v. Laughlin*, (1919) 249 U. S. 440, 39 S. Ct. 340, 63 U. S. (L. ed.) —, *affirming* (1917) 52 Ct. Cl. 292.

**Vol. VIII, p. 641, sec. 2387.** [First ed., vol. VI, p. 344.]

**II. NATURE OF TRUST AND TITLE AND AUTHORITY OF TRUSTEE** (p. 642)

**Conflict with railroad land grant.**—By Act of July 22, 1854 (Act of Congress, July 22, 1854, ch. 103, 10 Stat. 308), sections 16 and 36 of each township in the territory of New

Mexico were reserved for the purpose of being applied to schools in said territory. By Act of July 27, 1866 (Act of Congress July 27, 1866, ch. 278, 14 Stat. 292), Congress provided for the incorporation of the Atlantic & Pacific Railroad Company, which said corporation proposed to build a railroad through the then territory of New Mexico. Section 2 of the Act gave the said railroad company a right of way through the public lands of the United States, "including all necessary grounds for station buildings, workshops, depots, . . . switches," etc. On January 15, 1891 (Act of Congress Jan. 15, 1891, ch. 73, 26 Stat. 718), an Act was passed for the relief of the inhabitants of Gallup, N. M., which said Act authorized the probate judge of Bernalillo county to enter in trust for the occupants and inhabitants of said town, for town-site purposes, the southeast quarter of section 16, township 15 north, range 18 west, subject to the provisions of sections 2387, 2388, and 2389 of chapter 8 of the Revised Statutes of the United States. Pursuant to this Act the probate judge of Bernalillo county, on June 17, 1891, applied to enter said land. Application was made for the full quarter section. The receiver issued to said probate judge a final receipt, which had noted thereon that it was "subject to the station grounds and right of way of the Atlantic & Pacific Railroad Company, containing 27.72 acres of land, as shown by survey map on file in this office." The patent excepted such station grounds, containing 27.72 acres, from the operation thereof. In 1884 the Atlantic & Pacific Railroad Company filed with the Secretary of the Interior a map showing its claim to said station grounds. It was held (a) that the relief Act of January 15, 1891, did not grant to the probate judge of Bernalillo county such quarter section of land, but simply authorized him to enter the same in trust for the occupants and inhabitants of the town of Gallup for town-site purposes; that such entry was subject to the provisions of the general town-site law; that, until such entry was made pursuant to the provisions of such law, the probate judge of such county took no title to the land. (b) Under the provisions of R. S. sec. 2388, the probate judge was only authorized to enter land the title to which was in the United States at the date of the application; that it was incumbent upon the proper officers of the land department of the United States, upon application being made to enter lands for town-site purposes, to determine whether or not such lands were subject to entry, and that such determination on the part of said officers was judicial in character. (c) When the application was made herein the officers of the land department at Santa Fé determined that the title to the right of way and station grounds of the Atlantic & Pacific Railroad Company had vested in such company, consequently had passed from the United States, and the action of such officers

in so determining is not subject to collateral attack. *Dugan v. Montoya*, (1918) 24 N. M. 102, 173 Pac. 118.

**Vol. VIII, p. 657, sec. 2.** [First ed., 1914 Supp., p. 340.]

**Work done upon precise land.**—To same effect as last paragraph of original annotation, see *U. S. v. Honolulu Consol. Oil Co.*, (S. D. Cal. 1918) 249 Fed. 167, *following* *U. S. v. Thirty-Two Oil Co.*, (S. D. Cal. 1917) 242 Fed. 730 in original annotation.

**Injunction against drilling on disputed claims.**—Where lands are withdrawn under this section and the occupant protests on the ground that he is diligently prosecuting oil discovery work, an injunction may be granted on the suit of the government against further drilling pending the decision of the question raised by the protest, and a receiver appointed, "but the receiver will in no way interfere with the present management of the property" by the occupant. *U. S. v. Honolulu Consol. Oil Co.*, (S. D. Cal. 1918) 249 Fed. 167.

**Vol. VIII, p. 669, sec. 2396.** [First ed., vol. VI, p. 367.]

**Second subdivision—monument as best evidence.**—"It is elementary that courses, distances, and quantities yield to monuments set in the original survey, and that when such monuments are found they establish the boundaries of the survey; this for the reason that they are better evidence of what the surveyor did than are plats or field notes. . . . This rule applies, however, only in the location of lines run and marked, and affords no aid in determining the question of what section is included in such boundaries." *Morse v. Breen*, (Colo. 1919) 182 Pac. 887.

**Vol. VIII, p. 698, sec. 4.** [First ed., vol. VI, p. 397.]

**Discretion to exclude entrymen.**—After lands segregated under the Carey Act have been thrown open to settlement, the state authorities are, under the laws of Idaho, bound to allow the entry of any person who has the qualification presented by statute. *Furbee v. Alexander*, (Okla. 1918) 176 Pac. 97, wherein mandamus was issued to compel the allowance of the entry.

**Vol. VIII, p. 716, sec. 2480.** [First ed., vol. VI, p. 404.]

**Taxation.**—By the Act the lands covered thereby became the property of the state and were not subject to taxation while title was retained by it. *Dees v. Kingman*, (1918) 119 Miss. 199, 80 So. 528.

**Vol. VIII, p. 736, sec. 1.** [First ed., vol. VI, p. 371.]

**When subject to taxation.**—Railroad grant lands are not taken out of the provision as to unsurveyed lands until the surveys are approved. *Northern Pac. R. Co. v. Thompson*, (C. C. A. 9th Cir. 1918) 253 Fed. 178, 165 C. C. A. 78, wherein it was said: "By the statutes of Montana it is only property which has a taxable status on 12 o'clock noon on the first Monday in March of each year that may be taxed for that year. It was shown in the pleadings that for all the lands involved the field work for surveying was done prior to the first Monday in March, 1914, but that the plats were not approved by the surveyor-general of Montana until June 12, 1915, and that none of the plats of the surveys was approved by the Commissioner of the General Land Office until December 17, 1915, and that the approved plats were not filed in the local land office until March 8 and March 15, 1916. It follows that at the time of the assessments for the years 1914 and 1915 the survey of the lands involved had not been completed, and therefore the lands had not then been identified, so as to be rendered subject to taxation."

**Vol. VIII, p. 759, sec. 1.** [First ed., vol. VI, p. 449.]

**Application of Act.**—This Act applies only to railroad and wagon grants, and has no application to swamp land or other grants. (1916) 30 Op. Atty-Gen. 572.

**Nature of proviso.**—The proviso of this section is curative and has no prospective effect. *U. S. v. Great Northern R. Co.*, (C. C. A. 9th Cir. 1918) 254 Fed. 522, 166 C. C. A. 80, *following* *U. S. v. St. Paul, etc., R. Co.*, (1918) 247 U. S. 310, 38 S. Ct. 525, 62 U. S. (L. ed.) 1130.

**Vol. VIII, p. 761, sec. 2.** [First ed., vol. VI, p. 450.]

**Patent obtained by fraud.**—This section is not applicable in a suit to cancel a patent for fraud, "for it has to do, not with cases of patents issued as a result of fraud, but with those involving rights of purchasers in good faith where patents have been erroneously issued." *Frick v. U. S.*, (C. C. A. 9th Cir. 1919) 255 Fed. 612, 166 C. C. A. 646.

**Vol. VIII, p. 765, sec. 2275.** [First ed., vol. VI, p. 462.]

**Land within reservation.**—Land which has been temporarily withdrawn from disposition under the public land laws for the purpose of examining its fitness to be included in a national forest reserve is within a reservation. *Walker v. Kingsbury*, (1918) 36 Cal. App. 617, 173 Pac. 95.

**Effect of release of base lands.**—The right to lieu lands is complete when the reselection is made, and the subsequent release of the base lands from the reserve does not impair the right. *Walker v. Kingsbury*, (1918) 36 Cal. App. 617, 173 Pac. 95, allowing a writ of mandamus to compel a reselection by the surveyor general.

**Vol. VIII, p. 773, sec. 2449.** [First ed., vol. VI, p. 515.]

Where there is a certificate of land to a state or territory under this section, and where no authority is otherwise given to pass title by approval of the Secretary of the Interior, the title to coal land embraced in the certified list, and known to be such at the time of selection, remains in the United States, subject to the control and disposition of the Land Department. (1915) 30 Op. Atty.-Gen. 485.

**Vol. VIII, p. 779, sec. 1.** [First ed., vol. VI, p. 374.]

**When title passes to state.**—The Act as extended to the state of New Mexico by the enabling act operates as a present grant to the state of school sections, subject only to identification by survey, whereupon title vested in the state as of the date of the enabling act. Under the terms of the enabling act, as soon as such lands are surveyed in the field, the state acquires such an interest therein as entitles it to take possession thereof or to lease the same to private persons. *Dallas v. Swigart*, (1918) 24 N. M. 1, 172 Pac. 416.

**Vol. VIII, p. 785, sec. 2477.** [First ed., vol. VI, p. 498.]

**Lands reserved for school purposes.**—An enabling act reserving certain sections in every township for school purposes "when the land in the said territory shall be surveyed" does not invalidate the establishment of a highway where the highway was constructed before the survey was made. *Greiner v. Park County*, (Colo. 1918) 173 Pac. 719.

**Vol. VIII, p. 789, sec. 1.** [First ed., vol. VI, p. 501.]

**Land subject to grant.**—"Public land."—The words "public lands" are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used, and it is the duty of the court not to give such a meaning to the words as would destroy the object and purpose of the law or lead to absurd results. *Jackman v. Atchison, etc., R. Co.*, (1918) 24 N. M. 278, 170 Pac. 1036.

**Land subject to grant.**—*Land reserved from entry and sale.*—If at the time the railroad company seeks to appropriate land which is a part of the public lands of the United States, such land is subject to entry and sale, it is entitled to the benefits of the Act, notwithstanding that such land may have been reserved from entry and sale at the date of the passage of this Act. The status of the land at the date the appropriation is sought controls the right of the railroad company; not its status at the date of such Act. *Jackman v. Atchison, etc., R. Co.*, (1918) 24 N. M. 278, 170 Pac. 1036.

**Two methods of acquiring ground.**—This Act provides two methods by which a railroad company can acquire ground for its right of way and station grounds. Under the first section of the Act the right of way may become definitely located, and title acquired by the actual construction of the railroad over the public domain. Under the fourth section the right of way and station grounds may be acquired by (1) location of the road; (2) filing a profile of it in the local land office; and (3) the approval thereof by the Secretary of the Interior, to be noted upon the plats in the local land office. *Jackman v. Atchison, etc., R. Co.*, (1918) 24 N. M. 278, 170 Pac. 1036.

**Enlargement of grant by chief of Field Division.**—The Chief of the Field Division of the General Land Office may not enlarge the grant to certain railway companies made by this Act of the right to take from the public lands adjacent to their lines the timber necessary for railroad construction, nor give rights in the public lands not conferred by the Act. *Caldwell v. U. S.*, (1919) 250 U. S. 14, 39 S. Ct. 397, 63 U. S. (L. ed.) —, *affirming* (1917) 53 Ct. Cl. 33.

**Who may object to claim of railroad company.**—One claiming under a homestead entry upon public land which a railway company claims under this Act has no standing to challenge the power of the railway company under its charter to build a line over such land. *Van Dyke v. Arizona Eastern R. Co.*, (1918) 248 U. S. 49, 39 S. Ct. 29, 63 U. S. (L. ed.) —, *affirming* (1916) 18 Ariz. 220, 157 Pac. 1019.

**Disposal of timber for profit.**—The grant to certain railway companies made by this section of the right to take from public lands adjacent to their lines timber necessary for railway construction, did not include the right to dispose of, for profit, the "tie slash," i. e., the tops of trees the bodies of which were cut down to make railway ties, nor to make such tie slash an element of compensation to the agents employed by the railway companies to cut the timber. *Caldwell v. U. S.*, (1919) 250 U. S. 14, 39 S. Ct. 397, 63 U. S. (L. ed.) —, *affirming* (1917) 53 Ct. Cl. 33.

Persons appointed by a railway company as its timber agents to exercise its right under this Act to cut timber from public lands for

railway construction purposes were given no right to vend for profit the "tie slash," i. e., the tops of trees the bodies of which were cut down by them for railway ties, by virtue of the provision of the Act of March 3, 1891, section 8 (see vol. 9, p. 629) that in criminal prosecutions for trespass on public timber lands, or in suits to recover timber or lumber cut, it shall be a defense if defendant shall show that the timber was cut or removed from the lands for use in the state by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under the rules of the Interior Department, and has not been transported out of the state, since this Act expressly forbids its operation to enlarge the rights of any railway company to cut timber on the public domain. *Caldwell v. U. S.*, (1919) 250 U. S. 14, 39 S. Ct. 397, 63 U. S. (L. ed.) —, *affirming* (1917) 53 Ct. Cl. 33.

**Vol. VIII, p. 798, sec. 4.** [First ed., vol. VI, p. 506.]

**Filing of profile as directory.**—The provision of this section which requires a railroad company, desiring to avail itself of the benefits of this Act, to file a profile of its road, within twelve months after the location of any section of twenty miles of its road, is directory, and a railroad company may file such map, and secure the benefits of the Act after such period of time has elapsed, if it so elects, and the fact that it has completed its railroad does not prevent it from obtaining station grounds under such Act, if the land is public land, subject to entry and sale, at the time it applies therefor. *Jackman v. Atchison, etc., R. Co.*, (1918) 24 N. M. 278, 170 Pac. 1036.

A definite location of a right of way is made by the actual construction of the road, where the railway company changed its route as located by its original and approved map, and did not file its amended map and profile until after the road was completed. *Van Dyke v. Arizona Eastern R. Co.*, (1918) 248 U. S. 49, 39 S. Ct. 29, 63 U. S. (L. ed.) —, *affirming* (1916) 18 Ariz. 220, 157 Pac. 1019.

**Approval of profile.**—The approval by the Secretary of the Interior of the profile of a railroad company, filed under the provisions of this Act, showing its claim to lands for station grounds, is conclusive against collateral attack, if such land was, at the time of such approval, public land of the United States, and subject to entry and sale. *Jackman v. Atchison, etc., R. Co.*, (1918) 24 N. M. 278, 170 Pac. 1036.

**Effect of approval.**—Where a railroad company has complied with the provisions of this Act, and the Secretary of the Interior has approved its profile map, showing its right of way and station grounds, and such approval has been noted on the plats in the local land office, the omission of the reservation from the patent or final receipt of an

entryman, who settled upon the land after the rights of the railroad company accrued, would not operate to give the patentee title to land which had been theretofore vested in the railroad company. *Jackman v. Atchison, etc., R. Co.*, (1918) 24 N. M. 278, 170 Pac. 1036.

**Vol. VIII, p. 802, sec. 5.** [First ed., vol. VI, p. 506.]

**"Especially reserved from sale."**—Lands in a forest reserve are specially reserved from sale. *Chicago, etc., R. Co. v. U. S.*, (1917) 244 U. S. 351, 37 S. Ct. 625, 61 U. S. (L. ed.) 1184, *affirming* (C. C. A. 9th Cir. 1914) 218 Fed. 288, 134 C. C. A. 84, which *affirmed* (D. C. Idaho 1913) 207 Fed. 164.

**Vol. VIII, p. 810, sec. 1.** [First ed., vol. VI, p. 513.]

**Approval of Secretary of Interior.**—The actual construction of a railroad through a forest reserve must be deemed to have received the approval of the Secretary of the Interior conformably to this section where the railway company having secured a permit to enter the reserve for that purpose, and having obtained the secretary's approval of its map and profile, built the road through such reserve, but upon another line than the one shown by such map and profile. *Van Dyke v. Arizona Eastern R. Co.*, (1918) 248 U. S. 49, 39 S. Ct. 29, 63 U. S. (L. ed.) —, *affirming* (1916) 18 Ariz. 220, 157 Pac. 1019.

This section commits to the Secretary of the Interior the question of determining whether the public will be injuriously affected by the grant of a right of way to a railroad through a forest reserve and authorizes him to file and approve surveys and plats of the right of way. The measure of his discretion is large and only through his approval can a right of way be acquired. *Chicago, etc., R. Co. v. U. S.*, (1917) 244 U. S. 351, 37 S. Ct. 625, 61 U. S. (L. ed.) 1184, *affirming* (C. C. A. 9th Cir. 1914) 218 Fed. 288, 134 C. C. A. 84, which *affirmed* (D. C. Idaho 1913) 207 Fed. 164.

**Vol. VIII, p. 811.** [First ed., vol. VI, p. 513.]

**Rights of way for development of electrical power.**—Revocable permits under this Act or easements under the Act of March 4, 1911, ch. 238, section 1 (see vol. 8, p. 816) may be granted for the development and transmission of electric power upon public lands situate in Alaska. (1915) 30 Op. Atty-Gen. 387.

**Applications for revocable permits** under this Act should be filed with and passed upon by the Secretary of Agriculture when they relate to lands of the national forests. (1914) 30 Op. Atty-Gen. 263.

**Vol. VIII, p. 816, sec. 1.** [*Rights of way for electric lines.*] [First ed., 1912 Supp., p. 388.]

Authority to grant rights of way.—To same effect as original annotation, see (1914) 30 Op. Atty.-Gen. 263.

**Vol. VIII, p. 816, sec. 1.** [*Inclosure, etc.*] [First ed., vol. VI, p. 533.]

Color of title.—A holder of color of title to a small tract of government land embraced within the limits of the original survey of a Mexican land grant, which was without the limits of such grant as finally confirmed by the Court of Private Land Claims, who had, or whose predecessors in title had, expended large sums in improving the land, and where the original allotment of said land and the settlement and improvements thereon had been made in good faith, has "claim or color of title made or acquired in good faith," within the spirit of this section. Hence a contract for the sale of said land is not an illegal contract, and the fact that such grantor received his confirmatory deed from the corporation, created by the legislature to carry out the purpose of the grant, after it was definitely known that the land thereby granted and confirmed by such deed was without the limits of the confirmed portions of the grant, does not change or alter his status. *Robinson v. Sawyer*, (1918) 23 N. M. 688, 170 Pac. 881, following *Sandusky Third Nat. Exch. Bank v. Smith*, (1915) 20 N. M. 264, 148 Pac. 512.

**Vol. VIII, p. 822, sec. 3.** [First ed., vol. VI, p. 536.]

Preventing access by injunction.—Where a party is the owner of the odd-numbered sections of land, the odd-numbered sections having been granted by the government to aid in the building of the railroad, and the even-numbered sections are largely owned by the government, the remainder of the even-numbered sections being either school sections or held in private ownership, a court of equity will not, at the instance of the owner of the odd-numbered sections, enjoin an owner of live stock from grazing his sheep or cattle on the odd-numbered sections, in the absence of a legal fence maintained by such owner, or compliance by such owner with the provisions of section 39, Code 1915, as such an injunction would have the effect of giving to the owner of the odd-numbered sections absolute control and dominion over the government lands, included in the townships embracing such privately owned odd-numbered sections. *Jastro v. Francis*, (1918) 24 N. M. 127, 172 Pac. 1139, wherein the court

said: "If the owner of the odd-numbered sections in a township, the even-numbered being government domain, and none of the land being fenced, can procure the aid of the court of equity to restrain others from pasturing their animals upon said even-numbered sections, or driving their stock across any portion of such odd-numbered sections, he would be able to accomplish indirectly, and by the aid of a court of equity, that which he could not do directly, viz., maintain the exclusive use and occupancy of that part of the public domain so situated. That appellees expect to pasture, not only the odd-numbered sections in the two townships which they own, but the government lands, is apparent, for it would be physically impossible for them to utilize their own lands. The injunction, if sustainable, in its practical effect is every whit as effective as a fence surrounding the entire tract would be, in excluding appellants from using the government land in the townships, and the same nostrum could be readily applied to all others who might seek to graze their animals upon such government land. In other words, the court fences the land for appellees by its writ of injunction, and incloses for them a large area of government domain, and does it much more effectively than the parties did in the *Camfield Case*."

**Vol. VIII, p. 865.** [First ed., vol. VI, p. 522.]

No application to homestead entry.—To same effect as original annotation, see *Patterson v. Chaney*, (1918) 24 N. M. 156, 173 Pac. 859.

**Vol. VIII, p. 869, sec. 8.** [First ed., vol. VI, p. 526.]

The jurisdiction of the Interior Department over excepted mineral land can be exercised after the lapse of the limitation period prescribed by this section. (1915) 30 Op. Atty.-Gen. 485.

Recovery for fraud.—"The Act of Congress declares that suits by the United States to vacate patents for fraud shall not be brought subsequent to six years after the date of the patents. When the six years have expired such units are therefore presumed to be barred. And when the injured party invokes the aid of a court of equity to release him from that bar, the burden unavoidably falls upon the plaintiff to plead and prove (1) that it exercised reasonable care and diligence to discover the fraud before the statute of limitations ran; (2) that it had no knowledge or notice of any action which would have excited the attention of and would have incited a person of ordinary prudence and ability in the plaintiff's situation to an inquiry which would have led to a discovery of the fraud; and (3) that the defendant concealed the fraud by



trick or artifice, or so committed it that it concealed itself." *U. S. v. Diamond, etc., Coal Co.*, (C. C. A. 8th Cir. 1918) 254 Fed. 266, 165 C. C. A. 554, holding that a bill by the government did not contain allegations sufficient to meet the burden thus imposed.

**Alleging fraud.**—To same effect as original annotation, see *U. S. v. Diamond Coal, etc., Co.*, (C. C. A. 8th Cir. 1918) 254 Fed. 266, 165 C. C. A. 554.

**Limitation provisions as applicable to patents only.**—The limitation provisions of this

section and section 1 of the Act of March 2, 1896, ch. 39 (see vol. 8, p. 750) relate to patents only, and do not apply to a conveyance effected by an approval and certification by the Land Department of a list of state selections. (1916) 30 Op. Atty.-Gen. 572.

**Action for value of lands.**—The limitation attached to a suit to annul a patent does not apply to a suit by the government to recover the value of lands fraudulently patented. *Union Coal, etc., Co. v. U. S.*, (C. C. A. 8th Cir. 1917) 247 Fed. 106, 159 C. C. A. 324.

## PUBLIC MONEYS

**Vol. VIII, p. 881, sec. 3614.** [First ed., vol. VI, p. 546.]

**Designation of disbursing clerk to act for two departments.**—The Secretary of Labor may, with the concurrence of the Secretary of Commerce, if the public exigencies require it, designate the disbursing clerk of the Department of Commerce to disburse the moneys appropriated for the various bureaus and services of the Department of Labor until a regular disbursing clerk can be appointed, provided he is able and willing to give bond as required by this section. (1913) 30 Op. Atty.-Gen. 129.

**Vol. VIII, p. 902, sec. 3646.** [First ed., 1918 Supp., p. 718.]

**Indemnity bonds on issuance of duplicate checks.**—Where an original check issued by a United States disbursing officer is lost, the Secretary of the Treasury has no authority, under the provisions of this section, to dispense with the giving of a bond as a condition to the issuance of a duplicate check. (1913) 30 Op. Atty.-Gen. 66.

## PUBLIC OFFICERS AND EMPLOYEES

**Vol. VIII, p. 936, sec. 1765.** [First ed., vol. VI, p. 595.]

**Shipping commissioners.**—A shipping commission is not entitled to receive a fee from the estate of a deceased seaman but must pay the same into the registry of the District Court. *In re MacDonald*, (S. D. N. Y. 1917) 248 Fed. 983, following *Lewis v. U. S.*, (1917) 244 U. S. 134, 37 S. Ct. 570, 61 U. S. (L. ed.) 1039, and overruling *In re Johnson*, (S. D. N. Y. 1916) 251 Fed. 319.

**Vol. VIII, p. 955.** [*Government employees, etc.*] [First ed., 1912 Supp., p. 79.]

**Clerks of District Courts.**—A clerk of a federal District Court is properly indicted under this Act for making false entries in books which he is required to keep by Act of June 30, 1906, 34 Stat. L. 754, ch. 3914, § 1, 4 Fed. Stat. Ann. 736. *U. S. v. Dodge*, (S. D. Fla. 1918) 251 Fed. 737.

**Vol. VIII, p. 956, sec. 6.** [First ed., 1914 Supp., p. 317.]

**Removal from office.**—A person in the classified civil service cannot be deprived of his status in the service except by removal as

provided in this section, and it is for the head of a department, and not the Civil Service Commission, to determine when there exists proper cause for the removal. Thus, the Civil Service Commission has no authority to cancel the classification of an employee brought within the classified civil service under the Executive order of March 1, 1904, which classified certain positions in the civil service of the War Department in the Philippines. (1913) 30 Op. Atty.-Gen. 79.

**Salary subsequent to removal.**—Where an employee of the United States in the classified civil service is discharged from the service and claims the pay of the office subsequent to his removal, it must appear affirmatively that he was willing and able to discharge the duties of the office during said period. *Nicholas v. U. S.*, (1918) 53 Ct. Cl. 463.

**Review of removal.**—Where an employee in the classified civil service is regularly removed from office under charges, and the officers removing him were empowered by law so to do, the question as to whether there was just cause for such removal is one for the executive authorities, and the courts deal only with any departure from the law itself. *Eberlein v. U. S.*, (1918) 53 Ct. Cl. 466.

**Reinstatement after improper removal.**—Where after removal it is discovered that the charges upon which the removal was based

were without merit, and the employee is "reinstated" in his former position by proclamation of the President, such reinstatement was not intended to convert the removal into a suspension from duty but to render the

employee again eligible for the same position. *Eberlein v. U. S.*, (1918) 53 Ct. Cl. 466.

**Excepted positions.**—This section does not apply to those occupying excepted positions. (1913) 30 Op. Atty-Gen. 181.

## PUBLIC PARKS

**Vol. VIII, p. 965.** [*Arrests for violations, etc.*] [First ed., vol. X, p. 407.]

**Arrests by employees of Gettysburg National Park.**—Under this Act, employees of

Gettysburg National Park are authorized to make arrests for the violation of the laws and regulations relating to such park. (1915) 30 Op. Atty-Gen. 465.

## PUBLIC PRINTING

**Vol. VIII, p. 1026, sec. 3.** [First ed., vol. VI, p. 644.]

**Paper for postal cards.**—The Postmaster General is authorized to contract for, purchase, and inspect paper for the printing of postal cards. (1913) 30 Op. Atty-Gen. 241.

**Paper furnished on requisitions by executive departments.**—All paper furnished by the public printer on requisitions for the ordinary use of the executive departments and chargeable to their appropriations must be purchased in accordance with the provisions of this Act. (1913) 30 Op. Atty-Gen. 241.

**Vol. VIII, p. 1027, sec. 5.** [First ed., vol. VI, p. 645.]

**Rejection of bids—Review by mandamus.**—Under the provision of this section that the joint committee on printing created by this Act shall award contracts "to the lowest and best bidder for the interest of the government," the joint committee has the power to reserve the right, in its advertisements for bids, to reject any and all bids in its discretion; and its action in

rejecting a bid, although it is the lowest, cannot be reviewed in a mandamus proceeding instituted by such bidder. *Champion Coated Paper Co. v. Joint Committee on Printing of Congress*, (1917) 47 App. Cas. (D. C.) 141.

**Vol. VIII, p. 1027, sec. 6.** [First ed., vol. VI, p. 645.]

**Validity of contract made by joint committee.**—It was within the power of the joint committee on printing to make a contract for supplying the government with so much paper as might be required for the public printing and binding for the period of six months from March 1, 1916, and such contract obligated the contractor to furnish such paper to the limit of the government's needs during the life of the contract. In such case the government has no right to enter into a new contract for any part of the supply covered by the old contract, save as provided in such contract itself, nor can it be compelled to take more than it needs, though that need is less than the amount specified in the schedule or estimates. (1916) 30 Op. Atty-Gen. 541.

## RAILROADS

Vol. VIII, p. 1142, sec. 5256. [First ed., vol. VI, p. 720.]

Character of grant of public lands obtained by Union Pacific Railroad.—The Union Pacific Railroad Company by the grant to its predecessors in interest under the Act of Congress of July 1, 1862, ch. 120 (12 Stat. 489, ch. 120), and the amendatory Act of July 2, 1864 (13 Stat. 356, ch. 216), became the owner in fee of a right of way 200 feet from the center of the track, which right is superior to claims initiated after the Act of 1864, and is not defeated by adverse possession. The grant is of the land itself, and not a mere right of passage over it. *Union Pac. R. Co. v. Davenport*, (1918) 102 Kan. 513, 170 Pac. 993.

Vol. VIII, p. 1151, sec. 1. [First ed., vol. VI, p. 745.]

Troops of the United States.—Discharged military prisoners, discharged or retired enlisted men in the United States Army, enlisted men on furlough, and rejected applicants for enlistment, traveling as individuals, are not troops of the United States within the provisions of the railroad Land-Grant Acts governing payment for transportation of any property or troops of the United States. So applicants for enlistment in the United States Army, who have been examined at general recruiting stations, found mentally, morally, and physically fit for service, and are en route as individuals to recruiting depots for final examination and enlistment, are not troops of the United States. *U. S. v. Union Pac. R. Co.*, (1919) 249 U. S. 354, 39 S. Ct. 294, 63 U. S. (L. ed.) —, *affirming* (1917) 52 Ct. Cl. 226, wherein the court said: "In defining the transportation rights secured to the United States, these land-grant acts draw a broad distinction between freight and passengers. All 'property' of the Government, whatever its character and intended use, is to be carried 'free of toll or other charge'; but of the many persons in its service, only 'troops.' The history of the legislation shows that both the broad term, 'any property,' and the narrower one, 'troops,' were adopted deliberately. The earliest land-grant act in which the provision appears is that of September 20, 1850, c. 61, § 4, 9 Stat. 466, 467, under which the Illinois Central was constructed. The bill as introduced provided for the free transportation of 'troops and munitions of war.' It was amended so as to read 'any property or troops.' There had been an earlier act granting land to the State of Illinois for the construction of a canal (Act of March 30, 1822, c. 14, 3 Stat. 659) which was

amended (Act of March 2, 1833, c. 87, 4 Stat. 662) so as to permit, on the same terms, the use and disposition of the land for railroads. That act provided for the free transportation of 'any property of the United States, or persons in their service.' In 1850 the word 'troops' had (and it has ever since had) an established meaning:—namely, 'soldiers collectively,—a body of soldiers.' Thus the Army Appropriation Act of that year (Act of September 28, 1850, c. 78, § 1, 9 Stat. 504, 506) provides for the 'transportation of the army, including the baggage of the troops when moving either by land or water' and for 'mileage, or the allowance made to officers for the transportation of themselves and baggage when travelling on duty without troops.' The contemporary legislation draws a clear distinction also between troops, that is, those then having the status of soldiers, and those who once had been in, or were seeking to enter, the military service. Thus the Army Appropriation Act of March 2, 1847, c. 35, 9 Stat. 149, 151 (which provides in substantially the same terms as that of 1850 for the transportation of troops) makes specific provision for 'forwarding destitute soldiers to their homes,' for the 'comfort of discharged soldiers,' and for 'expenses of recruiting,' which include the cost of transportation. See Army Regulations, 1857, § 1321. And the Resolution of March 3, 1847, No. 7, 9 Stat. 206, authorizes the refund of moneys expended by the states and individuals 'in organizing, subsisting, and transporting volunteers previous to their being mustered and received into the service of the United States for the present war, and for subsisting troops in the service of the United States.' In view of the established meaning of the term 'troops' as used by Congress the duty of the court is merely to apply the provisions of the act to the several classes of persons described above. . . . We have no occasion to consider whether persons not enlisted as soldiers, but forming a part of a moving army or detachment are to be deemed 'troops of the United States' within the provision of the land-grant acts; nor whether a soldier travelling for the purposes of the Government, but not for any purpose connected with war or the preparation for war, falls within the provisions. (1890) 19 Op. Atty-Gen. 572."

Transportation of empty mail bags.—The provisions in the Land Grant Acts of Feb. 9, 1853, 10 Stat. 155, and July 28, 1866, 14 Stat. 338, that "all property and troops of the United States" shall be transported at the cost, charge, and expense of the company owning or operating the road, include empty mail bags and cannot be restricted to impedimenta or property appertaining to the

military establishment of the government. St. Louis, etc., R. Co. v. U. S., (1917) 53 Ct. Cl. 45.

**Vol. VIII, p. 1153, sec. 1.** [First ed., vol. VI, p. 747.]

**Contract for specially expedited transportation.**—Where the United States contracts with a railroad for specially expedited transportation of equipment and troops, and where the same in all respects conforms to the provisions of the Acts of March 3, 1909, 35 Stat. 745 and March 23, 1910, 36 Stat. 256, no reduction can be made from the contract rates not authorized by a provision in the contract. Southern Pac. Co. v. U. S., (1918) 53 Ct. Cl. 332.

**Vol. VIII, p. 1155, sec. 1.** [First ed., vol. VI, p. 752.]

**I. Introductory.**

1. Purpose.
3. Rules of construction.
4. State laws.

**II. "Engaged in interstate commerce."**

**IV. "Train."**

2. Switching operations.
3. Transfer operations.

**VII. Prohibition of use of hand brakes.**

**VIII. Action by injured employee.**

**I. INTRODUCTORY**

**1. Purpose (p. 1155)**

The primary object of the Safety Appliance Act is to protect railroad employees against the perils of the old method of braking. Grand Rapids, etc., R. Co. v. U. S., (C. C. A. 6th Cir. 1918) 249 Fed. 650, 161 C. C. A. 560.

**3. Rules of Construction (p. 1156)**

**In general.**—The Act as originally passed, being remedial and humanitarian in its purpose, is to be broadly construed. Chesapeake, etc., R. Co. v. U. S., (C. C. A. 6th Cir. 1918) 249 Fed. 805, 162 C. C. A. 39.

**"Common carrier."**—A system of internal trackage constructed and operated by an industrial corporation to meet the necessities of its business in the processes of manufacture may be regarded as a plant facility and does not make the corporation a common carrier. Where, however, the system is operated by an independent corporation organized as a common carrier, which, in addition to the service rendered in the industrial operation of the plant, also engages in the transportation in commerce of the product of the plant to customers and of the material required by the plant in the conduct of its business from all shippers to the plant, such additional service is that of a common carrier. The fact that under its discretionary power over joint rates the Interstate Commerce Commission may have refused to allow the company to participate in the

through rate because such participation would create an unjust discrimination does not establish that the company is not a common carrier within the meaning of the Safety Appliance Act. Kenna v. Calumet, etc., R. Co., (1918) 284 Ill. 301, 120 N. E. 259.

**4. State Laws (p. 1157)**

**State Workmen's Compensation Act.**—The right of a person injured by virtue of a violation of the Safety Appliance Act is not affected by the existence of a state Workmen's Compensation Act. Kenna v. Calumet, etc., R. Co., (1918) 284 Ill. 301, 120 N. E. 259, wherein the court said: "The plaintiff in error filed a special plea alleging that both the plaintiff and the defendant were subject to the Workmen's Compensation Act, and showed that the plaintiff in error had accepted the provisions of the act and that the defendant in error had not declined them. It is insisted that the compensation provided by the Workmen's Compensation Act was the defendant in error's exclusive remedy. On the other hand, it is contended that the federal Safety Appliance Act excludes the application of the Workmen's Compensation Act. It is conceded that the federal Employers' Liability Act excludes the application of the Workmen's Compensation Act in all cases in which the former act is applicable . . . The Safety Appliance Act is equally exclusive. . . . It is argued that the Workmen's Compensation Act does not conflict with or abrogate any of the provisions of the Safety Appliance Act, but only changes the remedy. The Safety Appliance Act by irresistible inference, as held by the Supreme Court of the United States, confers a private right of action for the death or injury of an employee caused by a violation of its terms. This right of action was to recover compensatory damages for the loss suffered. The Workmen's Compensation Act would take away this right of action and confer instead a right to a sum fixed by statute without regard to the damages in the particular cases except by reference to the wages which the employee was then earning in his particular employment. The Workmen's Compensation Act substitutes, not a different remedy for the employee, but a different thing for him to recover."

See to the same effect Southern R. Co. v. Henderson, (Tex. 1919) 208 S. W. 561.

In Delaware, etc., R. Co. v. Peck, (C. C. A. 2d Cir. 1918) 255 Fed. 265, 166 C. C. A. 431, a state Compensation Act was held to provide the only remedy for an injury caused by failure to provide efficient handholds. The court said: "The plaintiff's employment and injury both took place in the state of New Jersey. His theory is that for injuries resulting from a violation of this act he may recover damages in a common-law action brought wherever he can serve the defendant. But master and servant together constitute a relation or status which involves many mutual rights and duties not expressed in

the specific contract of employment. That contract fixes, among other things, the kind, place, and time of employment, and the compensation. The definition and extent of the relation itself are fixed by the law of the state where it was established, but Congress has written into it, in the case of railroad companies and their employes, this additional feature on which the plaintiff relies. The state of New Jersey has defined the rights and duties of the relation of master and servant by the Workmen's Compensation Act (chapter 95, Laws 1911, as amended by chapter 174, Laws 1913) which we regard as excluding all other jurisdictions. Section II regulates elective compensation without regard to the negligence of the employer, and subsection 9 provides that every contract of hiring shall be presumed to have been made with reference to section II unless there be an express statement in writing as a part of the contract or by either party to the other prior to any accident that it is not intended to apply. So also either party may terminate the application of section II by giving sixty days' notice in writing to the other before any accident. The answer sets up this act as a defense, and alleges that there was no provision in the contract that section II should not apply, and that the plaintiff had given no such notice to the defendant before the accident; wherefore he could not maintain the action. At the trial the defendant offered to prove these allegations, but the court refused to permit it, and the defendant excepted. We think this was error. The New Jersey act creates a system to be enforced by the court of common pleas of the county of New Jersey which would have jurisdiction in a civil case. The employé is required to give notice of the injury to the employer within a fixed time. The compensation to be paid for the loss of a leg or of a hand is a fixed proportion of the employé's daily wages for a fixed number of weeks, and this compensation may be commuted by the court of common pleas into one or more lump sums. That court is also to settle, at the request of either of the parties, any dispute about compensation. For these reasons we are of the opinion that the plaintiff cannot maintain this action in the District Court for the Southern District of New York."

## II. "ENGAGED IN INTERSTATE COMMERCE" (p. 1157)

**Car not being used in interstate commerce.**—If the railroad is engaged in interstate commerce the act applies to a car not at the moment being so used, and not on the main line but on a special or switch track leading to a private plant. *Texas, etc., R. Co. v. Sprole*, (Tex. Civ. App. 1918) 202 S. W. 985.

See to the same effect *St. Louis Southwestern R. Co. v. Smith*, (C. C. A. 5th Cir. 1918) 254 Fed. 581, 166 C. C. A. 585.

If the railroad is itself a highway of interstate commerce, it is liable to an employee

injured by reason of failure to comply with the Act though the employee was not himself engaged in interstate commerce when he was injured. *Devin v. Buffalo, etc., R. Co.*, (C. C. A. 3d Cir. 1918) 253 Fed. 948, 165 C. C. A. 390.

The requirements of the federal Safety Appliance Act, as amended, are mandatory and embrace all cars used on any railroad that is a highway of interstate commerce, whether the particular cars are at the time employed in such commerce or not, and includes employees injured through a failure to comply with its terms, even though engaged in duties unconnected with interstate commerce. *Ewing v. Coal, etc., R. Co.*, (1918) 82 W. Va. 427, 96 S. E. 73.

**Intrastate roads.**—A Texas railroad company authorized to connect and actually connected at the state line with other railroads so as to constitute with them an interstate system is within the Act. *St. Louis Southwestern R. Co. v. Smith*, (C. C. A. 5th Cir. 1918) 254 Fed. 581, 166 C. C. A. 585.

**Employee taking car to be repaired.**—The liability of an interstate railway company under the federal Safety Appliance Act to an employee injured through a violation of the commands of those statutes that certain safety appliances be installed upon railway cars used upon a highway of interstate commerce exists, although the employee when injured was engaged in returning the defective car to its owner for repairs. *Ewing v. Coal, etc., R. Co.*, (1918) 82 W. Va. 427, 96 S. W. 73.

## IV. TRAIN

### 2. *Switching Operations* (p. 1158)

Cars being moved on tracks which are never used by any of the trains running between stations but exclusively for switching purposes to supply the industries along these tracks with loaded cars or "empties" for outgoing freight are not within the act. *U. S. v. Northern Pac. R. Co.*, (C. C. A. 8th Cir. 1918) 255 Fed. 655.

In *U. S. v. Galveston, etc., R. Co.*, (C. C. A. 5th Cir. 1919) 255 Fed. 755, it was said: "The engine and cars, the movements of which are in question in the instant case, were assembled and coupled together for runs or trips, each of a distance of several miles. In those trips they crossed main line tracks of several railroads and streets at grade, and moved over stretches of main line track. The movements made were not kept from being runs or trips along the road by the circumstances that the tracks used were part of the network of tracks referred to generally as the Galveston yards and that main line tracks were used in only parts of the runs. There was no material difference between the unit formed by the assembling and coupling together of the engine and cars before each of the movements began and a train made up for a run to another station. It cannot properly be said that the movement throughout consisted of operations whereby the previously formed

unit was broken up. Nothing occurred while either of the movements was in progress which was materially different from what might have occurred if the movements had been to points beyond the yard limits. A result of each of the movements was that interstate freight was carried over an interstate railway thoroughfare to a point several miles nearer to its ultimate destination. The fact that there are switching operations before such a movement is completed does not have the effect of making the entire movement one which does not come within the prohibition of the statute. What was done included more than such shifting of cars while not controlled by the engineer by power or train brakes as properly may be regarded as not forbidden by the statute." To same effect, see *U. S. v. Gulf, etc., R. Co.*, (C. C. A. 5th Cir. 1919) 255 Fed. 758.

### 3. Transfer Operations (p. 1159)

A transfer of twenty-six freight cars as a unit from one railway terminal to another for delivery without uncoupling or switching out any car, involving a movement for a distance of three-quarters of a mile, and necessitating crossing at grade three city streets once, two streets twice, one street three times, and a main track movement of at least 2,600 feet, with two stops and startings on the main track,—is a train movement, not a mere switching operation, and is governed by the train-brake provisions of the Safety Appliance Act forbidding the operation of trains in which less than the requisite number of cars are controlled by power or train brakes, and providing that the train-brake requirement shall apply to all trains used on any railroad engaged in interstate commerce. *Louisville, etc., Bridge Co. v. U. S.*, (1919) 249 U. S. 534, 39 S. Ct. 355, 63 U. S. (L. ed.) —, wherein the court said: "It is argued that coupling of the train brakes was not necessary for the reason that the street crossings used were protected by gates, that a yard master from an elevated tower watched over the main line movements, and that the coupling of the train-brake appliances would involve more danger to the employees than the movement of the cars without their being used and operated. These suggestions serve to emphasize the dangerous character of the movement. But the construction which the act should receive is not to be found in balancing the dangers which would result from obeying the law with those which would result from violating it, nor in considering what other precautions will equal, in the promotion of safety, those prescribed by the act. Such considerations were for Congress when enacting the law and it has repeatedly been held by this court that other provisions of the Safety Appliance Act impose upon the carrier the absolute duty of compliance in cases to which they apply and that failure to comply will not be excused by carefulness to avoid the danger which the appliances pre-

scribed were intended to guard against, nor by the adoption of what might be considered equivalents of the requirements of the act. *St. Louis, etc., R. Co. v. Taylor*, (1908) 210 U. S. 281, 295 [28 S. Ct. 616, 52 U. S. (L. ed.) 1061, 1068]; *Great Northern R. Co. v. Otos*, (1915) 239 U. S. 349 [36 S. Ct. 124, 60 U. S. (L. ed.) 322]; *St. Joseph, etc., R. Co. v. Moore*, (1917) 243 U. S. 311 [37 S. Ct. 278, 61 U. S. (L. ed.) 741]. The case falls within the scope of *U. S. v. Erie R. Co.*, (1915) 237 U. S. 402 [35 S. Ct. 621, 59 U. S. (L. ed.) 1021], and *U. S. v. Chicago, etc., R. Co.*, (1915) 237 U. S. 410, 413 [35 S. Ct. 634, 59 U. S. (L. ed.) 1023, 1027], in the latter of which it is said that 'the controlling test of the statute's application lies in the essential nature of the work done.'

### VII. PROHIBITION OF USE OF HAND BRAKES (p. 1160)

The use of hand brakes while descending a down grade is not authorized by the fact that it is necessary for a brakeman to go on top of the cars to set the retainer valves of the power brakes in order to handle a train on such a grade. *Grand Rapids, etc., R. Co. v. U. S.*, (C. C. A. 6th Cir. 1918) 249 Fed. 650, 161 C. C. A. 560. The court said, with respect to the provision of the Act of 1910 (8 Fed. Stat. Ann., p. 1190) as to hand brakes: "We cannot think this provision was intended to defeat the design of the original act to release brakemen from the danger of going on the tops of trains moving upon the main lines; indeed, there is a plain inconsistency in the provisions themselves, the one exacting the air brake system and the other the hand brakes, which forbids a railroad company, upon its own idea of safe operation along its main line, to displace the air brake system in favor of the hand brake. This inconsistency is both recognized and provided for by section 5 of the Hand Brake Act (36 Stat. pt. 1, p. 299), which enacts among other things that 'nothing in this act shall be held or construed to relieve any common carrier . . . from any of the provisions . . . or requirements' of the original Safety Appliance Act (27 Stat. 531), as amended by the Acts of April 1, 1896 (29 Stat. 85), and March 2, 1903 (32 Stat. pt. 1, p. 943). The effect of this provision is particularly applicable to the instant case by reason of the admitted facts, before alluded to, that defendant's air brake system was 'at the time in good order and repair and in efficient condition and properly connected for use.' 244 Fed. 610. It must result that the requirement to equip all cars with efficient hand brakes was designed for purposes distinct from the use to which they were put in descending Boyne Hill; and it is sufficient here to say that the act concerning hand brake equipment finds abundant reason for its existence and application in places where the use of the air brake system is impracticable, as, for instance, in railroad yards."

## VIII. ACTION BY INJURED EMPLOYEE

Employee need not sue in state where injury occurred and the laws of that state are not applicable, where the action is based on a violation of the federal Act. *Texas, etc., R. Co. v. Sprole*, (Tex. Civ. App. 1918) 202 S. W. 985.

Right of action implied.—Though the Act contains no express language conferring a right of action for the death or injury of an employee occasioned by a failure to comply with its requirements, a right of action therefor, nevertheless, is within the contemplation and intent of the Act. *Ewing v. Coal, etc., R. Co.*, (1918) 82 W. Va. 427, 96 S. E. 73.

Vol. VIII, p. 1161, sec. 2. [First ed., vol. VI, p. 753.]

## VII. AUTOMATIC COUPLING AND UNCOUPLING APPARATUS (p. 1164)

In general.—The framers of the Act only intended to require the railroads to furnish some kind of an appliance that would automatically couple cars and uncouple the same without exposing employees to the risks that were incident to coupling and uncoupling cars before the date of the passage of the Act. *Chesapeake, etc., R. Co. v. Charlton*, (C. C. A. 4th Cir. 1917) 247 Fed. 34, 159 C. C. A. 252.

Coupler not opening automatically.—A coupling device which couples by impact when the knuckles are open and whose knuckles may be opened by a lever on the side of the car sufficiently complies with the Act. *Chesapeake, etc., R. Co. v. Charlton*, (C. C. A. 4th Cir. 1917) 247 Fed. 34, 159 C. C. A. 252, wherein it was said: "The railroads, we think, have fully met this requirement by equipping their cars with an appliance that couples automatically by impact, and so arranged that if the knuckles should, for any reason, become closed that the same could be opened by using the lever at the side of the car, and thereby accomplished the obvious purpose of the statute, viz. to have the railroads so construct their couplers that it would be possible to couple and uncouple cars without going between them."

Vol. VIII, p. 1174, sec. 4. [First ed., vol. VI, p. 755.]

## II. Handholds in ends.

## IV. Equivalents.

## II. "HANDHOLDS IN ENDS"

This section contemplates the necessity of having a grabiron or handhold upon each side of the car near each end of the car and is not complied with by maintenance of a grabiron or handhold on each side of the car near one end. *Ewing v. Coal, etc., R. Co.*, (1918) 82 W. Va. 427, 96 S. E. 73.

Number of grabirons.—"At each end of the car there was a pin lever operating the automatic coupler. This pin lever came out nearly to the corner. At each side, near to these corners, was a grabiron and a sill, so situated that a man could use them while operating the pin lever. There were also grabirons on each end of the car opposite to where the pin levers were. It appears to us that the language of the section was complied with." *Boehmer v. Pennsylvania R. Co.*, (C. C. A. 2d Cir. 1918) 252 Fed. 553, 165 C. C. A. 3. In that case the court said further: "It is clear that the number of grabirons was not specified and it is only by the Act of April 14, 1910 (36 Stat. 298, c. 160) as amended by that of March 4, 1911 (Act March 4, 1911, c. 285, 36 Stat. 1397), that the number of grabirons could be prescribed by the Interstate Commerce Commission. Since that time the Interstate Commerce Commission has provided that there shall be grabirons on both ends of each side of the car, with sills under them, and ladders on each side of each end of the car. This, however, is a new provision, and not in effect on November 8, 1915."

## IV. EQUIVALENTS (p. 1175)

Side ladder is within Act.—The grabiron Act applies to every rung of the side ladder on a freight car. *Kansas City, etc., R. Co. v. Swift*, (Tex. 1918) 204 S. W. 135.

Vol. VIII, p. 1182, sec. 8. [First ed., vol. VI, p. 756.]

Contributory negligence is not a defense to an action based on an injury resulting from a defective grabiron nor does it mitigate the damages. *Callicotte v. Chicago, etc., R. Co.*, (1918) 274 Mo. 689, 204 S. W. 529.

Vol. VIII, p. 1183, sec. 1. [First ed., vol. X, p. 375.]

## IV. "TRAINS" (p. 1185)

Wrecking cars.—Two cars with tools and equipment used exclusively for replacing derailed cars on the track, do not, when attached to an engine, constitute a "train" within the Act. *Baker v. Grace*, (Tex. Civ. App. 1919) 213 S. W. 299.

Vol. VIII, p. 1188, sec. 2. [First ed., vol. X, p. 375.]

Car having power brakes out of repair.—The provision of the Act that all power-braked cars which are associated together "shall have their brakes so used and operated" does not make it unlawful to haul a car on which the power brakes are out of repair, provided the train contains the required percentage of cars having power brakes in condition for use. *U. S. v. Chesapeake, etc., R. Co.*, (C. C. A. 4th Cir. 1917)

247 Fed. 49, 159 C. C. A 267, wherein the court said: "Was it the intention of Congress that where a car had once been equipped with a workable air brake, but which became defective, should never be used again in a train made up of cars properly equipped with the required percentage of air brakes? It is conceded by counsel for the government that the cars equipped with old-fashioned hand brakes may be used as the 15 per cent allowed by the requirements of the Interstate Commerce Commission. Inasmuch as 85 per cent. of the train in question was composed of cars equipped with workable air brakes, which is deemed by the Interstate Commerce Commission to be sufficient to insure the safety of employes and passengers, it became immaterial as to whether the remaining cars were equipped with air brakes or the ordinary hand brakes, and we cannot think of any possible reason why there should be any distinction made between the cars equipped with ordinary hand brakes and those with air brakes that had been cut out. It would be unreasonable, we think, for the government to make any such demand, and we do not believe that a fair interpretation of the statute warrants a ruling to that effect. The statute which requires a railroad to equip its cars with proper air brakes was enacted for the sole purpose of having a sufficient number of cars thus equipped in every train so as to insure safety, and we think this, and this only, is the extent to which Congress intended that the law should be applied."

**Vol. VIII, p. 1190, sec. 2.** [First ed., 1912 Supp., p. 336.]

**Secure ladder.**—To the same effect as the original annotation, see *Sullivan v. Minneapolis, etc., R. Co.*, (1918) 167 Wis. 518, 167 N. W. 301.

**Efficient hand brakes.**—This provision does not permit the carrier to require the use of hand brakes instead of power brakes at its convenience. *Grand Rapids, etc., R. Co. v. U. S.*, (C. C. A. 6th Cir. 1918) 249 Fed. 650.

**Employees protected.**—Though the immediate occasion for passing the laws requiring grabirons was undoubtedly "for greater security to men in coupling and uncoupling cars," yet these laws are not confined to the protection of employees only when so engaged. Carriers are liable to employees in damages whenever the failure to obey the safety appliance Acts is the proximate cause of injury to them when engaged in the discharge of duty. *Ewing v. Coal, etc., R. Co.*, (1918) 82 W. Va. 427, 96 S. E. 73.

**Vol. VIII, p. 1191, sec. 3.** [First ed., 1912 Supp., p. 1191.]

**Effect of extension order.**—The suspension clause of the order of the Interstate Commerce Commission entered on March 13, 1911,

pursuant to authority conferred upon the commission by section 3 of the Act of 1910, did not operate to extend the time for equipping each car with four grabirons on the sides, because the order expressly provides that the extension of time shall not be construed to relieve carriers from complying with the requirements of section 4 of the Act of March 2, 1893. *Ewing v. Coal, etc., R. Co.*, (1918) 82 W. Va. 427, 96 S. E. 73.

**Vol. VIII, p. 1192, sec. 4.** [First ed., 1912 Supp., p. 336.]

I. Introductory.

VI. "Nearest available point."

VII. "If such movement is necessary."

VIII. "Remedial action."

X. In association with cars "commercially used."

**I. INTRODUCTORY** (p. 1192)

**Scope of proviso.**—The proviso contained in the amendment of 1910 and ingrafted on the preceding enactment, while intended to relax the rigid rule of the original Act which made no provision for movements for repair, takes no case out of such enactment which does not fall fairly within the proviso's terms; and the defendant, in its reliance on the exception so carved out, was required to bring itself within both its language and reason. *Chesapeake, etc., R. Co. v. U. S.*, (C. C. A. 6th Cir. 1918) 249 Fed. 805, 162 C. C. A. 39.

**VI. "NEAREST AVAILABLE POINT"** (p. 1196)

"To relax somewhat the rigid rule prescribed by the original act, which did not exempt the necessary movement to a point where repairs could be made, the amendment of April 14, 1910, was enacted. Although the amendment measurably grants relief to and enlarges the right of interstate railroads, it nevertheless is limited by its express terms and manifest intent, and its further extension is unwarranted. It only permits the hauling, without penalty, of a car which becomes defective while the car is in use by the carrier on its line of railroad, to the nearest available point where such car can be repaired (if such movement is necessary to make repairs) after the defect has been discovered. Any other hauling of such a car, and consequently a hauling of it before its bad order condition is discovered, although the carrier be without fault in not making the discovery, is a violation of the statute." *Chesapeake, etc., R. Co. v. U. S.*, (C. C. A. 6th Cir. 1918) 249 Fed. 805, 162 C. C. A. 39.

In *Denver, etc., R. Co. v. U. S.*, (C. C. A. 8th Cir. 1918) 249 Fed. 822, 162 C. C. A. 56, it appeared that main line and foreign cars were carried past several intermediate repair points to the terminal at Salt Lake City. The only explanation given was that the company was accustomed to repair main line



and foreign cars only at the terminals at Denver and Salt Lake City, points separated by a distance of 745 miles, and to repair only branch line cars at intermediate points. The court said: "The explanation is insufficient to meet the requirements of the law. The great distance between the terminals made intermediate points of repair necessary. The statement of facts shows that a supply of men and materials was kept at the intermediate points adequate to make heavy repairs such as the cars here required. When defective cars are hauled past such a point, 'the nearest available point of repair' clause of the proviso demands something more than the habits or convenience of the carrier to justify the act. It must be shown by affirmative proof that the facilities at the intermediate point are not 'available' and that the movement is 'necessary.' In the absence of such proof the act is 'unlawful' under section 5. We do not lay down any absolute rule which would forbid hauling a defective car past an intermediate repair point. It might be that the congestion of defective cars at that point, or the seriousness of the defect in the car hauled, would be such as to justify the movement. All we say is that, when a car is hauled past the nearest repair point at which a supply of men and materials is kept, adequate for making the repair required, this justifies the holding that the law is violated, unless there is a showing of special reasons for the movement."

#### VII. "IF SUCH MOVEMENT IS NECESSARY" (p. 1197)

"The movement of a defective car is restricted by this proviso—

"1. To what is 'necessary' for its repair. If it can be repaired where the defect is discovered, it cannot be moved at all in its defective condition. If the defect is such that it must be moved to repair it, the movement is restricted to what is necessary for the repair.

"2. To hauling it from the point where the defect is first discovered to the nearest available point of repair. This and the first restriction, taken together, forbid every hauling or handling of the car for any other purpose than repair. It may not be handled for the purpose of delivering its load to the consignee, even when unloading is necessary for its repair, unless it be affirmatively shown that such delivery involves no more movement or handling of the car than unloading it or transferring its load. That affirmative showing cannot be made by the vague presumption that every one does his duty. It calls for positive proof. The defendant made no such showing. It insists that as the cars had to be unloaded before they could be repaired, every movement for unloading them is justified by the ultimate purpose to repair. That is the capital vice of the defense. The cars were loaded with coal. The coal could have been placed in bins or transferred to other cars. We cannot say without proof that this

operation, even when the delivery was on the main line, would involve as much handling of the car as its delivery to the consignee; and it is entirely plain that such would not be the case when the delivery was on a branch line, for that would involve a double switching and a complete diversion of the car from the nearest available point of repair." *Denver, etc., R. Co. v. U. S.*, (C. C. A. 8th Cir. 1918) 249 Fed. 822, 162 C. C. A. 56.

#### VIII. "REMEDIAL ACTION" (p. 1197)

To same effect as original annotation, see *U. S. v. Chicago, etc., R. Co.*, (C. C. A. 7th Cir. 1918) 250 Fed. 101, 162 C. C. A. 273.

#### X. IN ASSOCIATION WITH CARS "COMMERCIALY USED" (p. 1198)

Under the provision of this section that chained cars may not be moved, even for repair, in revenue trains, or in association with cars commercially used, unless they contain live stock or perishable freight, a train is a "revenue train" when it is moved for the purpose of transporting traffic for revenue. Cars are "commercially used" either when they are moving traffic, or when, though empty, they are moving to points for the purpose of receiving traffic. *Denver, etc., R. Co. v. U. S.*, (C. C. A. 8th Cir. 1918) 249 Fed. 822, 162 C. C. A. 56. In that case it was held to be a violation of the Act to operate "hospital trains" described as follows: "They were composed entirely of cars so defective as to make them unfit to be handled in ordinary freight trains until they were repaired. These trains were moved only in the daytime, and were in charge of special crews under special officers to see that they were carefully handled. They had on board a force of repair men for the purpose of making any temporary repairs that should become necessary for their movement in their defective condition. They picked up cars and set out cars at numerous stations along the line. The stations at which cars were set out were of two classes: First, the station for which the cargo was destined; second, when the cargo was destined for a station on a branch line the cars were set out at the terminus of that branch to be later hauled to the station for which they were destined. When the train involved in case 4861 started from Helper, it consisted of a caboose, 10 empties, and 1 loaded car. In the course of its journey it picked up at way stations 93 cars, set out 35 cars, and arrived at Salt Lake City with 58 cars. With the exception of 31 empties, all the cars handled in the train were loaded and proceeding in the direction of their final destination."

#### Vol. VIII, p. 1198, sec. 5. [First ed., 1912 Supp., p. 337.]

**Use of hand brakes.**—Since this section preserves the requirements of the original Act except as they are clearly abrogated, the pro-

vision of section 2 of this Act requiring hand brakes does not permit a railroad company to order their use instead of power brakes on occasions when such use is merely convenient, as to avoid the necessity of setting the valve retainers on the power brakes in descending a long grade. *Grand Rapids, etc., R. Co. v. U. S.*, (C. C. A. 6th Cir. 1918) 249 Fed. 650, 161 C. C. A. 560.

**Vol. VIII, p. 1201, sec. 2.** [First ed., 1912 Supp., p. 339.]

**Violation as negligence.**—The operation of a locomotive equipped with a boiler which is in a defective condition is negligence, for which the carrier is liable to an injured employee. *Lancaster v. Carroll*, (Tex. 1919) 211 S. W. 797.

Failure to condemn is not conclusive and the question in an action for personal injuries is whether due and reasonable care has been exercised by the railroad company. *Lancaster v. Allen*, (Tex. 1919) 207 S. W. 984, wherein it was said: "When Congress enacted the law which authorized the Interstate Commerce Commission to provide rules and tests, it is not to be assumed that it was intended to lower the standard of caution which has so long prevailed and which is so universally recognized by the courts of this country. The more reasonable inference is that the law was designed to enhance the safety of railway transportation by requiring greater precautions against the retention of defective machinery. The effect of the statute and the appropriate regulations which it authorized was to make the failure to comply with its standards negligence as a matter of law; whereas before this adoption such failure presented an issue of fact to be determined by the jury according to the common-law standard. That, however, did not otherwise alter the legal duty of the railway company to still exercise ordinary care to keep its machinery in a reasonably safe condition."

**Vol. VIII, p. 1208, sec. 1.** [First ed., 1909 Supp., p. 584.]

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- (1) In general.
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## I. INTRODUCTORY

### 1. Constitutionality

#### a. First Employers' Liability Act (p. 1210)

As applied to Alaska and the territories the Act is valid and was not repealed by the Act of 1908. *Walsh v. Alaska Steamship Co.*, (1918) 101 Wash. 295, 172 Pac. 269, holding also that the Act applies to a common carrier by water engaged in commerce between the states and Alaska.

### 2. Construction and operation

#### d. Construction Controlled by Federal Decisions (p. 1214)

The opinion of the Supreme Court of the United States.—To the same effect as the original annotation see *Southern Pac. Co. v. Industrial Acc. Commission*, (Cal. 1918) 171 Pac. 1071; *Kusturin v. Chicago, etc., R. Co.*, (1919) 287 Ill. 306, 122 N. E. 512; *Nelson v. Ironwood, etc., R., etc., Co.*, (Mich. 1918) 170 N. W. 45; *Matti v. Chicago, etc., R. Co.*, (1918) 55 Mont. 280, 176 Pac. 154; *Polluck v. Minneapolis, etc., R. Co.*, (S. D. 1918) 166 N. W. 641.

"If there is a decision from a federal court which is decisive of the question here, and especially if the federal decision is one that is more recent than the one cited from the state court, it is our duty to follow the federal court rather than the state court, since the question involved is one upon which the federal courts have the ultimate right to speak." *Kuchenmeister v. Los Angeles, etc., R. Co.*, (Utah 1918) 172 Pac. 725.

### 3. "Common Carrier by Railroad"

#### b. Electric Railway (p. 1215)

Street railways engaged in interstate commerce are within the provisions of this section. *Nelson v. Ironwood, etc., R., etc., Co.*, (Mich. 1918) 170 N. W. 45, wherein the court said: "If any distinction whatever can be drawn between street railways and other railroads in any respect that can fairly be claimed to have a possible bearing on the question of the legislative intent of Congress as to the inclusion or exclusion of the former class of carriers, the difference, we are convinced, will be found to be merely one of degree and not of kind. No substantial reason suggests itself to us why the safe and unimpeded transportation of passengers from one state into another on a local street railway line operating solely over city streets, and the safety of employees of such a railway, should not have been objects of solicitude on the part of Congress as well as the like beneficial results in connection with other forms of interstate railroad transporta-

tion. Nothing in the terms and provisions of the Act indicates a design to exclude street railways. Every provision of the Act is as applicable to a purely street railway carrier whose lines extend from one state into another as to an interstate suburban electric railroad of an interstate steam railroad."

#### f. Express Company (p. 1217)

An express company is "a common carrier by railroad" within the meaning of this Act. *Taylor v. Wells*, (C. C. A. 5th Cir. 1918) 249 Fed. 109, 161 C. C. A. 161.

### 4. Paramount to State Laws

#### a. In General (p. 1217)

State laws superseded.—To the same effect as the original annotation see *Baltimore, etc., R. Co. v. Branson*, (1917) 131 Md. 686, 104 Atl. 356; *Chicago, etc., R. Co. v. Hessenflow*, (Okla. 1918) 170 Pac. 1161.

A state constitutional provision changing the common law rule as to assumption of risk and contributory negligence is inapplicable to an action under the Federal Employers' Liability Act. *Missouri, etc., R. Co. v. Lenahan*, (Okla. 1918) 171 Pac. 455.

Uniform substantive law is insured, in whatever court or state an action under the Act may be brought. *Reed v. Illinois Cent. R. Co.*, (1918) 182 Ky. 455, 206 S. W. 794.

Waiver.—Where upon trial the parties agree that if the deceased was an employee at the time of the accident the action was governed by the federal Act there is a waiver of any later objection that the case is governed by the state law. *Ewig v. Chicago, etc., R. Co.*, (1918) 167 Wis. 597, 167 N. W. 442, 169 N. W. 429.

#### d. State Workmen's Compensation Acts (p. 1220)

Acts superseded.—State compensation acts are superseded as to persons within the scope of the liability act. *Erie R. Co. v. Linnekogel*, (C. C. A. 2d Cir. 1917) 248 Fed. 389, 160 C. C. A. 399.

"There never has been any doubt among the courts that, when Congress acts upon a subject, all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority. But there has been some controversy as to whether the federal Employers' Liability Act does cover injuries occurring without negligence. It has been the contention of some able counsel and is the holding of some of the state courts that the federal Employers' Liability Act covers or regulates the liability or obligation of carriers, and the right of the employee only for injury resulting in whole or in part from negligence, and does not cover injuries occurring without negligence. Following this line of reasoning, some of the courts have held that the state Workmen's Compensation Act could be invoked and relied upon, and brief given, in cases where the

liability is not predicated on negligence, and the thought in the reasoning is that the federal Employers' Liability Act covers liability arising from the negligence of the carrier only. The Supreme Court of New Jersey, in *Winfield v. Erie R. Co.*, (1916) 88 N. J. L. 619, 96 Atl. 394, held that, where the federal Act affords no remedy, that is, where the injury occurs under such circumstances that no liability is imposed upon the carrier by the Act, the injured employee may invoke the remedy given by the state statute, so it was said that, in order to defeat the right to invoke the State Workmen's Compensation Act, it must affirmatively appear that a right of action is given to the widow or personal representatives of the employee by the federal statute; in other words, that it must appear that the injury resulted in whole or in part from negligence chargeable to the defendant company, in order to bring it within the federal Employers' Liability Act. On this basis of reasoning that court held that the liability sought to be enforced was not a liability arising out of negligence, and therefore not covered by the federal Employers' Liability Act, but rested on a contractual obligation created by the state statute, consented to by both the employer and the employee, and said, in substance, that the injured party is entitled to invoke the state statute in the absence of any averment by her, or any proof offered, or any admission made by the defendant company, showing that the death of her decedent resulted from the defendant's negligence; that negligence is essential to create a liability against it under the federal statute. The New York court held to substantially the same doctrine in *Winfield v. New York Cent. R. Co.*, (1915) 216 N. Y. 284, 110 N. E. 614, Ann. Cas. 1916A 817. The California and Illinois Supreme Courts, however, held to a different doctrine. *Smith v. Industrial Acc. Commission*, (1915) 26 Cal. App. 560, 147 Pac. 600; *Staley v. Illinois Cent. R. Co.*, (1915) 268 Ill. 356, 109 N. E. 342, L. R. A. 1916A 450. In the last case it was said: 'The federal Employers' Liability Act has taken possession of—has occupied—that field for the purpose of calling into play therein this exclusive power of the federal government. Necessarily all common or statute law of this state on that subject has been superseded. The field of liability as to employees injured while engaged in interstate commerce on railroads is occupied exclusively by the federal Employers' Liability Act, and that, too, regardless of the negligence or lack of negligence of either party to the litigation.' Whatever controversy may have existed has now been set at rest by the decision of the Supreme Court of the United States, and the doctrine announced by the courts of California and Illinois has been approved. *Winfield v. New York Cent. R. Co.*, heretofore cited, came to the Supreme Court of the United States, and is reported in (1917) 244

U. S. 147, 37 S. Ct. 546, 61 U. S. L. ed. 1045, L. R. A. 1918C 439, Ann. Cas. 1917D 1139, and it was held that the doctrine announced by the Supreme Court of New York and New Jersey was wrong." *Des Moines Union R. Co. v. Funk*, (La. 1919) 170 N. W. 529.

By the federal legislation employees of an interstate railroad company are not within the purview of a state Workmen's Compensation Act, and the fact that such an Act permitted an interstate railroad company to become bound by its provisions would not entitle employees of such a company, injured while engaged in interstate commerce, to rely on such Act, merely because the company had consented to become bound, as the federal Employers' Act is exclusive of all state laws within the same field. *Carey v. Grand Trunk Western R. Co.*, (Mich. 1918) 166 N. W. 492, wherein the court said: "In our opinion the question before us is settled by *New York Cent. R. Co. v. Winfield*, (1917) 244 U. S. 147, 37 S. Ct. 546, 61 U. S. (L. ed.) 1045, Ann. Cas. 1917D 1139, unless a distinction can be made between the New York Workmen's Compensation Act (Consol. Laws, ch. 67) and ours. In that case the United States Supreme Court held that the entire subject of the liability of interstate railway carriers, for the death or injury of their employees, while employed by them in interstate commerce, is so completely covered by the provisions of the federal Employers' Liability Act of April 22, 1908, as to prevent any award under the New York Workmen's Compensation Act, where an employee was injured or killed without fault on the railway's part, while he was engaged in interstate commerce, although the federal Act gives the right of recovery only when the injury results in whole or in part from negligence attributable to the carrier. In other words, it was there held that by the federal Act, Congress manifested its will to cover the whole field of compensation or relief for injuries suffered by railroad employees engaged in interstate commerce, or at least the whole field of obligation of carriers relating thereto; and that it thereby withdrew the subject wholly from the domain of state action. The doctrine announced is that by the federal legislation employees of an interstate railroad company are not within the purview of a state Workmen's Compensation Act. This doctrine is reiterated in the *Erie Railroad Co. Case*, (1917) 244 U. S. 170, 37 S. Ct. 556, 61 U. S. (L. ed.) 1057. There the New Jersey statute was under consideration. The question presented included whether, by reason of the state statute, the carrier became bound contractually to make compensation, even though it came within the federal Act. Speaking of that statute the court said:

"Unless . . . a notice from one party to the other contain 'an express agreement in writing,' to the contrary, it 'shall be presumed' that the parties 'have agreed to be

bound" by this part of the statute. There was no express agreement in this instance and there is no basis for regarding the carrier as in any way bound by this part of the statute save as it provides that an agreement to be bound by it shall be presumed in the absence of a declaration to the contrary. But such a presumption cannot be indulged here, and this for the reason that by the federal Act the entire subject, as respects carriers by railroad and their employees in interstate commerce, was taken without the reach of state laws. It is beyond the power of any state to interfere with the operation of that Act, either by putting the carriers and their employees to an election between its provisions and those of a state statute, or by imputing such an election to them by means of a statutory presumption.

"But it is said that the Workmen's Compensation Act of New York, being compulsory upon the employer, renders the Winfield cases inapplicable here. We are unable to agree with this contention."

**Cases outside federal Act.**—Jurisdiction under state Compensation Acts is excluded only as to cases which fall within the scope of the federal Act. *San Francisco-Oakland Terminal Rys. v. Industrial Acc. Commission*, (Cal. 1919) 179 Pac. 386.

**Burden of proof.**—In a proceeding under the Workmen's Compensation Act of New Jersey brought by the widow of a railroad employee killed in a yard of the Erie railroad it was held that the burden was on the petitioner to show that the case was under that Act rather than under the federal Employers' Liability Act. *Lincks v. Erie Co.*, (1918) 91 N. J. 166, 103 Atl. 176.

#### e. State Employers' Liability or Death Statutes (p. 1222)

**Do not enlarge liability.**—A state statute does not enlarge the liability created by the federal Act. *Rask v. Atchison, etc., R. Co.*, (1918) 103 Kan. 440, 173 Pac. 1066.

**Presumption of negligence.**—There is no presumption of negligence under a state statute in an action under the federal Act. *Egler v. Southern R. Co.*, (Ga. App. 1918) 97 S. E. 93; *Louisville, etc., R. Co. v. Hixon*, (1918) 23 Ga. App. 105, 97 S. E. 554; *Yazoo, etc., R. Co. v. McCaskell*, (1918) 118 Miss. 629, 79 So. 817.

**State statutes abrogating assumption of risk** do not apply to an action under the federal Act. *Schaff v. Hendrich*, (Tex. 1918) 207 S. W. 543.

#### f. State Laws Relating to Procedure (p. 1222)

The method of procedure provided by Congress must control. *Swank v. Pennsylvania R. Co.*, (N. J. 1918) 104 Atl. 26.

A state death act providing that every action instituted under and by virtue of its provisions "shall be brought in the name of an administrator ad prosequendum" has no application to an action instituted under

the federal Employers' Liability Act. *Swank v. Pennsylvania R. Co.*, (N. J. 1918) 104 Atl. 26.

### II. EMPLOYER ENGAGED IN INTERSTATE COMMERCE

#### 2. Railroad Wholly in One State

##### b. Lessor to Interstate Railroad (p. 1226)

To the same effect as the original annotation see *Southern R. Co. v. Lloyd*, (1916) 239 U. S. 496, 36 S. Ct. 210, 60 U. S. (L. ed.) 402, *affirming* (1914), 166 N. C. 24, 81 S. E. 1003, and see a valuable discussion of the subject in *Hull v. Philadelphia, etc., R. Co.*, (1918) 132 Md. 540, 104 Atl. 274.

##### c. Electric Street Railroad (p. 1226)

**Plaintiff employed wholly within one state on interstate car.**—If a car on which the plaintiff is employed runs from one state into another he is engaged in interstate commerce although the crew to which he belongs takes the car within one state only and another crew takes it into the other state. *Nelson v. Ironwood, etc., R., etc., Co.*, (Mich. 1918) 170 N. W. 45.

#### 4. Hauling Empty Cars (p. 1227)

**The hauling of empty freight cars from one state to another.**—To same effect as original annotation, see *Hester v. East Tennessee, etc., R. Co.*, (C. C. A. 4th Cir. 1918) 254 Fed. 787, 166 C. C. A. 233.

#### 5. Intrastate Train with Interstate Cars (p. 1227)

**The presence of interstate cars in the train.**—To same effect as original annotation, see *Hester v. East Tennessee, etc., R. Co.*, (C. C. A. 4th Cir. 1918) 254 Fed. 787, 166 C. C. A. 233.

### III. EMPLOYEE ENGAGED IN INTERSTATE COMMERCE

#### 1. Relation of Employer and Employee

##### a. In General (p. 1227)

**A flagman employed jointly by two companies, one engaged in interstate commerce and the other not so engaged, is not within the Act so far as his services to the intrastate road are concerned.** *San Francisco-Oakland Terminal Rys. v. Industrial Acc. Commission*, (Cal. 1919) 179 Pac. 386.

##### b. Employee Going to or Returning from Work (p. 1228)

**Employee going to place of work on Sunday to get tools.**—The decedent was employed as a locomotive fireman. He came in from his run Saturday evening. He was to go out against at 3:45 a. m. on Monday. On Sunday he went to the railroad yard to get his tools from a "pony engine," and put them on a "pick-up" engine on which he might go out Monday morning, and also to get overalls to take home to be washed. While going through the railroad yards, he

was struck by a locomotive and killed. It was held that he was not at the time engaged in interstate commerce. *Hansen v. New York Cent., etc., R. Co.*, (1918) 91 N. J. L. 197, 103 Atl. 200, wherein the court said: "The decedent was doing nothing at the time of the injury but going for tools and overalls, which he was under the expectation he might need the next day upon another interstate journey. But this was nothing more than a mere expectation; he might have been ordered to other work; his act in getting the tools and overalls could not be directly and immediately connected with his previous work, since he did not expect to find the tools and overalls on the 'pick-up' locomotive he had been on the day before, but on what is called the 'pony' engine, on which he had worked at some previous time. Nor was his act in going for the tools and overalls directly and immediately connected with the work on which he expected to be employed the following day, since that work was subject to change, and even if he ran on the same train he did not know what locomotive he would have, since that would only be determined the following morning. In fact the engine which took out the 'pick-up' train had not come in at the time of his death. He therefore could not put the tools and overalls where they would be needed when the new run began."

*f. Employee of Lessee Railroad (p. 1234)*

To the same effect as the original annotation see *Hull v. Philadelphia, etc., R. Co.*, (1918) 132 Md. 540, 104 Atl. 274, involving an agreement by which two railroad companies made use of each other's tracks. *Hull*, a brakeman employed by the Western Maryland Railway Company, one of the parties to the agreement, was killed while on a train running over the tracks of the Philadelphia, etc., R. Co., the other party to the agreement. Suit was brought against the latter company for *Hull's* death but it was held that the defendant was not liable because *Hull* was not at the time of his death its "employee," although subject to the rules and regulations of the defendant. The court said: "In the case of *Robinson v. Baltimore, etc., R. Co.*, (1915) 237 U. S. 84, 35 S. Ct. 491, 59 U. S. (L. ed.) 849, *Robinson* was a porter on a Pullman car, was required to obey the rules and regulations of the railroad company, and collected tickets and fares from passengers coming on the train after 3 o'clock a. m. He was injured by the alleged negligence of the railroad company and sued under the federal Employers' Liability Act. It was held that he was not an employee within the meaning of that act. Justice Hughes said: 'We are of the opinion that Congress used the words "employee" and "employed" in the statute in their natural sense, and intended to describe the conventional relation of employer and employee. It was well known that there were on interstate trains persons engaged in

various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the act.' So it may be said that Congress may have been presumed to know that such arrangements as existed between these two companies were often made, and if it had intended to make the employees of the 'owning company,' as the agreement calls it, coemployees of the other company, it would have used language 'to indicate a purpose to include' them. The fact that the crews of the other company were subject to the rules and regulations of the owning company cannot be material in determining the question. That is, of course, necessary for the safety of all persons traveling on the line of the owning company, as well as all working on it. The business could not be successfully conducted on a road over which many trains ran, if the 'employees of each company,' to use the language of paragraph 21, while upon the tracks of the other, were not subject to and required to conform 'to the rules, regulations, discipline and orders of the owning company.' But that would certainly not have the effect of making them employees of the owning company, any more than it would the porter on a Pullman car, or an express agent, or mail agent traveling on the train. In *Oliver v. Northern Pac. R. Co.*, (E. D. Wash. 1912) 196 Fed. 432, it was held by the United States District Court that a porter on a Pullman car could recover under the federal act under the circumstances of that case, but the decision was based on the ground that he was employed by an association composed of the railroad company and the Pullman company, which were joint owners of fifty cars. In *Missouri, etc., R. Co. v. Black*, (1912) 105 Tex. 296, 147 S. W. 559, an agent of an express company who handled baggage, but there was no proof of employment by the railroad company, was held to be a passenger and not an employee within the meaning of the act. See also *Missouri, etc., R. Co. v. West*, (1913) 38 Okla. 581, 134 Pac. 655, to the same effect. It is the duty of the owning company to use all reasonable efforts to protect the employees of what we might call the 'visiting company,' and, even if there was no agreement on the subject, the owning company could enforce such rules and regulations as are necessary for the protection of its own employees and property, as well as those of the other company."

*g. Independent Contractor (p. 1234)*

The case of *Chicago, etc., R. Co. v. Bond*, (1916) 240 U. S. 449, 36 S. Ct. 403, 60 U. S. (L. ed.) 735, set out fully in the original annotation, is followed in *Polluck v. Minneapolis, etc., R. Co.*, (S. D. 1918) 166 N. W. 641, wherein the court said: "We think this case falls within the reasoning laid down in the similar case of *Chicago*,

etc., *Ry. Co. v. Bond*, (1916) 240 U. S. 449, 36 S. Ct. 403, 60 U. S. (L. ed.) 735, arising under the same act of Congress, wherein the court held that the injured person was not an employee but an independent contractor. . . . The distinguishing features of that case were that there the contract was in writing and the contractor absolved the railway company from liability for injury to himself and his employees, but those distinguishing features are to our minds unimportant."

**Employee of stevedoring corporation.**—Where an interstate railroad company contracts with an independent stevedoring corporation, whereby the latter, at a stipulated charge per ton, undertakes to load and unload freight of the railroad at its water front terminal, into and out of cars and vessels, and the stevedoring corporation selects and removes its own servants, defines their duties, fixes and pays their wages, and directs and supervises the performance of their tasks, subject only to the exigencies of railroad transportation, and to such inspection and control by the railroad as is essential to enable it to perform its functions as a common carrier, a workman of the stevedoring corporation, thus selected, paid and directed, and engaged in the work thus contracted for, is not an employee of the railroad. *Drago v. Cent. R. Co.*, (N. J. 1919) 106 Atl. 803.

## 2. Employed in Interstate Commerce

### a. General Rule and Tests (p. 1236)

It is essential to a case under the statutes. —To the same effect as the original annotation see *Northern Trust Co. v. Grand Trunk Western R. Co.*, (1918) 282 Ill. 565, 118 N. E. 986; *Kuchenmeister v. Los Angeles, etc., R. Co.*, (Utah 1918) 172 Pac. 725.

It is the carrier engaged in interstate commerce that this act (Federal Employers' Liability Act) seeks to regulate in relation to its duties to its employees, and the power of Congress extends to, and the act was intended to cover, all the employees whose employment relates to such commerce; and if such common carrier is also at the same time engaged in intrastate commerce, using the same means and agencies for both, the power of Congress extends to, and the act was intended to cover, all the employees whose employment relates to such means and agencies. *Eskelsen v. Union Pac. R. Co.*, (1918) 102 Neb. 423, 167 N. W. 408, 168 N. W. 366.

The employee must prove that he was employed in interstate commerce at the time he was injured. *Matti v. Chicago, etc., R. Co.*, (1918) 55 Mont. 280, 176 Pac. 154.

The true test as to whether one is engaged in interstate commerce.—To same effect as first paragraph of original annotation, see *Chicago, etc., R. Co. v. Allen*, (C. C. A. 7th Cir. 1918) 249 Fed. 280, 161 C. C. A. 288; *Benson v. Bush*, (1919) 104 Kan. 198,

178 Pac. 747; *St. Louis, etc., R. Co. v. True*, (Okla. 1918) 176 Pac. 759.

Would the performance of the act in which the employee was engaged directly and immediately tend to facilitate the movement of interstate commerce, or, conversely, would the failure to perform the act directly and immediately interfere with or hinder the movement of such commerce? In applying this test, the three essential factors to be considered are time, place and intent. That is to say, Was the act which the employee was performing in point of time, place and intent so directly connected with interstate commerce as to constitute an integral part of interstate transportation? If it was, the employee is entitled to the protection of the Act. If not, he is not. *Morrison v. Chicago, etc., R. Co.*, (1918) 103 Wash. 650, 175 Pac. 325.

### b. Employees Operating Train (p. 1244)

**Employees within the statute—Brakeman.**—Where the undisputed evidence shows that at the time of the alleged injury, the defendant company was engaged in interstate commerce, and that the plaintiff, who was brakeman on one of the defendant's freight trains, was injured on a freight car loaded with cotton which was being shipped to a point in another state, but to be taken to a point within this state for the purpose of compressing in transit, it was held that both plaintiff and defendant were at the time of the injury engaged in interstate commerce. *Chicago, etc., R. Co. v. Hessenflow*, (Okla. 1918) 170 Pac. 1161.

**Engineer.**—An engineer employed on an extra engine to help interstate trains up a heavy grade is engaged in interstate commerce even though on the return trip. *Callahan v. Boston, etc., R. Co.*, (N. H. 1919) 106 Atl. 37.

**Fireman.**—A fireman on an interstate train is within the statute though at the time of the injury assisting in repairing the waterspout of a tank where the engine had stopped to take water. *Texas, etc., R. Co. v. Williams*, (Tex. 1918), 200 S. W. 1149, wherein the court said: "It is conceded that the train with which the appellee was connected was at the time of the injury engaged in interstate commerce; that it was hauling a train of cars from the state of Louisiana into the state of Texas. But it is contended that his employment was that of a fireman; that when he undertook to assist in repairing the water tank he abandoned his authorized employment and voluntarily entered upon another branch of service of the appellant which had no connection with interstate commerce and also was beyond the scope of his employment. . . . It is true that under the evidence the appellee had been engaged by the appellant to perform only the duties of a fireman. But does it follow that under all circumstances a fireman is not expected to do something more than merely supply his engine with water

and fuel? Emergencies might arise when as a member of a train crew he would be expected to perform a service not literally within the terms of a fireman's contract. For instance, a crew whose duty it is to operate a train is not employed to remove obstructions from the track; but a group of trainmen, upon discovering a small obstruction easily removed, would be expected to perform that service as an incident to the continued operation of their train. On the other hand, should the track become obstructed by a considerable slide of earth from an adjacent embankment requiring days to remove, a train crew would not be expected to undertake that service. Between those extremes there must be found many varying conditions in which the question of duty should be determined as an issue of fact. In this instance the evidence shows that it was a part of the fireman's duty to supply the engine with water, and that it was necessary to take water at that particular place in order that the train might proceed on its journey. Had the fireman, upon reaching the water tank, found some slight derangement about the waterspout which it was necessary to repair and which he could easily have adjusted, it would reasonably be regarded as his duty to make the required adjustments. The extent to which he would be expected to go in such instances must depend upon the facts of each particular case. At the time of the injury appellee was assisting in doing something necessary for the further operation of the train, and which required no extended delay. The jury had a right to conclude that he was performing a service incidental to his principal employment."

A fireman on an interstate train who has completed his run and is engaged in placing the locomotive on a storage track is within the act. *Garber v. Missouri Pac. R. Co.*, (Mo. 1919) 210 S. W. 377.

**Electrical engineer instructing motorman.**—Plaintiff, an electrical engineer, employed by defendant to instruct the motormen how to operate motors, in interstate business, was while so employed engaged in interstate commerce. The duties of such employee required him to ride passenger trains and freight trains, and at times to board them while in motion, and his time, pay and service began and ended at a certain point on defendant's railway; he remained such employee within the meaning of said Act so long as he was engaged in the discharge of his duties as such and while attempting to board a freight train to get back to his initial point in order to complete his day's service. *Dumphy v. Norfolk, etc., R. Co.*, (1918) 82 W. Va. 135, 95 S. E. 863.

c. Employees Coupling, Uncoupling or Switching Cars (p. 1248)

**Employees within the statute—Switching.**—A member of a switching crew is engaged in interstate commerce at a time when having handled a train containing interstate

cars it is being moved for the purpose of handling another such train. *Wangerow v. Industrial Board*, (1919) 286 Ill. 441, 121 N. E. 724.

**Switching to siding preliminary to interstate trip.**—An employee switching an empty foreign car to a siding to be returned to its owners outside the state is within the Act. *Fayssoux v. Seaboard Air Line R. Co.*, (1918) 109 S. C. 352, 96 S. E. 150.

**Breaking up train.**—Whether a switchman working at breaking up trains and classifying cars in a yard where interstate and intrastate traffic are handled indiscriminately is within the Act is for the jury. *Robertson v. St. Louis Merchant's Bridge Terminal R. Co.*, (Mo. App. 1919) 213 S. W. 873.

A switchman employed in breaking up a train of cars which have been hauled into the state from another state is engaged in interstate commerce. *Southern Pac. R. Co. v. Stephens*, (Tex. 1918) 201 S. W. 1076.

**Spotting cars for loading.**—A brakeman engaged in "spotting" local cars for loading on a side track is within the Act, the brakeman being employed on an interstate train, and the "spotting" being made necessary by the fact that the local cars were moved out of the way of that train. *Texas, etc., R. Co. v. Lester*, (Tex. 1918) 207 S. W. 555.

**Employees not within the statute—Switching for convenience of consignee.**—Where a car on its arrival at destination is placed on a side track designated by the consignee the interstate transportation ends, and a crew who two days later engage in switching it to another side track on the request of the consignee are not within the Act. *Delaware, etc., R. Co. v. Peck*, (C. C. A. 2d Cir. 1918) 255 Fed. 261, 166 C. C. A. 431.

d. Employees Engaged in Construction or Repairs (p. 1254)

**Employees within the statute—Roadbed and tracks.**—To the same effect as the second paragraph of the original annotation, see *Morata v. Oregon-Washington, etc., Nav. Co.*, (1918) 87 Ore. 219, 170 Pac. 291.

A person employed by a railroad as a section hand and, with other servants, engaged in repairing and maintaining the track and roadway, by removing old and defective steel rails from the track and roadway and replacing the same with other steel rails is employed in interstate commerce. *Kusturin v. Chicago, etc., R. Co.*, (1919) 287 Ill. 306, 122 N. E. 512, wherein the court said: "It is urged by plaintiff in error that the work of removing old rails from the right of way was not an act in the work of repairing the road or roadbed in interstate commerce and that such work was not an act necessarily incident to such repair, and that therefore defendant in error, while so employed, was not engaged in interstate commerce. . . . There is nothing in the record to show that the employment of the defendant in error



was in intrastate commerce, and while under the federal Employers' Liability Act it is incumbent on the employee to show that he was engaged in interstate commerce, regardless of the fact that he may not have been engaged in intrastate commerce, yet such fact is of assistance in determining whether he was, in fact, still engaged in interstate commerce, or had completed such employment and had taken up employment of a different character. In this case the one operation connected with interstate commerce was that of repairing the track, and if the removal of these old rails was a part of such repair work, then the defendant in error was engaged in interstate commerce at the time of his injury. It appears from the evidence that for two weeks they had been taking out these old rails and replacing them with new ones and tamping down the roadbed; that the defendant in error was engaged in tamping the roadbed and loading these rails on the morning of his injury; that after noon his work was confined, up to the time of his injury, to the loading of the old rails. We are of the opinion that the removal of such old rails was a part of the general work of repairing the track. The fact that if those old rails remained on the right of way they would not interfere with the use of the track in interstate commerce is not controlling in determining the question whether the work of removing them was practically a part of the repairing of the road. As we view the matter, the removal of these old rails was an incident to such repairing and necessary to a proper upkeep of the track. To hold that such work was not a part of the work of repairing the track would be analogous to holding that while the building of a scaffold which surrounds a house under construction is a necessary part of the work of construction, the removal of such scaffold when the house is built is not."

A railway employee who was injured in the course of his employment on the work of constructing an earth fill to take the place of a wooden trestle over which interstate trains were passing was then employed in interstate commerce where the fill had reached the stage where it required the work of men and machinery to keep the interstate tracks clear during further construction, and the employee, a part of whose duty it was with a shovel to keep the track between the rails clear of earth and stones which might fall upon it in the progress of the work, was, at the time of the accident, preparing to make the required use of the machinery provided for the double purpose of keeping the rails clear for the interstate commerce passing over them, and of pushing the piled-up dirt to the edge of the embankment, to widen it. *Kinzell v. Chicago, etc., R. Co.*, (1919) 250 U. S. 130, 39 S. Ct. 412, 63 U. S. (L. ed.) —, *reversing* (1918) 31 Idaho 365, 171 Pac. 1136, wherein the court said: "We cannot doubt that the Supreme Court of Idaho fell into error in regarding the fill as new construction so unrelated to

the conduct of interstate commerce over the bridge at the time the accident to the petitioner occurred that the work being done by him should be regarded as not related to or necessary to the safe conduct of that commerce, and the judgment of that court is, therefore, reversed and the case remanded for further proceedings not inconsistent with this opinion."

*Dumping material into fill.*—A section hand employed in dumping waste material over the side of a fill, supporting a track, used in interstate commerce, is within the act if the purpose of the dumping is to strengthen the fill and make it safer. *Ohio Valley Electric R. Co. v. Brumfield*, (1918) 180 Ky. 743, 203 S. W. 541.

*Clearing turntable.*—An employee injured while assisting in raising an engine which had fallen into the pit in which was situated a turntable of the railroad company "used for the purpose of turning its engines and locomotives used by it in interstate traffic" is within the Act. *Deuel v. Chicago, etc., R. Co.*, (S. D. Cal. 1918) 253 Fed. 857.

*Unloading of rails.*—In *Reed v. Dickinson*, (Ia. 1918) 169 N. W. 673, an employee engaged in unloading rails to be used in an interstate railroad was held to be within the terms of the Act. The court said: "It appears that the plaintiff was working on the main line of the Chicago, Rock Island & Pacific Railway Company just east of Council Bluffs; that this line runs from Chicago, Ill., to Omaha, Neb.; and that passenger and freight trains pass over the track between these points. Just prior to the time of the injury, steel rails were being hauled over the main line, on flat cars, for distribution along the line, when distributed, to be placed in the track in substitution for old rails that were being removed. At the time the plaintiff was injured, he was helping remove these rails from the flat car. The rails so unloaded were being used in the repair of the track upon the main line of the company's road. Under all the decisions, both plaintiff and defendant were engaged in interstate commerce."

An employee engaged in loading rails which had been taken up for the purpose of laying new rails on a track used in interstate commerce is engaged in interstate commerce. *Hargrove v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1918) 202 S. W. 188.

It is a question for the jury whether an employee loading rails on a flat car to be transported to another place and there used to repair the track is engaged in interstate commerce. *Frobus v. Illinois Cent. R. Co.*, (1918) 181 Ky. 7, 203 S. W. 862.

*Unloading bridge piling.*—A member of a bridge gang engaged in unloading piling from a car which came from another state, the unloading being done in a railroad yard and the piling to be stored, is not within the statute. *Southern R. Co. v. Maxwell*, (1918) 117 Miss. 62, 77 So. 905, wherein the court said: "Appellee's contentions are:

First, that he was engaged in interstate commerce at the time of his injury. . . . Appellee's first contention is ruled by Chicago, etc., R. Co. v. Harrington, (1916) 241 U. S. 177, 36 S. Ct. 517, 60 U. S. (L. ed.) 941, and Lehigh Valley, etc., R. Co. v. Barlow, (1917) 244 U. S. 183, decided May 21, 1917, 37 S. Ct. 515, 61 U. S. (L. ed.) 1070, from which it appears that the interstate movement of the car here in question had terminated before appellee attempted to unload it, and that, while so doing, he was not employed in interstate commerce."

*Employee procuring ice for cars.*—In Southern Pac. R. Co. v. Pitchford, (C. C. A. 4th Cir. 1918) 253 Fed. 736, 165 C. C. A. 330, it appeared that cars of the defendant, taken from both interstate and intrastate trains, were carried into the defendant's Richmond yard, and there kept until needed. Plaintiff was a regular employee on the yard, known as a car cleaner, his duties being to clear the yard of papers and other refuse, and clean and ice cars, both interstate and intrastate. Every morning a delivery of several thousand pounds of ice was made at the yard. When the ice wagon arrived in response to the call "ice," the plaintiff and other yard employees were required to go to the chute through which the ice came from the wagons to the yard. Their duty was to put a push car on the track, put ice on, push it to an ice box, and place the ice in the box. It was from this box that plaintiff in the course of his employment took the ice and put it on the cars as it was needed. On May 21, 1915, plaintiff had finished cleaning a car, and had started on the work of cleaning up the yard, when he heard the call, "Pitchford, the ice is here." In response to the call, he went to the push car to aid in putting it on the track. While waiting by the belt line track for other employees to arrive, he turned to look at an engine approaching on the main track. At that instant, he was struck by a switch engine running rapidly on the belt line track. Holding that the Act was not applicable the court said: "It is immaterial that the plaintiff's last previous work may have been cleaning an interstate car, or that his next work would certainly have been icing an interstate car from the ice box. Illinois Cent. R. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; Erie R. Co. v. Welsh, 242 U. S. 303, 37 Sup. Ct. 116, 61 L. Ed. 319; Delaware, L. & W. R. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397. He had entered upon the work of receiving ice from the chute and transporting it to an ice box. This work was too remote from interstate commerce to be regarded a part of it. Chicago, B. & Q. R. R. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941."

*Lineman.*—Where a railroad engaged in interstate commerce maintained and operated a telegraph line, a lineman injured

while on his way in a gasoline motor car to assist in straightening some poles along the right of way is within this Act. Brier v. Chicago, etc., R. Co., (1918) 183 Ia. 1212, 168 N. W. 339, wherein the court said: "The record shows that the foreman under whom plaintiff worked was instructed by the company to take this motor car to a point along the defendant's line where the telegraph poles needed straightening and to straighten them. These were poles on which wires were strung and used by the company in directing the operation of the trains. The defendant's road was used in carrying freight and passengers between different states. Plaintiff was taken by the foreman to do the work so directed to be done, and was on his way to the places where these poles were at the time he received his injury. He was not actually engaged in straightening the poles at the time he received his injury, but was on his way, in company with the foreman, to do the work of straightening them. The question arises: Was the employment of the plaintiff connected with interstate commerce so as to bring him within the federal Employers' Liability Act? In Ross v. Sheldon, (1916) 176 Ia. 618, 164 N. W. 499, a question very similar to the one here under consideration was before that court. In that case the action was brought under the state law. The defense then interposed was that decedent was engaged in interstate commerce at the time he received his injuries, and that his rights were governed by the federal act. In that case, as in this, the plaintiff was a lineman and was injured. The railway was operated by electricity. The poles were along the line, and on these poles were cross-arms. Upon the cross-arms were wires. The defendant was engaged in putting additional cross-arms upon the poles. While at work in nailing cross-arms upon the poles, he was killed by contact with a live wire. The claim of the defendant was that the poles and cross-arms and signal wires were a part of the necessary instrumentalities of defendant's interstate commerce, and that the injury to the decedent occurred while he was engaged in the work of repair and maintenance. This court said:

"The federal act in question laid upon the defendant, as a carrier of interstate commerce, not only the duty of mere repair, but the duty to maintain sufficiency in its equipment. The most that can be said in concession to the appellant is that the defendant was engaged in curing an 'insufficiency of equipment,' and that the decedent was engaged in work to that end. We reach the conclusion that the evidence brings the case within the operation of the federal act, . . . and that this action, brought by the plaintiff under the state laws, was properly dismissed for that reason."

"We think that case governs this. The only fact that distinguishes it at all is the

fact that this plaintiff was not at the time of the injury actually engaged in the repair of the instrumentality necessary to interstate traffic. This, however, we think, is not a distinguishing factor."

*The engineer on a wrecking car* engaged in clearing a track after the derailment of a train is within the Act. *Houston Belt, etc., R. Co. v. Christian*, (Mo. 1919) 209 S. W. 816.

*An employee engaged in repairing a car* customarily used and to be then presently used in trains hauling interstate freight is within the Act. *King v. Norfolk, etc., R. Co.*, (N. C. 1918) 97 S. E. 29.

Whether a workman in a repair shop engaged on a car used in both interstate and intrastate commerce is within the Act depends on whether on the completion of the repairs the car was to be "forthwith turned to interstate service." *Cook v. Southern R. Co.*, (1918) 109 S. C. 377, 96 S. E. 148.

*Repairs on cars in actual use.*—A repair man engaged in making "light repairs" on cars while the train stands on a side track, there being on the train cars containing interstate freight, is within the Act. *Southern Pac. Co. v. Industrial Acc. Commission*, (Cal. 1918) 175 Pac. 453.

*An employee repairing a locomotive* which is used exclusively in interstate traffic is within the Act. *Kuchenmeister v. Los Angeles, etc., R. Co.*, (Utah 1918) 172 Pac. 725. See to the same effect *Atlantic Coast Line R. Co. v. Woods*, (C. C. A. 4th Cir. 1918) 252 Fed. 428, 164 C. C. A. 352, wherein the court in distinguishing the case from that of *Minneapolis, etc., R. Co. v. Winters*, (1917) 242 U. S. 353, 37 S. Ct. 353, 61 U. S. (L. ed.) 358, Ann. Cas. 1918B 54, in original annotation, said: "The case at bar, as we have stated, is distinguishable from the cases relied upon by counsel for plaintiff, inasmuch as the engine was taken out of interstate commerce for the express purpose that it might be repaired to enable it to continue as an instrument of interstate commerce. In other words, it is easily distinguished from the *Winters* Case because the character of the work in which the engine in this instance was employed did not depend 'upon remote possibilities or upon accidental later events.' It appears from the evidence that engine 88 was regularly engaged in hauling interstate passenger trains, operating under a rule of the road by which it reached Florence every three days. It further appears that on the day plaintiff was injured this engine was taken out of the Columbia-Wilmington train in order that the U-bolt in question might be repaired. It also appears that the engine was placed in the shop and sent out upon the same day on its regular run, hauling what is known as the Columbia-Wilmington train."

*Employees not within the statute*—A laborer engaged in constructing a dirt fill beneath a wooden trestle, though employed by a railroad company engaged in both inter-

state and intrastate commerce, is not within the statute. *Kenzell v. Chicago, etc., R. Co.*, (1918) 31 Idaho 365, 171 Pac. 1136, wherein the court said: "It is held that one engaged in repairing or keeping in usable condition a roadbed, bridge, engine, car, or other instrument then in use in such transportation is engaged in interstate commerce. . . . So, also, one engaged in an act incidental to his employment in interstate transportation comes within the provisions of the act. . . . But one engaged in an employment upon an article which may ultimately become an element of interstate commerce, but which is too remote to be directly connected therewith, or incidental thereto, is not engaged in interstate commerce within the meaning of the act. . . . It is well settled that new construction of either roadbed or equipment, designed ultimately to be used in interstate commerce, is not, while in the process of building, an instrument of interstate commerce, and one injured while employed about the same is not within the terms of the act. . . . We are of the opinion that constructing a fill to take the place of a trestle which is being used in interstate commerce is new construction, and that the fill does not become part of the railroad until it is completed and the track is placed upon it instead of upon the trestle."

*Taking out materials.*—A section foreman taking out concrete tiling to be used at some future time in repairs is not within the Act. *Morrison v. Chicago, etc., R. Co.*, (1918) 103 Wash. 650, 175 Pac. 325.

*Removing discarded rails.*—A section man engaged in removing discarded rails is not within the Act though he is a member of the same crew with other men engaged in taking up old rails and putting down new ones. *Perez v. Union Pac. R. Co.*, (Utah 1918) 173 Pac. 236.

*Repairing cinder hoist.*—An employee injured while repairing a cinder hoist used in connection with a cinder pit into which the engines of both interstate and intrastate trains emptied cinders is not within the Act. *Southern R. Co. v. O'Dell*, (C. C. A. 4th Cir. 1918) 252 Fed. 540, 164 C. C. A. 456.

*Construction of building.*—A railroad employee wheeling bricks from a car on a side track to a warehouse which is being constructed by the railroad company is not within the Act. *Matti v. Chicago, etc., R. Co.*, (1918) 55 Mont. 280, 176 Pac. 154.

*Repairing locomotive.*—Evidence which shows that a railroad employee was injured while repairing one of the company's locomotives, which had been using in pulling an interstate passenger train, and which had been taken from the line tracks and placed in a roundhouse for repairs, is insufficient to show that the rights of the parties were controlled by the privileges and obligations arising under the federal Employers' Liability Act. *Chicago, etc., R. Co. v. Cronin*, (Okla. 1918) 176 Pac. 919.

e. Employee Supplying Fuel or Water  
(p. 1267)

A coach cleaner filling the water cooler in a car used in interstate commerce and injured because of defects in a hose furnished to him for that purpose is within the Act. *Cassin v. Lusk*, (Mo. 1919) 210 S. W. 902.

f. Employee Guarding or Inspecting Property (p. 1269)

**Employees not within the statute—Janitor.**—In *Heed v. Industrial Commission*, (1919) 287 Ill. 505, 122 N. E. 801, it was held that a janitor in a railroad shop was not, in the state of facts shown, engaged in interstate commerce. The court said: "Concerning the nature of the commerce in which Pierce was employed, the facts are as follows: He performed the ordinary duties of a janitor in the shops of the company at Villa Grove. His work was sweeping, cleaning up, building fires in stoves during cold weather, helping to load scrap iron, and doing other work of that kind. The shops contained lathes, planers, and machinery, and slight repairs were there made upon engines which ran in and out of Villa Grove. The engines hauled trains both in interstate and intrastate commerce. On the morning of February 6, 1916, Pierce came to the shops and was splitting and breaking up kindling wood for the purpose of building fires in the stoves when a splinter flew from a board and struck the middle finger of his left hand."

**Watchman.**—A night watchman employed in railroad shops whose duties required him to take care of the locomotive shop and the storeroom was held not engaged in interstate commerce. *Wabash R. Co. v. Industrial Commission*, (1919) 286 Ill. 194, 121 N. E. 569, wherein the court said: "Dead engines were brought into the shops of plaintiff in error and repaired. While it is true that these engines had been used in both intrastate and interstate traffic, their repair had no direct connection with such traffic, and defendant in error, when performing his duties as watchman in those shops was not engaged in interstate commerce. *Chicago, Rock Island & Pacific Railway Co. v. Industrial Board*, 273 Ill. 528, 113 N. E. 80, L. R. A. 1916F, 540."

**Engine inspector.**—In *Mitchell v. Southern R. Co.*, (1919) 23 Ga. App. 196, 98 S. E. 184, it was said in an official syllabus: "There was no error in awarding a nonsuit on the first and second counts of the petition, as the evidence failed to establish that the defendant was engaged and the plaintiff employed, at the time of the injury, in interstate commerce. According to his testimony the plaintiff was 'inspector for engines, tanks, wheels, and all such as that—engine carpenter,' and inspected engines engaged in both intrastate and interstate commerce. He inspected any engine that came into the roundhouse, and an engine might run to Chattanooga, Tenn., on

one day, to Jacksonville, Fla., on another day, or to Macon, Ga., on still another day."

g. Employee Going to or Returning from Work or Temporarily Diverted Therefrom (p. 1271)

**Employees within statute—In general.**—"It is now quite well settled by federal decisions that 'in leaving the carrier's yard at the close of the day's work' the employé is but discharging a duty of his employment, and that, if he was employed in interstate commerce while actually at work, he was, in legal contemplation, so engaged while leaving the yard when the actual work was ended. *Erie R. Co. v. Winfield*, (1917) 244 U. S. 170, 37 S. Ct. 556, 61 U. S. (L. ed.) 1057, [Ann. Cas. 1918B 682]. Our own decisions are in harmony with this principle. *Ewald v. Chicago, etc., Co.*, (1888) 70 Wis. 420, 36 N. W. 12, 591, 5 A. S. R. 178; *Kunza v. Chicago, etc., R. Co.*, (1909) 140 Wis. 440, 123 N. W. 403. Of course the employé must be leaving by the proper and usual way, or at least by a way known to and expressly or tacitly permitted by the employer. We think that there was sufficient evidence in the present case to take this question to the jury." *Ewing v. Chicago, etc., R. Co.*, (1918) 167 Wis. 597, 167 N. W. 442, 169 N. W. 429.

**Arriving before time to begin work.**—An employee arriving at the place of work a few minutes before the time fixed for beginning work and injured while waiting for that time to arrive, is as much within the Act as if engaged in his regular duties. *Stool v. Southern Pac. R. Co.*, (1918) 88 Ore. 350, 172 Pac. 101.

**Going to meet foreman.**—A section man, who is a member of a crew engaged in laying rails, who goes to a station to meet the foreman, by order of the former, is within the Act while making the trip. *Williams v. Chesapeake, etc., R. Co.*, (1918) 181 Ky. 313, 204 S. W. 292.

**Going to make report.**—The timekeeper of a gang repairing a track used in interstate commerce is within the act while going to the telegraph office to send a report to his superior. *Crecelius v. Chicago, etc., R. Co.*, (Mo. 1918) 205 S. W. 181.

**Yard brakeman returning to engine.**—The plaintiff was a member of a crew attached to a switch engine, and his day's work was in switching cars in interstate and intrastate commerce. He had just switched a string of 50 or 60, all on the same string, and some of the cars transported freight which came from other states into the state of New Jersey, and others freight which was being transported out of the state into other states, and still other cars contained freight which was being transported between places wholly within the state of New Jersey. The plaintiff had not concluded his day's work, and was not leaving the yard, but was crossing the tracks to rejoin his engine, to continue his work. It was held that he was within the

act. *Erie R. Co. v. Downs*, (C. C. A. 2d Cir. 1918) 250 Fed. 415.

**Returning with work train.**—A conductor employed by interstate carrier and in charge of a work train distributing ties along a section of the carrier's line, which is wholly in one state, is engaged in interstate commerce, and that status obtains even after the ties have been distributed and he is returning home, still, however, in charge of the train. *Ely v. Chicago Great Western R. Co.*, (Ia. 1918) 166 N. W. 739, wherein the court said: "Plaintiff brought this action under the federal Employers' Liability Act, and his right to maintain it is challenged by counsel for defendant upon the ground that he was not, at the time of the accident, engaged in interstate commerce. He left Clarion in the morning in charge of extra No. 130 composed of an engine, caboose, and several cars loaded with ties to be distributed at various places along the track. Having finished unloading the ties at Thornton, in obedience to orders from the chief dispatcher, plaintiff and crew were returning to Clarion. The train at this time consisted of the caboose and engine. The crew comprised the fireman, engineer, two brakemen, and plaintiff. Several of the section men who had assisted in unloading the ties were also riding in the caboose. Although counsel does not concede that, while plaintiff was in charge of the train unloading ties with which to repair the track used for interstate traffic, he was employed therein, it has quite generally been held that an employee engaged in delivering material therefor, or in repairing bridges or tracks, used in interstate commerce, is likewise so employed. An employee while on his way to and from his work, if employed in interstate commerce, injured by the negligence of his employer, is entitled to prosecute his action for damages under the federal act."

**Returning on tricycle.**—A signal repairer returning home on a railroad tricycle furnished to him for the purpose of his work, is within the Act. *Louisville, etc., R. Co., v. Mullins*, (1918) 181 Ky. 148, 203 S. W. 1058.

**Employee not within Act—Foreman taking crew to work.**—In *St. Louis, etc., R. Co. v. True*, (Okla. 1918) 176 Pac. 758, a roundhouse foreman was held not to be within the Act, the facts being stated as follows: "Under the rules of the company, the day shift left the roundhouse at 6 o'clock p. m., and it was plaintiff's duty to be there at that time and convey them in the motor-driven car furnished by the defendant to Barton, and there get the night crew and bring them back to the roundhouse in time for them to go to work at 7 o'clock p. m., after which his duties for the day ended. While plaintiff was nearing Lexi with the night crew on the car, they ran upon a cow lying on the track, which could not be seen, owing to the darkness, and the alleged negligence of defendant in failing to furnish proper lights for the car, which, on request of plaintiff, defend-

ant had promised but had failed to supply. The particular work which the crew was to perform after arriving at Lexi was not shown, except that they were required to do whatever might be found to be done in the roundhouse and yards under the direction of their foreman; and whether they were expected to work on an engine or car used wholly in intrastate commerce, or whether they were to work on an engine or car used wholly in interstate commerce, or whether they would work on implements used both in intrastate and interstate commerce, the evidence does not disclose."

#### i. Other Employees (p. 1275)

**Employees within the statute—Removing snow from track.**—An employee of an interstate railway carrier, who is injured while removing snow from a track over which interstate trains are being run regularly, is engaged in interstate commerce. *Koofos v. Great Northern R. Co.*, (N. D. 1919) 170 N. W. 859.

**Care of "camp car."**—A person employed by a railway company to care for and keep clean a so-called "camp car," to attend to the beds, and to cook for himself and a gang of railway bridge carpenters quartered in such car and engaged in the repair of railway bridges and abutments in use as instrumentalities of interstate commerce, was, at the time of receiving injuries in a collision between an engine and the camp car, then on a sidetrack, employed in interstate commerce where he was then inside the car, engaged in cooking a meal for the bridge carpenters and himself. *Philadelphia, etc., R. Co. v. Smith*, (1919) 250 U. S. 101, 39 S. Ct. 396, 63 U. S. (L. ed.) —, *affirming* (1918) 132 Md. 345, 103 Atl. 945, wherein the court said: "The only question we have to consider is whether plaintiff at the time he was injured was engaged in interstate commerce within the meaning of the statute. Petitioner, citing *Illinois Cent. R. Co. v. Behrens*, (1914) 233 U. S. 473, 478 [34 S. Ct. 646, 58 U. S. (L. ed.) 1051, 1055, Ann. Cas. 1914C 163], and *Erie R. Co. v. Welsh*, (1916) 242 U. S. 303, 306 [37 S. Ct. 116, 61 U. S. (L. ed.) 319, 324], as conclusive to the effect that the true test is the nature of the work being done by the employee at the time of the injury, and that what he had been doing before and expected to do afterwards is of no consequence, argues that since plaintiff at the time of the injury and for some weeks prior thereto was and had been working as mess cook and camp cleaner or attendant for a gang of bridge carpenters who were quartered for their own convenience in a camp car belonging to petitioner, which was not being moved in interstate commerce, but was located and standing on a switch track in the neighborhood of the bridge upon which the carpenters then were and for some weeks prior thereto had been and for some time afterwards were working;

and since plaintiff at the moment of the injury was engaged in cooking food which was the property of himself and the carpenters, he was not at the time engaged in interstate commerce.

"As thus stated, the relation of plaintiff's work to the interstate commerce of his employer would seem to be rather remote. But upon a closer examination of the facts the contrary will appear. Taking it to be settled by the decision of this court in *Pedersen v. Delaware, etc., R. Co.*, (1913) 229 U. S. 146, 152 [33 S. Ct. 648, 57 U. S. (L. ed.) 1125, 1127, Ann. Cas. 1914C 153], that the repair of bridges in use as instrumentalities of interstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it, it of course is evident that the work of the bridge carpenters in the present case was so closely related to defendant's interstate commerce as to be in effect a part of it. The next question is, what was plaintiff's relation to the work of the bridge carpenters? It may be freely conceded that if he had been acting as cook and camp cleaner or attendant merely for the personal convenience of the bridge carpenters, and without regard to the conduct of their work, he could not properly have been deemed to be in any sense a participant in their work. But the fact was otherwise. He was employed in a camp car which belonged to the railroad company, and was moved about from place to place along its line according to the exigencies of the work of the bridge carpenters, no doubt with the object and certainly with the necessary effect of forwarding their work, by permitting them to conduct it conveniently at points remote from their homes and remote from towns where proper board and lodging were to be had. The circumstances that the risks of personal injury to which plaintiff was subjected were similar to those that attended the work of train employees generally and of the bridge workers themselves when off duty, while not without significance, is of little moment. The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang and forwarding their work by reducing the time lost in going to and from their meals and their lodging place. If, instead, he had brought their meals to them daily at the bridge upon which they happened to be working, it hardly would be questioned that his work in so doing was a part of theirs. What he was in fact doing was the same in kind, and did not differ materially in degree. Hence he was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act."

**Employees not within the statute—*Electric Lineman.***—An electric lineman injured

while engaged in wiping insulators on the main power line between a power house and substations furnishing electricity to a railroad engaged in both interstate and intrastate commerce is not employed in interstate commerce. *Southern Pac. Co. v. Industrial Acc. Commission*, (Cal. 1918) 171 Pac. 1071, wherein the court said: "The Industrial Accident Commission made an award in favor of the dependents of William T. Butler, who was killed while working as an electric lineman in the employ of petitioner, Southern Pacific Company. Said company operates a system of electric railway lines in Alameda county; its cars being used in both intrastate and interstate commerce. For the generation of electric power the company maintains at Fruitvale a main power house, whence an alternating current of high voltage is transmitted through a main power line to substations. At the substations the current passes through converters and transformers which convert it to a direct current and reduce its voltage. The direct current, thus reduced, passes to the trolley wires, and from them to the motors on the cars. When Butler sustained the fatal injury, which was caused by an electric shock, he was engaged in wiping insulators on the main power line between the Fruitvale power house and the substations. . . . In *Chicago, etc., R. Co. v. Harrington*, [1916] 241 U. S. 177, 36 S. Ct. 517, 60 U. S. (L. ed.) 941, the Supreme Court of the United States had occasion to consider a state of facts more closely analogous to the situation here presented. The injured employé was a member of a switching crew which was engaged in switching cars of coal belonging to the railroad company. The coal was being switched to a shed, where it was to be placed in bins and chutes, and supplied as needed to locomotives engaged in interstate as well as intrastate transportation. It was held that the federal Employers' Liability Act was not applicable. Applying the test laid down in the *Shanks Case*, the court said that:

"Manifestly there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use."

"The reasoning is apt here. The coal was essential to the production of motive power for the locomotives, just as, in this case, the electric current was necessary to move petitioner's cars. But in moving the coal to the shed Harrington was engaged in a work which was at least one step removed from the actual furnishing of the coal to the engines, and this precluded that close relation of his work to interstate commerce which would bring him within the scope of the federal act. So in this case Butler was working on the part of the line between the main power house and a substation. The current was still to pass through the transformers

and converters, and be so converted and reduced as to be suitable for use in propelling the cars. The test of remoteness seems as applicable in the one case as in the other. It is true, as petitioner claims, that the electric current, once it is generated at the main power house, passes along the main power line, to and through the converters and transformers in the substations, and to the trolley wires, without interruption, and without storage. No doubt, too, a break in that current at any point, however remote from the lines of track, would immediately stop the progress of all cars then moving. But we think the decisive factor in the case is not to be sought in these characteristics of electric energy. As the Supreme Court of the United States says:

"The federal act speaks of interstate commerce in a practical sense suited to the occasion." *Shanks v. Delaware, etc., R. Co.* [(1916) 239 U. S. 556, 36 S. Ct. 188, 60 U. S. (L. ed.) 436, L. R. A. 1916C 797]; *Chicago, etc., R. Co. v. Harrington, supra.*

"Viewing the question before us in this light, we think the answer to it should be the same as that given in the *Harrington Case*. The main power line is not part and parcel of the railroad or its equipment, in the same sense as the roadbed or the trolley line. It is an instrumentality by means of which something necessary for the operation of the cars is brought to a point where it can be usefully applied. Its purpose is simply to get to the road the necessary power to operate cars thereon—the same purpose served by wagons or cars laden with coal to be carried to the road for the operation of its locomotives. Even though the power flows without interruption from the power house to the trolley lines, it still remains that all that the main line does, and all that those engaged in keeping it in order do, is to assist in putting on the trolley line the necessary power to be used by the operatives of the road as desired, or, to paraphrase the language already quoted from the *Harrington Case*, 'putting the electric power [coal supply] in a convenient place from which it could be taken as required for use.'"

*Repairing dwelling house.*—A railroad employee injured while walking on the track on his way to repair a house occupied as a residence by the general manager, is not within the Act. *Walden v. Cumberland R. Co.*, (1918) 181 Ky. 100, 203 S. W. 854.

#### IV. INJURIES TO EMPLOYEE

##### 1. Negligence Generally

##### a. Basis of Liability (p. 1277)

*Negligence of employer as basis.*—To same effect as original annotation, see *Hoyer v. Central R. Co.*, (C. C. A. 2d Cir. 1918) 255 Fed. 493, 166 C. C. A. 569.

*Employer not insurer.*—To same effect as original annotation, see *Hoyer v. Central R.*

*Co.*, (C. C. A. 2d Cir. 1918) 255 Fed. 493, 166 C. C. A. 569.

##### b. Relation of Negligence to Injury (p. 1278)

*Negligence must have been proximate cause.*—To the same effect as the original annotation see *Tremelling v. Southern Pac. Co.*, (Utah 1917) 170 Pac. 80.

*Negligence concurring with that of employee.*—Where an accident resulted from the failure of the injured person to keep a lookout for trains and the failure of the persons in charge of a train to give warning signals, the railroad company is liable, the negligence of the employee going only in reduction of damages. *Stool v. Southern Pac. Co.*, (1918) 88 Ore. 350, 172 Pac. 101.

##### c. Mode of Determining What Constitutes Negligence (p. 1279)

*Common law rules applicable.*—The term "negligence" is interpreted in the light of the common law, as construed and applied by the federal courts, free from legislative interference. *McLean v. Chicago Great Western R. Co.*, (1918) 140 Minn. 35, 167 N. W. 349.

*Federal or state rules as controlling.*—See to the same effect as the original annotation *Pennsylvania Co. v. Stalker*, (Ind. App. 1918) 119 N. E. 163.

*Order of Interstate Commerce Commission.*—The orders of the Interstate Commerce Commission are not intended to fix the "maximum of negligence." Accordingly while the failure to equip a locomotive with a light on the rear is not shown to be a violation of rule 29 of the commission, because it is not proved that the locomotive in question was "shopped for heavy or general repairs" after the promulgation of the rule, the operation of the locomotive without such a light may be found to be common law negligence. *Fuller v. Oregon-Washington R., etc., Co.*, (Ore. 1919) 181 Pac. 338.

##### d. Defects in Cars, Engines, Appliances, etc.

##### (2) Duty of Carrier as to Place to Work (p. 1280)

*Safety stations on bridge.*—Where a night watchman charged with the duty of guarding a railroad bridge was killed by a passing train under circumstances not disclosed by the evidence and it appeared that the bridge was inadequately provided with "safety stations," by which trains could be avoided by a person on the bridge, it was held that the question of negligence was for the jury. *Kreitzer v. Southern Pac. Co.*, (Cal. App. 1919) 177 Pac. 477.

*Leaving car near switch.*—Whether it is negligence to leave a car on a side track so near a switch that a brakeman alighting from a train to throw the switch may be struck thereby is for the jury. *Mills v. Roberts*, (1918) 136 Ark. 433, 206 S. W. 751.

f. Effect of Section on Particular Doctrines or Maxims

(2) Fellow Servant Doctrine (p. 1284)

In general.—To the same effect as the second paragraph of the original annotation see *Kusturin v. Chicago, etc., R. Co.*, (1919) 287 Ill. 306, 122 N. E. 512; *Clement v. Maine Cent. R. Co.*, (1917) 117 Me. 45, 102 Atl. 559; *Scarlett v. Delaware, etc., R. Co.*, (1917) 222 N. Y. 155, 118 N. E. 513; *Casey v. Boston, etc., R. Co.*, (1919) 231 Mass. 529, 121 N. E. 403; *Rockwell v. Hustis*, (N. H. 1918) 104 Atl. 127; *Santomassimo v. New York, etc., R. Co.*, (N. J. 1918) 105 Atl. 14.

2. Persons Entitled to Sue

b. Personal Representatives (p. 1287)

Who is "personal representative."—A "personal representative" within the meaning of this section means an executor or general administrator. *Swank v. Pennsylvania R. Co.*, (N. J. 1918) 104 Atl. 26.

c. Widow (p. 1289)

Widow cannot sue in individual capacity.

--To same effect as original annotation, see *Garber v. Missouri Pac. R. Co.*, (Mo. 1919) 210 S. W. 377.

3. Pleadings

a. In General (p. 1295)

Sufficiency of complaint generally.—A petition in an action against a railroad company for personal injuries to plaintiff while he was in the employ of defendant, stating that defendant was the owner, and was "engaged in the operation of a system of steam commercial railroads traversing the states of Illinois, Iowa, Nebraska, Colorado, and other states," when not attacked by demurrer or motion, sufficiently alleges the interstate character of defendant so as to bring the cause of action within the federal Employers' Liability Act. *Gwynne v. Goldware*, (1918) 102 Neb. 260, 166 N. W. 625.

Cure of complaint by answer.—Failure to allege facts showing that the plaintiff was engaged in interstate commerce is cured by adversary pleadings supplying the facts, followed by a trial on the theory that the action is under the federal Act. *King v. Norfolk, etc., R. Co.*, (N. C. 1918) 97 S. E. 29.

Statute need not be expressly referred to.—To the same effect as the original annotations, see *Northern Trust Co. v. Grand Trunk Western R. Co.*, (1918) 282 Ill. 565, 118 N. E. 986.

Plaintiff's original petition pleaded that the defendant owned and operated a railroad throughout Nebraska and other states named in the petition and that he was employed by the company as a baggage handler at its Omaha depot and while so engaged a fellow employee negligently caused a heavy trunk to fall upon him whereby he sustained personal injuries for which he sought to recover damages. The petition did not state that it was brought under a law of Nebraska.

It was held that the petition stated a cause of action under the federal Employers' Liability Act. In such case an amended petition filed more than two years after the accident, that in specific terms alleged the interstate character of defendant and of plaintiff's employment, did not state a new cause of action, but related back to the filing of the original petition, and the action was not barred by the federal statute of limitations. *Eskelsen v. Union Pac. R. Co.*, (1918) 102 Neb. 423, 167 N. W. 408, 168 N. W. 366.

Pleading as showing cause of action under both federal and state statute.—In *Southern R. Co. v. Maxwell*, (1918) 117 Miss. 62, 77 So. 905, it was contended by the plaintiff who had recovered judgment against the defendant under the federal Employers' Liability Act that if not engaged in interstate commerce at the time he was injured as contended by the defendant in the appeal, yet he was entitled to have the judgment affirmed because he was entitled to a recovery under the Employers' Liability Act of Alabama. But to this contention the court replied as follows: "In support of the second contention it is urged by counsel for appellees that, while the declaration, which contains only one count, states a cause of action under the federal Employers' Liability Act, it also, treating the allegations relative to interstate commerce as surplusage, states a cause of action under the Alabama Employers' Liability Act, and that if the evidence fails to show that appellee was engaged in interstate commerce at the time he was injured, nevertheless the judgment should be affirmed, for the reason that he is entitled to a recovery under the Alabama statute. If these statutes were identical, so that the pleadings could have presented the same issues under the one as under the other, it may be that this contention would not be without merit; but, as pointed out by the Supreme Court of Alabama in *Louisville, etc., Co. v. Carter*, (1915) 195 Ala. 382, 70 So. 655, Ann. Cas. 1917E 292, they differ materially, in that under the Alabama statute contributory negligence may be pleaded in bar of the action, while under the federal statute it can be pleaded only in mitigation of damages."

c. Amendments to Pleadings (p. 1302)

Amendment changing parties plaintiff.—A judgment for the plaintiff in an action for damages for wrongful death cognizable under the federal Employers' Liability Act, commenced by the widow of the deceased in her personal capacity, was reversed by the Supreme Court of the state upon the ground that the plaintiff could not, although sole beneficiary, maintain the action, except as personal representative, such reversal being without prejudice to such rights as the personal representative might have. It was held not error for the trial court upon remand to allow the petition to be amended by joining the widow as personal representative of the deceased, as party plaintiff, without in



any way enlarging or modifying the facts upon which the action was based. It was held, further, that such amendment of the petition is not equivalent to the commencement of a new action, for the purpose of applying the two-year limitation provided by the statute. *Missouri, etc., R. Co. v. Lenahan*, (Okla. 1918) 171 Pac. 455.

**Common law liability.**—Where the plaintiff brought suit under the federal Act and did not incorporate in his declaration a count charging a common law liability it was held that such omission could not be supplied by amendment on its appearing that he had no cause of action under the federal act, because such an amendment would introduce a new and different cause of action. *Baltimore, etc., R. Co. v. Branson*, (1917) 131 Md. 686, 104 Atl. 356.

**Stating cause of action under state law.**—Where a complaint states a cause of action for damages, under the federal Employers' Liability Act, for death by wrongful act occurring in the state of Iowa, and plaintiff recovered judgment, which was reversed upon appeal, an amendment of the complaint eliminating therefrom all allegations relating to interstate commerce and the application of the federal Act, and pleading in lieu thereof certain statutes of the state of Iowa, does not constitute a departure from law to law, and the pleading of a new cause of action. *Nash v. Minneapolis, etc., R. Co.*, (1918) 141 Minn. 148, 169 N. W. 540.

**Erroneous date.**—Where plaintiff files a petition stating a cause of action under the federal Employers' Act but erroneously states the date of the injury it is proper to permit an amendment that correctly charges the date. *Martinson v. Chicago, etc., R. Co.*, (1918) 102 Neb. 238, 166 N. W. 624.

#### 4. Practice and Procedure

##### a. In General (p. 1306)

**A state attorney's lien statute applies to causes of action arising under the Employer's Liability Act.** *Mytton v. Missouri Pac. R. Co.*, (Mo. 1919) 211 S. W. 111.

##### c. Jury of Less than Twelve (p. 1313)

**Verdict by three-fourths of jury.**—To same effect as original annotation, see *Chicago, etc., R. Co. v. Ward*, (Okla. 1918) 173 Pac. 212.

#### 5. Evidence

##### a. In General (p. 1317)

**Sufficiency of evidence in general.**—See to same effect as original annotation *Atlantic Coast Line R. Co. v. Selden*, (C. C. A. 4th Cir. 1918) 249 Fed. 122, 161 C. C. A. 174.

##### b. Proof of Negligence (p. 1318)

**Admissibility of ordinance regulating speed of train.**—Where an employee was killed by being struck by a train traveling at an unlawful rate of speed the speed ordinance is admissible in evidence in an action to recover damages for his death. *Pennsylvania Co. v.*

*Stalker*, (Ind. App. 1918) 119 N. E. 163, wherein the court said: "Appellant insists that the court erred in rejecting 18 of the 41 instructions tendered. One of these rejected instructions is in the following language:

"(38) Certain provisions of an ordinance of the city of Valparaiso have been introduced in evidence on the trial of this cause. I now instruct you that these provisions of such ordinance are not to be considered by you for any purpose, and they are withdrawn from your consideration.' . . . Appellant contends that the refusal to give said instruction No. 32 is error, for the reason that since this action is under the federal statute all state laws and municipal ordinances are excluded from consideration. We cannot sustain the contention in this sense. The federal statute declares that employers within its scope shall be liable to their employees for negligence. It does not specify what shall constitute negligence, but leaves that question to be determined in accordance with the established rules of the law of that subject. The ordinance does not undertake to regulate interstate commerce or to create any civil liability against the railway company. It is merely a reasonable exercise of the police power, and is designed to promote the safety of persons and property which would be jeopardized by the running of trains at a dangerous speed within the municipality. We have not been advised that this point has been specifically decided by any federal court; but we are of the opinion that, on principle, such an ordinance ought to be considered as bearing on the question of negligence."

##### c. Evidence Bearing on Question of Damages (p. 1319)

**Pain suffered before death.**—The representative of a deceased person may recover in a single action damages for pain suffered by an injured person between his injury and death, and also for pecuniary damages resulting to the next of kin from the death, although the causes of action are separate and distinct, but both causes of action must be set up in the pleadings if recovery be sought in each, and if plaintiff proceeds to trial on a complaint for pecuniary damages resulting from death alone, and refuses, when given opportunity to do so, to amend his complaint to embrace the other cause of action, it is error to permit evidence, over objection, in support of the injury not covered by the complaint. The statute gives a single action for a double wrong, but each wrong must be declared on. *Lennon v. Erie R. Co.*, (1918) 92 N. J. L. 209, 104 Atl. 444.

##### e. Burden of Proof (p. 1321)

**Negligence.**—To same effect as original annotation, see *Yazoo, etc., R. Co. v. McCaskell*, (1918) 118 Miss. 629, 79 So. 817.

In an action by an employee against his employer, the fact of the accident carries

with it no presumption of negligence on the part of the employer, but such negligence is an affirmative fact for the injured employee to establish by the evidence. *Chicago, etc., R. Co. v. Hessenflow*, (Okla. 1918) 170 Pac. 1161.

**Effect of state statute.**—The error of the trial court in instructing the jury, in an action under the federal Employers' Liability Act and the Boiler Inspection Act of February 17, 1911 (see vol. 8, p. 1200), that the so-called *Prima Facie* Act of Mississippi (Miss. Code 1906, § 1985, as amended by Laws 1912, ch. 215) applied, and that it relieved the plaintiff of the burden of proof to establish negligence, cannot be said not to have been prejudicial, on the theory that the Boiler Inspection Act imposed upon the railway company the absolute duty to have the locomotive and tender, and all parts and appurtenances thereof, in proper condition and safe to operate, and that the mere breaking of the king pin which fastened the drawbar to the tender, and the breaking of the coupling chains between engine and tender, which apparently caused the accident, show conclusively that they were defective, where the evidence did not establish as matter of law that the king pin or the chains were defective, but at most presented a question for the jury. *New Orleans, etc., R. Co. v. Scarlet*, (1919) 249 U. S. 528, 39 S. Ct. 360, 63 U. S. (L. ed.) — (reversing (1917) 115 Miss. 285, 76 So. 265), followed *Yazoo, etc., R. Co. v. Mullins*, (1919) 249 U. S. 531, 39 S. Ct. 368, 63 U. S. (L. ed.) —, reversing (1917) 115 Miss. 343, 76 So. 147.

The rights of a railway company cannot be said not to have been prejudiced by the error of the highest state court in affirming a judgment of the trial court in favor of plaintiff in an action under the federal Employers' Liability Act for injuries received by a flagman while switching an interstate train, on the ground that the so-called *Prima Facie* Act of Mississippi (Miss. Code 1906, § 1985, as amended by Laws 1912, ch. 215), as to which the trial court had given no instruction, applied and relieved the plaintiff of the burden of establishing negligence, — even though there may have been sufficient evidence of the railway company's negligence to go to the jury, and the general instructions concerning negligence may have been proper, where the jury was also instructed that it was the absolute duty of the railway company to furnish the deceased with a safe place to perform the duties incident to his employment. *Yazoo, etc., R. Co. v. Mullins*, (1919) 249 U. S. 531, 39 S. Ct. 368, 63 U. S. (L. ed.) —, reversing (1917) 115 Miss. 343, 76 So. 147.

#### 6. Damages

##### a. Recovery by Employee (p. 1322)

**Statute does not affect measure of damages.**—There is no merit in the argument that, because the federal law is virtually a

compensation statute, and fixes liability for defective appliances, regardless of the question of negligence, public policy demands that there should not be as large verdicts as the one in this case. The same test is applied in this case as in any case of negligence in which the law does not designate certain acts of omission or commission as negligence per se. Compensation is the end to be attained in each instance. *Galveston, etc., R. Co. v. Hopkins*, (Tex. Civ. App. 1918) 202 S. W. 222.

**Excessiveness.**—Verdict awarding \$37,500 for injuries causing permanent disablement of brakeman reduced to \$12,500. *Smith v. Kansas City Southern R. Co.*, (Mo. 1919) 213 S. W. 481.

#### b. Actions for Death

##### (1) In General (p. 1323)

**Measure of damages generally.**—To same effect as original annotation, see *Oliver v. Seaboard Air Line Ry.*, (S. D. Ga. 1918) 250 Fed. 652, also holding that no damages are recoverable for pain and suffering of the employee.

**Measure of damages stated.**—The state courts are obliged, by rulings of the Supreme Court of the United States, to fix the amount of compensation, if compensation be due to the beneficiaries of a deceased employé, under the federal Employers' Liability Act, at the present or cash value of what the employé might reasonably have contributed to the support of the beneficiaries during the term of his life expectancy, according to the evidence. The right of recovery being limited to the pecuniary loss, that loss is to be determined or computed by discounting the lost future benefits, at a fair or reasonable rate at which the money might be loaned or invested safely at interest, for each year of the life expectancy. *Jones v. Kansas City Southern R. Co.*, (1918) 143 La. 307, 78 So. 568.

**Excessiveness of verdict generally.**—For injuries to plaintiff, an engine house hostler, resulting in the permanent shortening of one leg, which was left in such condition that it caused constant pain when used, a verdict of \$4,791.75 was not excessive, where the plaintiff, 30 years old at the time of the accident, was earning \$20 a week, and in a short time would have become a duly qualified engineer, with an increase in salary. *Clement v. Maine Cent. R. Co.*, (1917) 117 Me. 45, 102 Atl. 559.

**Loss and suffering during lifetime.**—"The Supreme Court held in *St. Louis, etc., R. Co. v. Craft*, (1915) 237 U. S. 648, 35 S. Ct. 704, 59 U. S. (L. ed.) 1160, that a recovery could be had for damages growing out of loss and suffering endured by an injured decedent while he lived, and also for the pecuniary loss suffered by the beneficiaries named in the statute because of his death, in the same action, recognizing, however, that

the two claims are different. *Lennon v. Erie R. Co.*, (1918) 92 N. J. L. 209, 104 Atl. 444.

## (2) Pecuniary Loss (p. 1325)

**Pecuniary loss must be shown.**—The jury must find, as to each plaintiff, what pecuniary benefit each plaintiff had reason to expect from the continued life of the deceased, and the recovery must be limited to compensation of those relatives, in the proper class, who are shown to have sustained such pecuniary loss. *Horton v. Seaboard Air Line R. Co.*, (1918) 175 N. C. 472, 95 S. E. 883.

## c. Recovery by Widow and Children

### (1) In General (p. 1327)

**Measure of damages generally.**—To same effect as second paragraph of original annotation, see *The Erie Lighter* 108, (D. C. N. J. 1918) 250 Fed. 490.

**Presumption as to pecuniary loss.**—To same effect as original annotation, see *The Erie Lighter* 108, (D. C. N. J. 1918) 250 Fed. 490.

### (3) Actions by Children (p. 1330)

**Loss of care, society and companionship.**—To same effect as original annotation, see *The Erie Lighter* 108, (D. C. N. J. 1918) 250 Fed. 490.

## e. Apportionment of Damages (p. 1331)

**In general.**—The jury is not required to apportion the award of damages among the beneficiaries of a deceased employee. *Jones v. Kansas City Southern R. Co.*, (1918) 143 La. 307, 78 So. 568.

## 7. Questions for Court and Jury (p. 1334)

**Negligence of carrier.**—To same effect as original annotation, see *Cincinnati, etc., R. Co. v. McGuffey*, (C. C. A. 6th Cir. 1918) 252 Fed. 25, 164 C. C. A. 137, leaving car on repair track without giving warning of its position.

To the same effect see *Kusturin v. Chicago, etc., R. Co.*, (1919) 287 Ill. 306, 122 N. E. 512, wherein the court said: "It is also urged by plaintiff in error that there was no evidence tending to establish negligence on its part. The rule established by the federal courts is that the federal act proceeds on the principle which regards negligence as the basis of the duty to make compensation and excludes the existence of such duty in the absence of such negligence. . . . The question of negligence was therefore one of fact, to be left to the jury, under proper instructions from the court, and unless, upon a review of the evidence, this court is able to say that there was no evidence fairly tending to show negligence it will not disturb the verdict."

**Failure to inspect car.**—Negligence of railroad company in failing to inspect a foreign car held for the jury. *Rowe v. Colorado, etc., R. Co.*, (Tex. 1918) 205 S. W. 731.

## Proximate cause and assumption of risk.

The plaintiff, a switch foreman, rode on a rod or bar extending across the front of the engine with his back to the boiler, and in getting down to the footboard caught the clothing of one leg in the jagged end of a bar extending above and in the same direction as the footboard and projecting slightly beyond an upright brace to which it was fastened, and was thrown and injured. He was engaged at the time in the discharge of his duties and the place in which he was riding was one customarily used by switchmen. It is held that whether there was negligence of the defendant in respect of the projecting jagged end of the bar proximately causing the injury and whether the plaintiff assumed the risk were questions for the jury. *Miller v. Chicago, etc., R. Co.*, (1918) 140 Minn. 14, 167 N. W. 117.

## 8. Appeal and Error (p. 1336)

### Absence of palpable error in state courts.

To the same effect as the original annotation, see *Gillis v. New York, etc., R. Co.*, (1919) 249 U. S. 515, 39 S. Ct. 355, 63 U. S. (L. ed.) — (affirming (1916) 224 Mass. 541, 113 N. E. 212), wherein the court said: "The full court [of Massachusetts] reviewed the testimony quite elaborately and concluded from that review that 'the only person who was negligent was the deceased, and the judge was right in directing a verdict for the defendant,' and cited *Great Northern R. Co. v. Wiles*, (1916) 240 U. S. 444, [36 S. Ct. 406, 60 U. S. (L. ed.) 732]. That case repeated the established principle that when the evidence justifies it, it is competent for a court to direct a verdict for a defendant. The principle is not attacked by plaintiff. The contention, however, is that the courts below, one of which tried the case, were wrong in their estimate of the evidence and that plaintiff was entitled to the judgment of the jury upon it. We are unable to yield to the contention. Nor do we think it necessary to give a review of the evidence. It will be found in the opinion of the court and we have verified its correctness. The case turns, therefore, upon an appreciation of the testimony and admissible inferences therefrom, and even if the conclusions of the courts were more disputable we should have to defer to them. *Baltimore, etc., R. Co. v. Whitacre*, (1916) 242 U. S. 169 [37 S. Ct. 33, 61 U. S. (L. ed.) 228]; *Erie R. Co. v. Welsh*, (1916) 242 U. S. 303 [37 S. Ct. 116, 61 U. S. (L. ed.) 319]."

**Failure to submit comparative negligence is harmless** where the case is tried on the theory that contributory negligence bars a recovery and the jury finds for the plaintiff. *Hinton v. Chicago, etc., R. Co.*, (Mo. 1918) 206 S. W. 396.

**Failure of an administrator to allege pecuniary loss** cannot be urged for the first time on appeal. *Roberts v. Southern R. Co.*, (1918) 141 Tenn. 95, 206 S. W. 457.

**Vol. VIII, p. 1339, sec. 3. [First ed., 1909 Supp., p. 585.]**

**I. Construction of section.**

**II. Contributory negligence.**

1. In general.
2. Effect on amount of damages.
3. Effect of violation of Safety Appliance Acts.
5. Instruction to jury.
6. Questions for jury.

**I. CONSTRUCTION OF SECTION (p. 1340)**

**In general.**—In the absence of proof of negligence on the part of defendant, the presence or absence of contributory negligence on the part of plaintiff can have no bearing on the case. On the other hand, if negligence on the part of defendant is shown, it then becomes material to determine whether or not plaintiff was guilty of contributory negligence. At common law contributory negligence, when shown, had the effect of defeating a recovery; but, under the statute on which this action is based, it has no effect other than to diminish the damages recoverable. *Jackson v. Rutledge*, (Ind. 1919), 122 N. E. 579.

Where the causal negligence is partly attributable to the employer, the contributory negligence of the employee will not defeat recovery, but only lessen the damages. It is only when the employee's act is the sole cause—when the employer's act is no part of the causation—that the employer is free from liability under the federal Employers' Liability Act. *Koofos v. Great Northern R. Co.*, (N. D. 1919) 170 N. W. 859.

**Distinction between contributory negligence and assumed risk**, see notes under section 4, *infra*.

**Damages shall be diminished.**—To the same effect as the original annotation, see *Kansas City, etc., R. Co. v. Costa*, (Okla. 1918) 170 Pac. 892.

The damages recoverable by an employee guilty of contributory negligence bear "the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both." *Koofos v. Great Northern R. Co.*, (N. D. 1919) 170 N. W. 859.

**Common law rules as applicable.**—The term "contributory negligence" is used as interpreted in the light of the common law, as construed and applied by the federal courts, free from legislative interference. A municipal speed ordinance is not admissible to prove contributory negligence on the part of an engineer, in an action for damages for injury to his person while engaged in interstate commerce. *McLain v. Chicago, etc., R. Co.*, (1918) 140 Minn. 35, 167 N. W. 349.

**Federal decision control.**—Contributory negligence is to be determined in a state court by the rules laid down in the federal decisions. *Rowe v. Colorado, etc., R. Co.*, (Tex. 1918) 205 S. W. 731.

**II. CONTRIBUTORY NEGLIGENCE**

**1. In General (p. 1342)**

**Not a defense.**—Contributory negligence is not a defense. *Brown v. Missouri, etc., R. Co.*, (Mo. 1919) 212 S. W. 26; *Lancaster v. Hynes*, (Tex. Civ. App. 1919) 214 S. W. 957.

"Contributory negligence is not a defense in an action to recover damages on account of negligence under the Employers' Liability Act, and it cannot therefore be taken into consideration on a motion for judgment of nonsuit." *Davis v. Southern R. Co.*, (1918) 175 N. C. 648, 96 S. E. 41.

**Necessity of pleading.**—While there can be no objection to a properly framed plea of contributory negligence when such negligence is pleaded in bar as the sole cause of injury, we apprehend there is no necessity for such plea under the statute the result of which seems to be that the plea of not guilty puts the question of contributory negligence before the jury. *Louisville, etc., R. Co. v. Wright*, (Ala. 1918) 80 So. 93.

A plea of contributory negligence is demurrable if pleaded in bar instead of in mitigation of damages. *Porter v. Louisville, etc., R. Co.*, (Ala. 1918) 78 So. 375.

**2. Effect on Amount of Damages (p. 1344)**

**Doctrine as to effect of contributory negligence in general.**—To the same effect as the original annotation, see *Clement v. Maine Cent. R. Co.*, (1917) 117 Me. 45, 102 Atl. 559; *Scarlett v. Delaware, etc., R. Co.*, (1917) 222 N. Y. 155, 118 N. E. 513; *Morata v. Oregon-Washington, etc., Nav. Co.*, (1918) 87 Ore. 219, 170 Pac. 291; *Fuller v. Oregon-Washington R., etc., Co.*, (Ore. 1919) 181 Pac. 338; *Baird v. Northern Pac. R. Co.*, (1918) 100 Wash. 384, 170 Pac. 1016, 173 Pac. 636; *Miller v. Great Northern R. Co.*, (Wash. 1919) 177 Pac. 799.

**3. Effect of Violation of Safety Appliance Acts (p. 1346)**

**Proximate cause.**—Where a train was being switched at an excessive speed and got out of control because the automatic couplers were defective, the defect in the couplers is the proximate cause of injury to a brakeman injured while jumping from the car, and the question whether he was negligent in jumping is eliminated. *Potter v. Los Angeles, etc., R. Co.*, (Nev. 1919) 177 Pac. 933.

**Evidence of violation.**—The fact that an automatic coupler failed in two successive trials to couple, is sufficient to warrant a finding that it was defective, which finding eliminates the question of contributory negligence. *Thompson v. Atchison, etc., R. Co.*, (1919) 104 Kan. 116, 177 Pac. 536.

**5. Instructions to Jury (p. 1349)**

**Improper instructions.**—To the same effect as the last paragraph of the original annotation, see *Texas, etc., R. Co. v. Williams*, (Tex. 1918) 200 S. W. 1149.

**Defendant should ask for instruction.—**

"There was no instruction to the jury that if they found for the plaintiff they should diminish the award 'in proportion to the amount of negligence attributable to such employé.' It has been held in many decisions of our state that if a party desires to limit the amount of recovery for damages that plaintiff has sustained by reason of his injuries, it is the duty of defendant to ask for an instruction to that effect. Without passing on the question as to whether this rule of practice in our courts is here applicable or is subject to the control of Congress or of the courts of the United States, and without passing upon the question as to whether, in the absence of any request, it was error for the trial court to fail to instruct the jury that if they found for plaintiff the amount of damages should be diminished in proportion to the amount of negligence attributable to the employé, in case they found the plaintiff employé guilty of contributory negligence, it is sufficient to say that the case was tried below on the theory that if plaintiff was guilty of contributory negligence he was not entitled to recover anything. So, at the request of the defendant, the jury was here instructed. That is not only the settled law of this state and has been so for years, but is the rule of the common law, as see *Seaboard Air Line Ry. v. Tilghman*, (1915) 237 U. S. 499, 35 S. Ct. 653, 59 U. S. (L. ed.) 1069." *Harris v. St. Louis, etc., R. Co.*, (Mo. 1918) 200 S. W. 111.

**As to duty to reduce damages.—**An instruction as to reduction of damages for contributory negligence should require and not merely authorize the jury to make the deduction. *Crecelius v. Chicago, etc., R. Co.*, (Mo. 1918) 205 S. W. 181.

**Harmless error in instruction.—**To instruct that contributory negligence is a defense, is harmless though the jury finds for the defendant where there is no evidence of negligence on the part of the employer. *Miller v. Great Northern R. Co.*, (Wash. 1919) 177 Pac. 799.

**Failure to instruct proper.—**Where the record fails to disclose any contributory negligence on the part of the plaintiff instruction to the jury need not state that in estimating the damages they were to consider the contributory negligence of the plaintiff. *Capital Traction Co. v. McKeon*, (1918) 132 Md. 79, 103 Atl. 314.

**6. Questions for Jury (p. 1351)**

**Contributory negligence for jury.—**To the same effect as the original annotation, see *Cincinnati, etc., R. Co. v. McGuffey*, (C. C. A. 6th Cir. 1918) 252 Fed. 25, 164 C. C. A. 137; *Jackson v. Rutledge*, (Ind. 1919) 122 N. E. 579; *Nelson v. Ironwood, etc., R., etc., Co.*, (Mich. 1918) 170 N. W. 45.

**Watchman found dead.—**Where a night watchman employed to guard a bridge is found dead, having been killed by a passing

train, the fact that the body was found in a sitting or crouching position does not warrant an inference that he was asleep and the question of contributory negligence is for the jury. *Kreitzer v. Southern Pac. Co.*, (Cal. App. 1919) 177 Pac. 477.

**Failure to observe car near track.—**A brakeman alighting at night from a moving train to throw a switch, is not, as a matter of law, guilty of contributory negligence, in failing to observe a car standing on an adjacent track so close as to strike him. *Mills v. Roberts*, (1918) 136 Ark. 433, 206 S. W. 751.

**Vol. VIII, p. 1352, sec. 4. [First ed., 1909 Supp., p. 585.]****I. In general.****II. Principles generally as to assumption of risk.****1. In general.****2. Knowledge as affecting.****3. Acts of master or superior as affecting.****4. Negligence of employer.****5. Negligence of fellow servant.****III. Particular employees.****IV. Burden of proof.****V. Questions for court and jury.****I. IN GENERAL**

**Effect limited to terms of Act.—**To same effect as original annotation, see *Delaware, etc., R. Co. v. Tomasco*, (C. C. A. 2d Cir. 1919) 256 Fed. 14; *Kusturin v. Chicago, etc., R. Co.*, (1919) 287 Ill. 306, 122 N. E. 512; *Morata v. Oregon-Washington, etc., Nav. Co.*, (1918) 87 Ore. 219, 170 Pac. 291; *Schaff v. Hendrich*, (Tex. 1918) 207 S. W. 543; *Southern Pac. R. Co. v. Miller*, (Tex. 1919) 207 S. W. 554; *Holloway v. Missouri Pac. R. Co.*, (1918) 276 Mo. 490, 208 S. W. 27.

**Simple tools.—**The doctrine of assumption of risk applies to a railway employee working with simple tools which are not within the Safety Appliance Act. *Donahue v. Louisville, etc., R. Co.*, (1919) 183 Ky. 608, 210 S. W. 491.

**Where no statute has been violated by the carrier the common law doctrine of assumption of risk obtains.** *Kansas City, etc., R. Co. v. Roe*, (Okla. 1919) 180 Pac. 371.

**Where the automatic coupler Act is violated the defense of assumption of risk is eliminated.** *Potter v. Los Angeles, etc., R. Co.*, (Nev. 1919) 177 Pac. 933.

**Decisions of the federal courts are controlling as to assumption of risk in an action under the statute.** *Jones v. Norfolk Southern R. Co.*, (N. C. 1918) 97 S. E. 48; *Hargrove v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1918) 202 S. W. 188.

**Assumption of risk is a substantive issue. It is not a matter of procedure nor a rule of evidence, and therefore the federal Act and**

the decisions of the United States Supreme Court constitute the substantive law on this subject; but the procedure is the established procedure prevailing in the courts of this state. *Pennsylvania Co. v. Stalker*, (Ind. App. 1918) 119 N. E. 163.

In matters outside the scope of the Act such as assumption of risks arising otherwise than by the violation of a statute, the state decisions are controlling in an action in a state court. *Holloway v. Missouri Pac. R. Co.*, (1918) 276 Mo. 490, 208 S. W. 27.

As to the effect of state statutes abrogating the doctrine of assumption of risk, see the annotation to section 1 of this Act.

## II. PRINCIPLES GENERALLY AS TO ASSUMPTION OF RISK

### 1. In General (p. 1355)

**Risks assumed.**—Under the federal Employers' Liability Act (Act April 22, 1908, ch. 149, 35 Stat. 65, the servant assumes all the ordinary risks of his employment which are known to him, or which could have been known by the exercise of ordinary care to a person of reasonable prudence and diligence in like circumstances. Risks not naturally incident to the occupation, but which arise from the negligence of the master, are not assumed by the servant until he becomes aware of such negligence and of the risk arising therefrom, unless the negligence and risk are so apparent and obvious that an ordinarily careful person would observe the one and appreciate the other. Whether the risk is an ordinary risk of the employment, or an extraordinary risk known to the servant, or with knowledge of which he is chargeable, is a question of fact to be submitted to the jury. *Chicago, etc., R. Co. v. Ward*, (Okla. 1918) 173 Pac. 212; *Dickinson v. Granbery*, (Okla. 1918) 174 Pac. 776.

Under the federal Employers' Liability Act the law of assumption of risk is that of the common law as it existed prior to the passage of said Act, except where the common carrier violates the provisions of any statute enacted for the safety of its employees; and where the evidence is undisputed and the injury not caused, as in this case, by any violation of such statutory provisions for the protection of employees, the question of assumption of risk is one of law. *Chicago, etc., R. Co. v. Hessenflow*, (Okla. 1918) 170 Pac. 1161.

**Distinction between contributory negligence and assumption of risk.**—In *Donahue v. Louisville, etc., R. Co.*, (1919) 183 Ky. 608, 210 S. W. 491, in holding that a mechanic knowingly using a defective chisel assumed the risk, it was said: "There is a distinction recognized by all the courts between assumed risk and contributory negligence, but this distinction fades when pursued to the point where the danger to the servant becomes open and obvious, for there he may in some cases be said to be guilty of contributory negligence if he proceeds with the work, or in other instances to have assumed the risks of

danger. The distinction, however, is important in cases tried under the federal Employers' Liability Act."

### 2. Knowledge as Affecting (p. 1356)

**Actual knowledge of obvious risk.**—To the same effect as the original annotation, see *Capan v. Delaware, etc., R. Co.*, (1917) 91 N. J. L. 164, 102 Atl. 661.

**Adequacy of safety station on bridge.**—Where a night watchman is killed on a bridge because a safety station designed to allow him to avoid passing trains is blocked by barrels, it must appear that he knew not only the general situation but that the extension of cars over the track made the place unsafe before he can, as a matter of law, be held to have assumed the risk. *Kreitzer v. Southern Pac. Co.*, (Cal. App. 1919) 177 Pac. 477.

**Remaining at work in presence of known danger.**—It is negligence for which the master may be held responsible if, knowing of any peril which is known to the servant also, he fails to remove it in accordance with assurances made by him to the servant that he will do so. A servant who refrains from abandoning certain work on the assurance of his master that he will remove a known peril cannot ordinarily be said to have assumed the risk of injury from such peril. *Kofoos v. Great Northern R. Co.*, (N. D. 1919) 170 N. W. 859.

**Must know not only condition but danger.**—The servant has a right to assume that his employer has furnished him a safe place to work and has provided him with safe appliances with which to work. He assumes all the normal risks incidental to his employment that are known to him, or which, by the exercise of ordinary diligence and prudence by a person of reasonable caution and intelligence, are ascertainable, and does not include those risks incidental or attributable to the negligence of the employer, until he becomes aware of such negligence and the risks arising therefrom, and in that event it must appear that he not only knew the negligence or defect arising therefrom, but that it endangered his safety, or else the danger must have been so obvious that a person of ordinary prudence in like circumstances would have realized it, all of which are questions of fact for the jury. *Wichita Falls, etc., R. Co. v. Davern*, (Okla. 1919) 177 Pac. 909.

### 3. Acts of Master or Superior as Affecting (p. 1357)

**Acting in obedience to orders of superior.**—A great deal of confusion will be found among the decided cases on the effect of an order by the master, or his agent having authority to direct a certain work, upon the defense of assumption of risk. The rule adopted in Indiana seems to be that if a servant is injured while obeying a direct command of the master he will not be held to have assumed the risk unless the danger is so great

and imminent that a reasonably prudent person would not have assumed it. The reasoning for this view is that by giving the direct command to perform the work the master takes upon himself the risks which otherwise would be assumed by the servant. The servant does not stand on the same footing with the master. His primary duty is obedience; and if when in the discharge of that duty he is damaged through the neglect of the master, it is proper that he should be recompensed. It is upon this inequality of positions that it is held that a prudent man has a right, within reasonable limits, to rely upon the ability and skill of the agent in whose charge the common master has placed him, and is not bound at his peril to set his own judgment above that of his superior. *Vandalia R. Co. v. Kendall*, (Ind. App. 1918) 119 N. E. 816.

In entering upon the work of a boiler maker's helper, plaintiff assumed the ordinary risks incident to the employment, but he did not assume the risk of injury arising from remaining in a tank for an unusual length of time, under the direction of his superior, if in so doing he acted with ordinary care under the circumstances. *Martinson v. Chicago, etc., R. Co.*, (1918) 102 Neb. 238, 166 N. W. 624.

#### 4. Negligence of Employer (p. 1359)

**Risks from negligence not assumed.**—A servant assumes all the ordinary risks which are incidental to his employment and that risk is an ordinary one which remains after the master has exercised reasonable care for the safety of his servant. *Louisville, etc., R. Co. v. Wright*, (Ala. 1918) 80 So. 93.

#### 5. Negligence of Fellow Servant (p. 1361)

**Rules stated.**—To the same effect as the original annotation see *Eskelsen v. Union Pac. R. Co.*, (1918) 102 Neb. 423, 167 N. W. 408; *Jones v. Norfolk Southern R. Co.*, (N. C. 1918) 97 S. E. 48; *Ewig v. Chicago, etc., R. Co.*, (1918) 167 Wis. 597, 167 N. W. 442, 169 N. W. 429.

**On same basis as negligence of employer.**—“In saving the defense of assumption of risk in cases other than those where the carrier's violation of a statute enacted for the safety of employees contributed to the injury or death, the federal Employers' Liability Act places a coemployee's negligence, where it is the ground of the action, in the same relation as the employer's own negligence would stand to the question whether a plaintiff is to be deemed to have assumed the risk.” *Louisville, etc., R. Co. v. Brown*, (Fla. 1919) 81 So. 156.

**As to the effect of the Act on the fellow servant rule** see the annotation under section 1 of this act.

#### III. PARTICULAR EMPLOYEES (p. 1362)

**Brakeman.**—A railroad brakeman does not assume the risk of being thrown off a car by the negligent act of the employer or his ser-

vants. *Erie R. Co. v. Linnekogel*, (C. C. A. 2d Cir. 1917) 248 Fed. 389, 160 C. C. A. 399.

A brakeman alighting from a moving train to throw a switch does not assume as a matter of law the risk of injury from a car standing on an adjacent track. *Mills v. Roberts*, (1918) 136 Ark. 433, 206 S. W. 751.

**Bridge painter.**—The state doctrine as to assumed risk is applicable to a bridge painter struck by a passing train while at work. *Texas, etc., R. Co. v. Gericke*, (Tex. Civ. App. 1919) 214 S. W. 668.

A fireman who, on the train's being started while he is in the station, climbs on top of a freight car and tries to make his way forward to his place in the cab assumes the risk of falling while so doing. *Briggs v. Union Pac. R. Co.*, (1918) 102 Kan. 441, 175 Pac. 105.

**Section hand.**—Whether a section hand assumed the risk of being struck by a passing train was held for the jury. *Stool v. Southern Pac. Co.*, (1918) 88 Ore. 350, 172 Pac. 101.

When a motor car is being driven by the foreman of a section hand crew at an excessive rate of speed, which causes it to leave the track with resulting injuries to a member of the crew, he will not be deemed to have assumed the risk incident to such excessive rate of speed by a failure to protest it, and a requested instruction to that effect was properly refused. *Wichita Falls, etc., R. Co. v. Davern*, (Okla. 1919) 177 Pac. 909.

A switchman in immediate charge of kicking cars onto a repair track, but under direction of a foreman on the ground, was held not to assume the risk of injury from cars standing on the track and unseen because of fog. *Cincinnati, etc., R. Co. v. McGuffey*, (C. C. A. 6th Cir. 1918) 252 Fed. 25, 164 C. C. A. 137.

In *Robertson v. St. Louis Merchant's Bridge Terminal R. Co.*, (Mo. App. 1919) 213 S. W. 873, it appeared that a yard switchman was injured while attempting to pass between a standing car and a moving car, because the standing car projected farther than he thought beyond the rails. It was held that he did not assume the risk but “at most” was guilty of contributory negligence.

A switchman having knowledge of the rough and uneven condition of a track assumes the risk of derailment of a switch engine thereby. *Kansas City, etc., R. Co. v. Roe*, (Okla. 1919) 180 Pac. 371.

#### IV. BURDEN OF PROOF (p. 1363)

**General rule.**—*Assumption of risk.*—To same effect as original annotation, see *Kreitzer v. Southern Pac. Co.*, (Cal. App. 1919) 177 Pac. 477.

#### V. QUESTIONS FOR COURT AND JURY (p. 1363)

**General rule.**—To the same effect as the original annotation, see *Pennsylvania Co. v. Stalker*, (Ind. App. 1918) 119 N. E. 163.

**Danger of obeying order.**—Whether a servant fully understood and appreciated the danger of obeying an order is ordinarily a question for the jury. *Vandalia R. Co. v. Kendall*, (Ind. App. 1918) 119 N. E. 816.

**Vol. VIII, p. 1364, sec. 5.** [First ed., 1909 Supp., p. 585.]

- II. Applicability of section generally.
- III. Settlement and release after injury.
- IV. Benefit or insurance contracts.

**II. APPLICABILITY OF SECTION GENERALLY**  
(p. 1365)

**Independent contractor agreeing to assume all liability.**—No evasion of this section results from the making of a contract by an interstate railroad carrier with an independent stevedoring corporation under which the work of handling the railroad company's freight from cars to boats and from boats to cars at its water front terminal is to be performed by such independent contractor, even though the latter expressly assumes all liability for injury to its employees while employed upon the premises of the railroad company. *Drago v. Cent. R. Co.*, (N. J. 1919) 106 Atl. 803.

**Contract with express messenger, exempting the express company from liability for personal injuries is void under this section.** *Taylor v. Wells Fargo & Co.*, (C. C. A. 5th Cir. 1918) 249 Fed. 109, 161 C. C. A. 161. The court said: "It was the purpose of the Congress to provide special protection to persons subject to the hazards incident to the operation of railroads. There could have been no reason for giving the protection to a railroad conductor, and refusing it to an express messenger. It will not be assumed that Congress intended to make a distinction in the absence of language that would so indicate. It will certainly not be assumed in the face of language which is clear and unambiguous. Those of the decisions which seem to sustain the right of a railroad company and an express company, between them, to contract away the right of a human being to protection against negligence, are entirely out of harmony with fundamental principles of right and the ordinary conceptions of law. No court ought at this time, in the face of the unequivocal language of the Congress, to make a ruling which would differentiate express company messengers, not alone from other persons engaged in the hazards of railroading, but from all other persons engaged in hazardous businesses. The Employers' Liability Act is proof that Congress was not unresponsive to the universal feeling that every business should carry its hazards. It will not be assumed that language, which is properly and logically comprehensive, is to be so construed as to exclude a class dependent on legislation even for protection against negligence."

**Actions not under federal Act.**—An employee can claim the benefit of this section though he is not suing under the federal Employers' Liability Act. *Taylor v. Wells Fargo & Co.*, (C. C. A. 5th Cir. 1918) 249 Fed. 109, 161 C. C. A. 161.

**III. SETTLEMENT AND RELEASE AFTER INJURY** (p. 1367)

**General rule.**—To the same effect as the original annotation see *Kusturin v. Chicago, etc., R. Co.*, (1919) 287 Ill. 306, 122 N. E. 512, wherein the court said: "It is also urged that defendant in error executed a release which is a bar to any further recovery. If defendant in error executes such release with knowledge of its meaning, such release will bar his recovery in an action at law. *Hartley v. Chicago, etc., R. Co.*, (1905) 214 Ill. 78, 73 N. E. 398; *Momence Stone Co. v. Turrell*, (1903) 205 Ill. 515, 68 N. E. 1078. The evidence shows that defendant in error was Croatian by birth; that he spoke and understood the English language very imperfectly, and could not read or write it; that when he had been in the hospital about fourteen weeks the claim agent of the plaintiff in error, who spoke English only, visited him in company with an interpreter employed by said claim agent, who spoke the Austrian language, of which the Croatian language was a dialect, or to which it was very similar. The plaintiff in error's claim agent secured the signature to an instrument releasing plaintiff in error from all liability both under the Workmen's Compensation Act (*Laws* 1913, p. 335) and the federal Employers' Liability Act for the sum of seventy dollars. The release and receipt for the said sum were in the English language. Defendant in error testified that he could not read the release, that they told him this was payment of half wages under the Compensation Law, that he worked under the compensation Law, elsewhere, and that he did not know that he was releasing his cause of action. The interpreter also testified that he told defendant in error that this paper was payment to him under the Compensation Act, and that it was offered as such payment for the fourteen weeks since the injury. Whether or not defendant in error, who could not talk or read English, signed this release with a knowledge of its meaning, was a question for the jury, and we cannot say that they were not justified in finding that he did not have such knowledge."

**Settlement with one joint tortfeasor.**—A settlement and satisfaction as against a railroad company operates as a release of a joint tortfeasor. *Middaugh v. Des Moines, etc., Storage Co.*, (Ia. 1918) 8 169 N. W. 395.

**IV. BENEFIT OR INSURANCE CONTRACTS**  
(p. 1368)

**Acceptance of benefits of relief department.** Congress did not intend that there should be both payment of benefits and a recovery of damages for the injury, at least in so far as



Payment for both was to be made by the same defendant. *Getkin v. Pennsylvania R. Co.*, (1917) 259 Pa. St. 150, 102 Atl. 506.

It is apparent from an examination of this section of the statute that it was aimed at all contracts and devices whereby any railroad company attempted to relieve itself from liability to its employees, and that its purpose was to render such provisions void. The language is that such contract, rule, regulation, or device "shall to that extent be void." This section clearly contemplates that a relief association of railroad employees, organized and operated under such a plan as is disclosed by the answer to this case, shall be valid, except as to provisions releasing the company from liability. This is indicated by the provision to the effect that in any action brought under the provisions of the act the common carrier sued may set off therein any sum it has contributed or paid to any insurance, relief, benefit, or indemnity that may have been paid to the injured employee or to the person entitled thereto on account of the injury or death for which said action was brought. *Pittsburgh, etc., R. Co. v. Miller*, (Ind. 1918) 120 N. E. 706 (on rehearing; original opinion 119 N. E. 801).

State laws in any way conflicting with this section are superseded. *Vandalia R. Co. v. Sanders*, (Ind. 1918), 121 N. E. 275.

A state statute making void relief association agreements between railroad companies and employees whereby the employees are required to surrender or waive all right to damages against such companies for personal injuries, is superseded by this section. *Pittsburgh, etc., R. Co. v. Miller*, (Ind. 1918) 120 N. E. 706 (on rehearing; original opinion 119 N. E. 801). The court said: "This court has recently decided that section 5308, Burns 1914, is superseded by the section of the federal act quoted. *Baltimore, etc., R. Co. v. Miller*, (1915) 183 Ind. 323, 107 N. E. 545. There can be no doubt that Congress was acting within the scope of its granted powers in passing the section quoted, for it has been frequently decided that Congress has power to regulate contracts between shippers and the carriers of interstate commerce, and also to fix the number of hours that certain employees of such carriers may be required to work."

**Vol. VIII, p. 1369, sec. 6. [First ed., 1912 Supp., p. 335.]**

- I. Limitation of action.
- II. Jurisdiction and venue.
- III. Removal to federal court.

**I. LIMITATION OF ACTION (p. 1370)**

The cause of action for death does not accrue until the appointment of a personal representative for the deceased. *Bird v. Ft. Worth, etc., R. Co.*, (Tex. 1918) 207 S. W. 518.

A cause of action for death accrues at the time of the death of the employee and not at the time the fatal injury was received. *Oliver v. Seaboard Air Line Ry.*, (S. D. Ga. 1918) 250 Fed. 652, wherein it was said: "I am aware of the conflicting English decisions under Lord Campbell's Act, and that some of them hold that the cause of action is the defendant's negligence, and that, if the deceased had in his lifetime accepted a sum of money in full satisfaction and discharge of his claim against the defendant, this would bar the right of the personal representative to recover for the homicide, on the theory that the death of the injured person did not create a fresh cause of action. The fallacy in this reasoning, as applied to the Employers' Liability Act, is the assumption that the act did not authorize two actions—one by the injured employee commenced in his lifetime, and the other by his personal representative for the benefit of his family, after his death. See, in this connection, *Kansas City So. Ry. Co. v. Leslie*, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915B, 834; *Fogarty v. Northern Pac. Ry. Co.*, 85 Wash. 90, 147 Pac. 652, L. R. A. 1916C 803. As remarked by Mr. Justice McReynolds in *Garrett, Adm'r, v. L. & N. R. R. Co.*, 235 U. S. at page 312, 35 Sup. Ct. at page 33, 59 L. ed. 242: 'It is now definitely settled that the act declared two distinct and independent liabilities resting upon the common foundation of a wrongful injury: (1) Liability to the injured employee for which he alone can recover; and (2) in case of death, liability to his personal representative 'for the benefit of the surviving widow or husband and children,' and, if none, then of the 'parents, which extends only to the pecuniary loss and damage resulting to them by reason of the death.' It would seem to follow that, as the liability to the plaintiff in this case did not arise until his intestate's death, the cause of action accrued at that time, and, as the suit is brought within two years of the employee's death, it is not barred by the statute."

In *Giersch v. Atchison, etc., R. Co.*, (Kan. 1918) 171 Pac. 591, the facts were as follows: The widow brought her action under the state statute and recovered a judgment which was reversed. When reached the second time for trial, leave was given to amend by interlineation by increasing the amount of recovery prayed for and by the allegation of the widow's appointment as administratrix and by striking out the former allegation that no administration had been had nor any personal representative appointed. The plaintiff's intestate was killed more than two years before this time while engaged in interstate commerce. It was held that the statute of limitations had run, and that the plaintiff as administratrix could not recover.

**Infancy.**—Infancy is no excuse for failing to bring suit within two years after the

injury was sustained in a state where that fact is not an obstacle to the beginning of an action based on a legal injury. *Gillette v. Delaware, etc., R. Co.*, (1917) 91 N. J. L. 220, 102 Atl. 673.

**Effect of amendment.**—An amendment to the plaintiff's pleading relates back to the filing of that pleading, and the fact that the amended pleading was filed more than two years after the accident is immaterial provided the original pleading was filed within two years. *Eskelsen v. Union Pac. R. Co.*, (1918) 102 Neb. 423, 167 N. W. 408, 168 N. W. 366.

Though the complaint failed to allege that the plaintiff was engaged in interstate commerce if the defect was cured by adversary pleadings the action is not barred though a trial amendment correcting the complaint was not made within two years from the accident. *King v. Norfolk, etc., R. Co.*, (N. C. 1918) 97 S. E. 29.

**Amendment made after two years from time of accrual of cause of action.**—Where a petition is filed and service of summons made within two years from the date of injury the cause of action is not barred by the statute of limitations, although more than two years has elapsed between the date of the injury and the date of an amendment to the petition correcting the date of injury which was erroneously alleged in the petition as filed. *Martinson v. Chicago, etc., R. Co.*, (1918) 102 Neb. 238, 166 N. W. 624.

**Effect of state statute.**—A state statute allowing a new action to be brought within one year after a nonsuit has no application to an action under the Act. *Belch v. Seaboard Air Line R. Co.*, (1918) 176 N. C. 22, 96 S. E. 640.

## II. JURISDICTION AND VENUE (p. 1372)

**Enjoining suit in another state.**—An administrator appointed in the state where the intestate lived and where the accident causing his death occurred may be enjoined from suing in a distant state for the purpose of forcing a settlement by subjecting the defendant to unnecessary expense. *Reed v. Illinois Cent. R. Co.*, (1918) 182 Ky. 455, 206 S. W. 794.

The courts of any state where the defendant railroad does business have jurisdiction. *Reed v. Illinois Cent. R. Co.*, (1918) 182 Ky. 455, 206 S. W. 794.

## III. REMOVAL TO FEDERAL COURT (p. 1374)

**Pleadings as determining removability of cause.**—Where there is diverse citizenship and there is a question whether the cause of action is under a state law or under the federal Employers' Liability Act the determination of this question depends upon the state of the pleadings and the record at the time of the application for removal. *Northern Trust Co. v. Grand Trunk Western R. Co.*, (1918) 282 Ill. 565, 118 N. E. 986.

A complaint is sufficient to prevent removal which alleges that the plaintiff's in-

testate was a car repairer and was killed while at work on a car which was used in commerce of both sorts and was brought to the shop for repairs with a view to its being returned and continued in such interstate and intrastate commerce. *Cook v. Southern R. Co.*, (1918) 109 S. C. 377, 96 S. E. 148.

**Order of removal not conclusive.**—In *Deuel v. Chicago, etc., R. Co.*, (S. D. Cal. 1918) 253 Fed. 857, the court in remanding an action for injuries received by an employee while engaged in interstate commerce said: "Defendant makes the point that since, under the act of Congress, the state courts and the federal courts have concurrent jurisdiction in actions arising under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65), the action of a state court in removing a case to a federal court on the ground of diversity of citizenship, presumptively thereby determining that the action is not one prosecuted or prosecutable under the federal act, is conclusive, and that this court may not, in any wise, sit in appellate judgment, so to speak, upon the state court's conclusions. No authority is cited in support of this contention, and apparently it is in direct opposition to the uniform practice obtaining in such proceedings. I am persuaded it is the duty of the federal courts to remand cases arising under this particular statute no less than in other instances, where they have been erroneously removed. See *Kansas City Southern Railway v. Leslie*, 238 U. S. 599, and the cases cited therein with approval, appearing on page 602 et seq., 35 Sup. Ct. 844, 59 L. ed. 1478."

**Vol. VIII, p. 1383, sec. 1.** [First ed., 1909 Supp., p. 581.]

**Carriers and employees affected.**—See annotation infra under section 2 of this act.

**Vol. VIII, p. 1387, sec. 2.** [First ed., 1909 Supp., p. 582.]

III. "Common carriers, officers and agents."

V. Employees within Act.

VI. "On duty."

VII. Day and night offices.

III. "COMMON CARRIERS, OFFICERS AND AGENTS" (p. 1389)

**Terminal company as common carrier.**—See infra, subdivision V of this annotation.

V. EMPLOYEES WITHIN ACT (p. 1391)

A section hand employed in sweeping snow from the switches connected with the railroad yards is not within the Act. *Jones v. Louisville, etc., R. Co.*, (Ky. 1919) 209 S. W. 350.

**Joint employee of two companies.**—In *U. S. v. Denver, etc., R. Co.*, (C. C. A. 8th Cir. 1918) 249 Fed. 464, 161 C. C. A. 422, the court stated the facts as follows: "The

operator was a joint employé of the defendant and the Santa Fé Company. For the services performed for the defendant the agent received his instructions directly from its chief dispatcher and other officials, and for services performed for the Santa Fé he received his instruction directly from the chief dispatcher and other officials of that company. The regular hours of his service were from 7:15 a. m. to 7:15 p. m. On June 17, 1915, he went on duty at his regular time at 7:15 a. m., and remained on duty until 8:45 p. m. Knowing that a train on the Santa Fé line was due to pass Portland about 7 o'clock p. m., he inquired of the train dispatcher of that company about handling said train, and was advised by the train dispatcher that the train might be expected through Portland at any time after 7 o'clock, and that he should attend to it on its arrival, giving it proper clearance through the interlocking plant. In response to this order he remained on duty until the train arrived at 8:45 p. m. and performed the desired service. The officers, agents and representatives of defendant, except only the operator himself, were not aware of the instructions of the train dispatcher of the Santa Fé, just referred to, nor of the operator's intention to remain on duty. After 7:15 p. m. the operator performed no service for defendant, but his services from 7:15 to 8:45 were wholly for the Santa Fé Company in the clearance of said train. For the overtime involved in this service defendant paid the operator, and was repaid by the Santa Fé Company. The officers and agents of the defendant, who allowed and paid the operator's claim for overtime, had no knowledge that the overtime claimed by him involved a violation of the Hours of Service Act." Holding that the defendant was guilty of a violation of the Act it was said: "The agent was its agent, was employed and paid by it, and was at the post of duty to which that company assigned him. It could not escape liability by showing that the Santa Fé Company was the more primary cause of the excess service. Its duty under the statute still remained imperative. It was bound to see to it that the agent did not remain on duty for an excess period. If it failed to discharge that duty, it 'permitted' the employé to perform the excess service, and was liable to the penalty fixed by the statute."

**Employees of terminal company.**—A navigation corporation engaged in conducting the usual terminal operations for a number of interstate railways, including the transportation between its docks and warehouses and points on any of the said railways of all property that is offered, is a "common carrier," although all the services rendered are performed under contracts with such railway companies as agent for them, and not on its own account, and all the freight transported is contained only in cars furnished by the railway companies with which it has con-

tracts. *U. S. v. Brooklyn Eastern Dist. Terminal*, (1919) 249 U. S. 296, (39 S. Ct. 283, 63 U. S. (L. ed.) —, reversing (C. C. A. 2d Cir. 1917) 239 Fed. 287, 152 C. C. A. 275, wherein the court said: "The Hours of Service Act declares (in the first section) that, 'The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease.' Hence, neither the character of the Terminal's railroad nor its independent ownership excludes it from the scope of the act. But the Terminal contends that it is not subject to the provisions of the statute, since it is not incorporated as a common carrier and does not hold itself out as such; does not file tariffs; and does not undertake to transport property for all who may apply to have their goods transported; but merely transports as agent such freight as is delivered to it by or for those carriers, and those only, with whom it has elected to make special contracts; and that, under these contracts it performs for the railroads, and not for the public, a part of the whole carriage which they, as common carriers, have undertaken with the shipper to perform. We need not undertake a definition of the term 'common carrier,' for all purposes. Nor are we concerned with questions of corporate power or of duties to shippers, which frequently compel nice distinctions between public and private carriers. We have merely to determine whether Congress, in declaring the Hours of Service Act applicable 'to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad,' made its prohibitions applicable to the Terminal and its employees engaged in the operations here involved. The answer to that question does not depend upon whether its charter declares it to be a common carrier, nor upon whether the state of incorporation considers it such; but upon what it does. *Terminal Taxicab Co. v. Kutz*, (1916) 241 U. S. 252, 254, [36 S. Ct. 583, 60 U. S. (L. ed.) 984, 986, Ann. Cas. 1916D 765]. The relation of the Terminal to the several railroads is substantially the same as that of the terminal considered in *U. S. v. Baltimore, etc., R. Co.*, (1912) 225 U. S. 306, [32 S. Ct. 817, 56 U. S. (L. ed.) 1100], (1913) 231 U. S. 274, 288, [34 S. Ct. 75, 58 U. S. (L. ed.) 218, 226]. The transportation performed by the railroads begins and ends at the Terminal. Its docks and warehouses are public freight stations of the railroads. These with its car floats, even if not under common ownership or management, are used as an integral part of each railroad line, like the stockyards in *U. S. v. Union Stockyard, etc., Co.*, (1912) 226 U. S. 286, [33 S. Ct. 83, 57 U. S. (L. ed.) 226], and the wharfage facilities in *Southern Pac. Terminal Co. v. Interstate Commerce*

Commission, (1911) 219 U. S. 498, [31 S. Ct. 279, 55 U. S. (L. ed.) 310]. They are clearly unlike private plant facilities. Compare Tap Line Cases, (1914) 234 U. S. 1, 25 [34 S. Ct. 741, 58 U. S. (L. ed.) 1185]. The services rendered by the Terminal are public in their nature, and of a kind ordinarily performed by a common carrier. If these terminal operations were conducted directly by any, or jointly by all, of the ten railroad companies with which the Terminal has contracts, the operations would clearly be within the scope of the Hours of Service Law. The evils sought to be remedied exist equally, whether the terminal operations are conducted by the railroad companies themselves or by the Terminal as their agent; and whether the Terminal acts only as such agent for railroads or undertakes in addition to transport on its own account goods for shippers."

#### VI. ON DUTY (p. 1396)

**Period allowed for meals.**—In *Chicago, etc., R. Co. v. U. S.*, (C. C. A. 8th Cir. 1918) 253 Fed. 555, 165 C. C. A. 225, the meal hour of a telegraph operator was held not to break the continuity of his service, the court stating the facts and its conclusions as follows: "The usual daily service of the operator was from 2 p. m. to 11 p. m., with an hour out for rest and his evening meal. The hour, generally from 6 o'clock to 7, was not definitely fixed, but depended upon the requirements of the work. The understanding between him and the company, and the practice, was that, though at some time he should have his hour off, it was alterable and adjustable to the needs of the office; also that, while off duty during the hour, he was subject to recall by the company whenever its business required. It is clear that the time allowed was so uncertain and restrained that it was not a period for refreshment, rest, and recreation within the meaning of the law. It was not his own, to occupy as he deemed best. He was at his employer's beck at any time, and might even be called to the office from the table. He was not free to go from his home beyond reach of a summons to active duty, but had to hold himself within call and in readiness to respond at any moment. Instead of that sense of freedom essential to mental and physical relaxation, a tenseness was imposed as by an alarm clock sounding peremptorily, but with uncontrolled irregularity. The hour of rest and refreshment was dominated by the business requirements of the company. That on the day in question he was not called before it expired is immaterial. The arrangement between them and the practice determined their relation, and whether the operator should be regarded as free or on continuing duty."

**Periods of rest.**—In *U. S. v. Minneapolis, etc., R. Co.*, (C. C. A. 8th Cir. 1918) 250 Fed. 382, 162 C. C. A. 452, it appeared that

an operator in an office open only during the daytime was on duty in the aggregate during the twenty-four-hour period eleven hours and twenty-four minutes, and at liberty twelve hours and thirty-six minutes. The periods of relief or rest constituting these twelve hours and thirty-six minutes were respectively three hours and seven minutes, two hours and twenty-four minutes, fifty minutes for dinner and six hours and fifteen minutes. The court said: "Counsel for the government suggest that, if the first two periods are thought to be too short or too inopportune for rest and relief, the operator was on duty more than 13 hours. But these two periods came in the night, when the operator was in the station where he lived and slept, and it was his practice to pass them in bed. The court below found these periods to be times of substantial rest, and refused to count them as periods of labor or duty, and any other conclusion would be evidently unjust and irrational."

#### VII. DAY AND NIGHT OFFICES (p. 1400)

**Two offices operated together.**—In *Grand Rapids, etc., R. Co. v. U. S.* (C. C. A. 6th Cir. 1918) 249 Fed. 646, the following facts appeared:

Prior to the Hours of Service Act, and until the K. S. tower was constructed and put in operation, February 25, 1906, the company used the Elmira office continuously through one agent operator from 7 a. m. to 7 p. m., and another operator from 7 p. m. to 7 a. m. From the opening of K. S. tower until May 25, 1914, when it burned down, the Elmira office was used only as a day office and by one agent operator from 7 a. m. to 7 p. m. The K. S. office was used continuously by two operators, one during the day and the other during the night, until the Hours of Service Act went into effect, March 4, 1908; it was then used continuously by three operators, each working eight hours in the twenty-four; this practice was continued until May 24, 1914, though by overlapping, the hours of each operator were increased to nine. By reason of the fire the K. S. office was temporarily abolished, and during this period—that is, from May 25, 1914, to April 21, 1915—the Elmira office was again used continuously though by three operators, each working nine hours. On April 21, 1915, day service alone was resumed at the Elmira office through an agent operator from 7 a. m. to 7:30 p. m.; and this was continued until and including the dates now in question, March 13 to 17, inclusive, 1916. When the day service was so renewed at the Elmira office, the company, through the use of a box car, re-established a telegraph and telephone office at the site of the K. S. tower; and from that time on, and including the dates in issue herein, this box car office was used as follows: One operator served regularly from 7 p. m. to 7:30 a. m., though this was not all the serv-

ice rendered there. The operator at the Elmira office, in addition to his duties there as a station agent, was compelled to keep in touch with the box car office daily, by going there himself to look after way-bills, and by giving orders over the telephone from the Elmira office to conductors and engineers, as well as receiving necessary information from them, at the box car office; the conductors and engineers, as well as the agent operator at the Elmira office, having been supplied with pass-keys to enter and use the box car office. When necessary, the train employees, such as conductors, would go from the box car office to the Elmira office to communicate personally with the agent operator in regard to orders concerning the movements of cars or trains. It was held that the box car and the station were to be regarded as a single office and that the Act was violated.

**Office operated only in daytime.—***Construction of Act.*—"Little reflection is required to convince that this statute may not be literally construed and enforced. It cannot be indispensable to the existence of a night and day office that it shall be continuously operated every hour of the night and every hour of the day, nor can it be indispensable to the existence of the daytime office that it shall never be operated in the nighttime. An enforcement of the statute as it literally reads would render its terms contradictory, would cause the daytime and the night and day time to overlap each other, and would make the enactment absurd and its enforcement impracticable. It must have a reasonable, sensible construction, one that will advance the remedy it provides, repress the wrong at which it was leveled, and effect the intention of the Congress that enacted it. To this end the facts of each case as it arises must be laid alongside the statute, and the office to which they relate must be assigned to the class to which, in the light of such an interpretation of the law, it belongs." *U. S. v. Minneapolis, etc., R. Co.*, (C. C. A. 8th Cir. 1910) 250 Fed. 382, 162 C. C. A. 452, holding that "An office in which the telegraph operator's regular hours are from 7 a. m. to 6 p. m. daily, with an intermission of an hour at noon for dinner, and in which he is required to serve ordinarily from 30 to 40 minutes at 12:35 a. m. and from 30 to 40 minutes at 4:20 a. m., in order to meet trains passing through his station at those times, but in which the aggregate of his time on duty does not exceed 13 hours in any 24-hour period, is an office operated only during the daytime" within the meaning of this section.

**Vol. VIII, p. 1406, sec. 3.** [First ed., 1918 Supp., p. 756.]

**V. EXCUSES FOR EXCESS OF SERVICE (p. 1408)**

**Proviso as relieving carrier from exercise of diligence.—**It is not error to exclude tes-

timony offered to show what changes in method, practices and properties had been made by the railroad company to enable it, in the exercise of reasonable care, prudence and foresight, to meet the new conditions created by the statute and to secure compliance therewith. *Atchison, etc., R. Co. v. U. S.*, (C. C. A. 9th Cir. 1918) 251 Fed. 261, 163 C. C. A. 417, wherein the court said: "This testimony was offered on the theory that a general exercise of diligence on the part of the defendant to avoid future violations of the statute might be shown in evidence as bearing upon the question whether it had or had not violated the law in the particular instances in which violation was charged. We think the evidence was properly excluded as foreign to the issues. Proof of reasonable care and diligence to make provision against violations of the Hours of Service Law in the operation of a railroad is not proof, and does not tend to prove, that the law has not been violated. The law imposes on carriers, not an obligation to exercise care and diligence, but a positive and absolute duty to obey its command."

**Due diligence to avoid keeping a train crew in service more than sixteen hours in case of delay by accident involves more than merely providing a relief crew at the first terminal point reached.** If a relief crew could have been sent out from a terminal point to the delayed train the failure to do so renders the carrier liable. *Gulf, etc., R. Co. v. U. S.*, (C. C. A. 5th Cir. 1919) 255 Fed. 753.

**Delay equal to excess service.—**It is not a defense to show that an unavoidable accident caused delays for a period of time sufficient to equal the excess service, but the defendant must show what use was made of the remainder of the time, or that the excess service was the necessary result of the accidents which caused the delays. *Atchison, etc., R. Co. v. U. S.*, (C. C. A. 9th Cir. 1918) 251 Fed. 261, 163 C. C. A. 417, wherein the court said: "The evidence is that the first crew were on duty six hours and twenty-five minutes beyond the regular running time, whereas the delay caused by what is claimed to have been unavoidable accident was but two hours and twenty-five minutes; that the second and third crews were on duty five hours beyond the regular running time, whereas the delays attributable to the accidents were in each case but one hour, leaving in each case four hours unaccounted for. No attempt was made to explain the delays in the running of the trains as resulting from other causes. The burden was upon the defendant to show that the excess service was the necessary result of the causes which are claimed to have justified it, and that the defendant exercised the requisite diligence to prevent it."

## 1918 Supp., p. 754, sec. 1. [Eight-hour day, etc.]

**Scope of Act.**—This Act applies only to trainmen who work "on the engines and in the cars" and not to a switch tender in railroad yards. *Coke v. Illinois Cent. R. Co.*, (W. D. Tenn. 1919) 255 Fed. 190. Discussing the scope of the Act, the court said: "Clearly the Adamson Law does not apply to all employes of railroads engaged in interstate commerce, nor does it apply to all those who are actually engaged in doing some of the things necessary for the operation of trains. It would seem, therefore, reasonable and proper to follow the line of cleavage which the Congress intended to establish, as gathered from the contemporaneous history of events attending the consideration and passage of the law. When the act is thus considered in the light of the utterances of the President, the Congressional Record, the hearings before the committee on interstate commerce, and the report of the wage commission, it appears that Congress was dealing with the four brotherhoods only, and intended the legislation to apply only to those doing the work performed by the brotherhoods; that is to say, to trainmen who worked 'on the engines and in the cars.'"

**Preparatory service.**—Thirty minutes of "preparatory service" required of an employee before each run, is to be included in computing overtime. *Nelson v. St. Joseph, etc., R. Co.*, (Mo. 1918) 205 S. W. 870.

**Contract for monthly compensation.**—The Act is applicable to a railroad employee whose contract calls for a stipulated compensation per month and contains no provision as to hours of service or overtime. *Nelson v. St. Joseph, etc., R. Co.*, (Mo. 1918) 205 S. W. 870.

**Possibility of calculating daily wage.**—Under a contract at a monthly rate for a specified day's run to be made four days in each five, it is possible to calculate the daily wage by dividing the monthly rate by the number of trips made, and therefore it is possible to apply the overtime provisions of this Act to the contract. *Nelson v. St. Joseph, etc., R. Co.*, (Mo. 1918) 250 S. W. 870.

## 1918 Supp., p. 757, sec. 1.

### I. Validity.

1. Act of Congress.
2. Presidential proclamations.
3. Orders of director general of railroads.

### II. Construction.

#### III. Extent of federal control.

#### IV. Right of action by railroad.

#### V. Right of action against railroad.

#### VI. Jurisdiction and venue of action by or against railroad.

#### VII. Service of process.

#### VIII. Removal of cause to federal court.

#### IX. Execution of process against railroad.

### I. VALIDITY

#### 1. Act of Congress

**Generally.**—That Congress had authority in time of war to enact the legislation placing certain public utilities under federal control is now generally conceded, and the constitutionality of the acts cannot be seriously questioned. *Northern P. R. Co. v. North Dakota*, (1919) 250 U. S. 135, 63 L. ed. 897, P. U. R. 1919D, 705, 39 Sup. Ct. Rep. 505; *Nueces Valley Town-Site Co. v. McAdoo*, (1919) 257 Fed. 143; *Dahn v. McAdoo* (1919) 256 Fed. 549; *Wainwright v. Pennsylvania R. Co.*, (1918) 253 Fed. 459; *Vaughn v. State*, (Ala. 1919) 81 So. 417; *Missouri Pac. R. Co. v. Ault*, (Ark. 1919) 216 S. W. 3; *West v. New York, N. H. & H. R. Co.*, (Mass. 1919) 123 N. E. 621; *Lavalle v. Northern P. R. Co.*, (Minn. 1919) 172 N. W. 918.

Assuming that this Act vests power in the President to make regulations concerning the venue of actions in federal courts against railroads while under federal control, it is constitutional as being within the war powers of Congress. *Wainwright v. Pennsylvania R. Co.*, (E. D. Mo. 1918) 253 Fed. 459. The court said: "In *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316, 421 (4 L. ed. 579), Chief Justice Marshall delivering the opinion of the court, it was held as a proper canon of the interpretation of the powers of Congress under the national Constitution, among others: 'Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.' This rule of construction has never been doubted or questioned by any subsequent decision, but has been uniformly followed, whenever it has been before the courts, and must therefore be accepted as elementary in the construction of the national Constitution. That there is nothing in the Constitution prohibiting Congress from determining the venue in civil actions is beyond question. Article 1, § 8, cl. 11, of the Constitution, grants Congress the power to declare war, and clause 12 of that section empowers it to raise and support armies. That, by virtue of these provisions of the Constitution, Congress may use all means which are, in its opinion, appropriate to that end and not prohibited by some provision of the Constitution, has, under the rule established in *McCulloch v. Maryland*, been settled in *Miller v. United States*, 78 U. S. (11 Wall.) 268, 20 L. Ed. 135, and *Stewart v. Kahn*, 78 U. S. (11 Wall.) 493, 506, 507, 20 L. Ed. 176, reaffirmed in *Mayfield v. Richards*, 115 U. S. 137, 5 Sup. Ct. 1187, 29 L. Ed. 334. In *Stewart v. Kahn* it was held:

"The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by

the Constitution. In the latter case the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.

"The same principle was recognized in the *Legal Tender Cases*, 79 U. S. (12 Wall.) 457, 539, (20 L. Ed. 286), where it was held:

"Before we can hold the legal tender acts unconstitutional, we must be convinced they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the government, not appropriate in any degree (for we are not judges of the degree of appropriateness), or we must hold that they were prohibited. This brings us to the inquiry whether they were, when enacted, appropriate instrumentalities for carrying into effect or executing any of the known powers of Congress, or of any department of the government. Plainly to this inquiry, a consideration of the time when they were enacted, and of the circumstances in which the government then stood, is important. It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times."

"See, also, the address of former Justice Hughes on the War Powers under the Constitution, 42 American Bar Association, 232.

"Whether the exigencies existed when Congress enacted this statute was for that body to determine, and cannot be questioned by the courts, if there is any substantial ground therefor. *McCulloch v. Maryland*, supra; *Lottery Cases*, 188 U. S. 321, 355, 23 Sup. Ct. 321, 47 L. Ed. 492; *McDermott v. Wisconsin*, 228 U. S. 115, 128, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A, 39. That there was substantial ground for the enactment of the statute requires no argument. The conditions so graphically described in the *Legal Tender Cases* (79 U. S. [12 Wall.] 540, 20 L. Ed. 286) prevail now, and it will conduce to brevity to refer to what was there said, without quoting it in this opinion.

"That the act was enacted under the war power is not only apparent from its context, but it is expressly declared in section 16 of the act 'to be emergency legislation, enacted to meet conditions growing out of war,' and section 14 provides that the federal control of railroads shall continue not exceeding one year and nine months after the ratification of the treaty of peace."

**Validity denied.**—In one case, however, the authority of Congress to pass the Act of March 21, 1918, has been challenged, and it was held unconstitutional in so far as it pertains to the maintenance of actions and the recovery of judgments against carriers for damages sustained by employees and others while the railroad is being operated by and

under the direction of the federal authorities. *Schumacher v. Pennsylvania R. Co.*, (1919) 106 Misc. 564, 175 N. Y. S. 84.

## 2. Presidential Proclamations

**Proclamations of December 26, 1917.**—The authority of the President, in his proclamation of December 26, 1917, taking possession and control of certain systems of transportation by virtue of the Act of Congress approved August 29, 1916 (see vol. 9, p. 1095), to appoint the Secretary of the Treasury as Director General of Railroads, is seriously questioned in *Muir v. Louisville & N. R. Co.*, (1918) 247 Fed. 888.

However, the subsequent Act of Congress of March 21, 1918, apparently confirms the authority of the President, and, in effect, ratifies his act in the appointment of the Director General of Railroads. This construction is found in *Rhodes v. Tatum*, (Tex. 1918) 206 S. W. 114, where the decision in *Muir v. Louisville & N. R. Co.*, (Fed.) supra, is reviewed. In the former case it is said: "It was doubtless this criticism of the act which induced Congress to pass the law of March 21, 1918, and we think this act cures the defects in the former act discussed by Judge Evans. One purpose of the Act of August 29, 1916, and of the Act of March 21, 1918, was to place all transportation companies under the control of the national government to facilitate the handling of troops, equipment, etc., necessary to a successful prosecution of the war. It is provided by section 8 of the latter act that 'the President may execute any of the powers herein and heretofore granted him with relation to federal control through such agencies as he may determine, and may fix the reasonable compensation for the performance of services in connection therewith,' etc. This section, in effect, approves the appointment of a Director General, and approves the acts of such officer and his subordinates done in the execution of the powers granted the President, and under its provisions we must accept the Director General and his department as one of the agencies selected by the President to aid him in the execution of the powers granted by the acts mentioned."

To the same effect see *Dahn v. McAdoo* (N. D. Ia. 1919) 256 Fed. 549.

## 3. Orders of Director General of Railroads

**General Orders 18 and 18A.**—General orders 18 and 18A of the Director General of Railroads are valid. *Wainwright v. Pennsylvania R. Co.*, (1918) 253 Fed. 459; *Johnson v. McAdoo*, (E. D. La. 1919) 257 Fed. 757; *Russ v. New York*, (1919) 179 N. Y. S. 310; *Rhodes v. Tatum*, (Tex. 1918) 206 S. W. 114.

**General Order No. 26** is valid. *Rhodes v. Tatum*, (Tex. 1918) 206 S. W. 114.

**Continuance under General Order No. 26** of the Director General of Railroads rests in the discretion of the court. *Illinois Cent. R.*

Co. v. Ryan, (Tex. Civ. App. 1919) 214 S. W. 642 (holding the refusal of a third continuance not to be an abuse of discretion). See to the same effect *Cocker v. New York, etc., R. Co.*, (S. D. N. Y. 1918) 253 Fed. 676; *Harnick v. Pennsylvania R. Co.*, (S. D. N. Y. 1918) 254 Fed. 748.

**General orders invalid.**—General orders 18, 18A and 26 are invalid. *Friesen v. Chicago, etc., R. Co.*, (D. C. Neb. 1918) 254 Fed. 875; *Haubert v. Baltimore, etc., R. Co.*, (N. D. Ohio 1919) 259 Fed. 361; *Ralyo v. Northern Pac. R. Co.*, (Minn. 1919) 175 N. W. 687; *El Paso, etc., R. Co. v. Lonick*, (Tex. 1919) 210 S. W. 283; *El Paso, etc., R. Co. v. Havens*, (Tex. 1919) 216 S. W. 444; *Illinois Central R. Co. v. Ryan*, (Tex. 1919) 214 S. W. 642; *Frank v. Chicago, etc., R. Co.*, (Wis. 1919) 173 N. E. 701.

In *Benjamin Moore & Co. v. Atchison, etc., R. Co.*, (N. Y. 1919) 106 Misc. 58, 174 N. Y. S. 60, it was held that General Orders 18 and 18A must be construed to be wholly perspective in their operation, and if construed so as to cut off or extinguish a right of action already existing they were beyond the power of the President and his agents to make. To same effect see *West v. New York, etc., R. Co.*, (Mass. 1919) 123 N. E. 621.

In *Friesen v. Chicago, etc., R. Co.*, (D. C. Neb. 1919) 254 Fed. 875, it was held that orders of the Director General providing that suits against carriers, while under federal control, should be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose, did not have the effect of limiting the plaintiff's right of action, and that when authorized by a state statute he might bring an action against a railroad on a cause of action, which did not arise out of a violation of its duties as a common carrier, in a district other than that in which he resided when it accrued. Construing this section the court said: "The plain meaning of the words used in this section is that the laws then existing governing the relationship of the railways as common carriers were to remain in effect except when they were inconsistent with the terms of that Act of Congress or of any other act applicable to federal control or with any order of the President. Orders of the President relating to the carriers' duties and liabilities, other than as common carriers, were not authorized by this portion of section ten. The authorization of the bringing of an action at law as then provided by law, against the railway company upon a cause of action, not arising against it, as a common carrier, was therefore not subject to an order of the President limiting the districts in which such an action could be commenced, because of anything contained in this section of the Act of Congress. Authority for the orders in question, as applied to an action of this kind, is sought in the provisions of section 9. . . .

"It may be conceded that the President would have been authorized to make these orders under the broad grant of power in the Act of August 29, 1916, but by the terms of section 9 this grant thereafter remains in force 'except as expressly modified and restricted in this act,' and the President is granted further powers 'necessary or appropriate to give effect to any of the powers herein and heretofore conferred.' These words are a restriction of the powers previously vested in the President, so that he may not take action contrary to the provisions of this Act of Congress. It was manifestly not the purpose of Congress in the elaborate provisions of this act to give authority by which the President might abrogate any or all of it. The provisions for financial management of the roads while under federal control and for the reimbursement of the owners; the right of the Interstate Commerce Commission, under the terms of section 10, to hear complaints of the justness of an order of the President establishing or changing rates, regulations, and practices of the carriers; the creation of a criminal offense, by the terms of section 11, for violation of the act or interfering with the possession or use of the property of the carrier; the declaration in section 12 that moneys and other property derived from the operation of the carriers during federal control are the property of the United States; and the declaration in section 14 that the period of federal control shall not extend beyond 21 months after the proclamation of the President of the exchange of ratifications of the treaty of peace—are illustrations of powers, liabilities, and limitations that were not subject to annulment by an executive order. The general grant of power in section 9 is to give effect to the powers 'herein and heretofore granted,' and not to the powers herein or heretofore granted, and the prior act remains in force 'except as expressly modified and restricted by this act.'"

**General Order No. 50 of the Director General of Railroads is valid.** *Dahn v. Union Pacific R. Co.*, (N. D. Ia. 1919) 256 Fed. 549; *Rutherford v. Union Pacific R. Co.*, (D. C. Neb. 1919) 254 Fed. 880; *Mordis v. Hines*, (W. D. Ark. 1919) 258 Fed. 945; *Haubert v. Baltimore, etc., R. Co.*, (N. D. Ohio 1919) 259 Fed. 361; *Nash v. Southern Pac. R. Co.*, (N. D. Cal. 1919) 260 Fed. 280; *Owens v. Hines*, (N. C. 1919) 100 S. E. 617; *Castle v. Southern R. Co.*, (S. C. 1919) 99 S. E. 846. See also *Sagona v. Pullman Co.*, (N. Y. 1919) 174 N. Y. Supp. 536.

In *Peacock v. Detroit, etc., R. Co.*, (Mich. 1919) 195 N. W. 580, the court, without passing directly on the validity of this order, granted a motion to substitute the Director General for the railroad company as defendant.

**General Order No. 50 is invalid as in conflict with section 10 of this Act.** *Jensen v. Lehigh Valley R. Co.*, (D. C. Colo. 1919) 255



Fed. 797; *Scorborough v. Louisiana R. & Nav. Co.*, (La. 1919) 82 So. 286; *Lavelle v. Northern Pacific R. Co.*, (Minn. 1919) 172 N. W. 918; *Gawan v. McAdoo*, (Minn. 1919) 173 N. W. 440.

In *Vaughn v. State*, (Ala. 1919) 81 So. 417, the order was held invalid as being a denial of due process of law. In this case it was said: "In view of the express provisions of the Act of Congress that, 'while under federal control, . . . actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law,' etc., and other considerations hereafter to be stated, it is a question of serious doubt whether the making of this order is within the scope of the Director General's authority; but, assuming that it is, his authority is sustainable on no other theory than that the transportation companies themselves are under federal control, and therefore within his jurisdiction. If they are not under his jurisdiction, what authority has he to say that they cannot be sued, and why is it necessary for him to so say? If the transportation companies have no connection with the operation of the railroads, this fact is a complete defense to any action against them, and this order is wholly futile. Moreover, if the transportation companies are under federal control, the Director General is without authority to interfere with the orderly administration of justice or to set aside the ordinary and usual course of procedure in courts of justice according to the course of the common law and deny to a plaintiff the right to pursue his ordinary legal remedy against one who, he alleges, has transgressed or violated his rights. Such a proceeding as authorized by this general order would effect an entire change of parties, and, after a plaintiff has pursued his remedy to judgment, it would not be enforceable. Confessedly the Director General is not personally liable, and there is no statute or authority for biuding the government in such a proceeding, and this course would clearly amount to a denial of due process of law in violation of the Constitution, both state and federal." *Vaughn v. State*, (Ala. App. 1919) 81 So. 417.

*Vested rights*.—And in *McGregor v. Great Northern R. Co.* the order was held to be invalid and not warranted by this Act, in so far as it purported to be applicable to causes of action already vested.

Likewise in *Smith v. Atlantic Coast R. Co.*, (S. C. 1919) 100 S. E. 148, the court without passing directly on the validity of General Order No. 50, held that it was not applicable to a cause of action which arose and on which suit was commenced before the issuance of the order.

*Liability of carrier corporations*.—Section 10 provides that actions at law may be brought against carriers and judgment rendered "as now provided by law." Order No. 50 issued by the Director General of Rail-

roads October 28, 1918, required that actions for death or injury to persons growing out of the possession, control or operation of any railroad by the Director General should be brought against the Director General and not otherwise. In so far as such order prohibits the maintenance of such an action against the railroad company, it is in conflict with this section. *Lavelle v. Northern Pac. R. Co.*, (Minn. 1919) 172 N. W. 918; *McGregor v. Great Northern R. Co.*, (N. D. 1919) 172 N. W. 841.

In *Hatcher & Snyder v. Atchison R. Co.*, (D. C. Colo. 1919) 258 Fed. 952, the court, while denying the liability of a railroad company for negligence when under federal control, refused to grant a motion to substitute the Director General as defendant and dismiss the railroad company in accordance with General Order No. 50.

## II. CONSTRUCTION

A "transportation system" within the meaning of section 11 of this Act is a system which transports something from one place to another. *U. S. v. Kambeitz*, (N. D. N. Y. 1919) 256 Fed. 247.

"Use" and "operation" of transportation system.—The "use" of a transportation system within the meaning of section 11 consists in taking up, carrying, and putting down property, and the "operation" of the system consists in running the cars and carrying therein such property so being moved from one point or place to another. *U. S. v. Kambeitz*, (N. D. N. Y. 1919) 256 Fed. 247.

*Interference with operation of transportation system*.—Express company employees who steal express packages from the company's cars, after they have been taken over and are being operated by the government under this Act, are guilty of interfering with and impeding "the possession, use, operation, or control . . . of any transportation system" within the meaning of section 11 of the Act. *U. S. v. Kambeitz*, (N. D. N. Y. 1919) 256 Fed. 247.

*Property derived from operation of transportation system*.—Property being transported for hire by an express company under government control, is "property derived from or used in connection with the possession, use, or operation" of a transportation system and an employee who steals it is guilty of a criminal offense under section 11. *U. S. v. Kambeitz*, (N. D. N. Y. 1919) 256 Fed. 247.

## III. EXTENT OF FEDERAL CONTROL

*In general*.—"The Act of Congress of March 21, 1918, and the orders of the Director General of Railroads, . . . clearly evince a construction of the Act of August 29, 1916, and the action of the President thereunder, inconsistent with the view that federal control extends to, and embraces, only the property and facilities of the transportation companies. In fact, the Act of March 21,

1918, defines the terms 'system or systems of transportation' as used in the Act of August 29, 1916. . . . The 'systems of transportation' or 'carriers' . . . have officers and employees, are capable of contracting and being contracted with, may sue and be sued, plead and be impleaded, are entitled to compensation, are capable of arbitrating differences with the government, are authorized to settle and adjust claims, and declare dividends; in short, are capable of exercising all the functions and powers of corporations with limitations essential to federal control and the carrying out the purposes of the government . . . to meet the extraordinary conditions imposed by the fact that the United States is at war with a foreign power. These facts lead to the inevitable conclusion that federal control of the transportation systems of the country contemplated and effected a mobilization under one head of the persons and corporations engaged in the business, as well as the facilities of transportation for the purpose of meeting and coping with these extraordinary conditions, and the Director General of Railroads is just what his designation or title imports,—the general in command of the army of transportation." *Vaughn v. State*, (Ala. App. 1919) 81 So. 417. To the same effect, see *Marshall v. Bush*, (1918) 102 Neb. 279, 187 N. W. 59; *Haubert v. Baltimore, etc., R. Co.*, (1919) 259 Fed. 361.

The Act contemplates that the carrier corporations shall be permitted to transact their business as formerly except as modified by the federal control of their transportation facilities. *McGregor v. Northern Pacific R. Co.*, (N. D. 1919) 172 N. W. 841.

*Government as lessee.*—In the case of *Peacock v. Detroit, G. H. & M. Ry. Co.*, (Mich. 1919) 175 N. W. 580, it was held that the relations between the railroad and the government during federal control of railroads were either technically those of lessor and lessee or analogous thereto.

*Government as bailee.*—In *Bloch v. United States*, (C. C. A. 5th Cir. 1919) 261 Fed. 321, the defendant was convicted of the offense of receiving or having in his possession property stolen from an interstate shipment, knowing the property to have been stolen. The indictment was challenged because it did not sufficiently allege the ownership of the goods. In sustaining the indictment the court said: "The shipment is alleged to have been made over an interstate railroad and during the period of government operation and control. The government was therefore a bailee of the property during its transportation. The court takes judicial notice of this status, and neither averment nor proof of it was required."

*Master and servant.*—"From the time that the proclamation of the President became effective on December 28, 1917, the Director General as the representative of the President has been in the exclusive possession and control of the railroad. The railroad company exercises no control whatever.

The railroad is operated under the orders of the Director General. The railroad company has nothing to do with such operation. When the Director General assumed control all the employees on the railroad ceased to be employees of the railroad company and became employees of the Director General. At that time the relation of master and servant ceased to exist between the employees operating the railroad and the railroad company. That relation then began and still exists between such employees and the Director General." *Mardis v. Hines*, (1919) 258 Fed. 945.

*Switching charges.*—But see *Lincoln Commercial Club v. Missouri P. R. Co.*, (Neb. 1919) 172 N. W. 687, P. U. R. 1919E 57, wherein it was held that an order, made prior to the time of the President's proclamation taking over the control of the railroads by the federal government, by which a state railway commissioner found that switching charges were discriminating and unjust, and canceled that portion of a tariff rate, will not be reversed, as the federal control does not make a change in the situation.

*Outlying parcels of land.*—The extent of federal control is to be measured by the necessities of the business of the corporation as a common carrier; and outlying parcels of land not connected with such business are not included within the meaning of the legislation on the subject. *United States R. Administration v. Burch*, (1918) 254 Fed. 140.

*Intrastate rates.*—In taking over the railroads from private ownership to its control and operation, the resulting power of the United States to fix the rates to be charged for the transportation services to be rendered by it is not subordinated to the asserted authority of the several states to regulate the rates for all local or interstate business. This has been definitely decided by the Supreme Court of the United States in *Northern P. R. Co. v. North Dakota*, (1919) 250 U. S. 135, 63 L. ed. 897, P. U. R. 1919D 705, 39 Sup. Ct. Rep. 502, in reversing the decision of the lower court (N. D. 1919), 172 N. W. 324. To the same effect see *Kneeland-Bigelow Co. v. Michigan Central R. Co.*, (Mich. 1919) 174 N. W. 605.

*Review of rate regulation.*—Rates initiated by the President or Director General, under section 10, are subject to review by the Interstate Commerce Commission, and its power to revise or alter is the power previously vested in it under the Act to regulate interstate commerce, as amended, which gives it authority to regulate intrastate rates as such. *State v. Northern Pac. R. Co.*, (N. D. 1919) 172 N. W. 324.

*Local taxes.*—The fact that by this Act and the President's proclamation under the same, railroads have been taken charge of by the United States, and are being operated and controlled by the government, is not a defense against the payment of local taxes.

Any question of taxation concerning a bridge owned by a corporation and used by various railroad companies can only arise between the federal government and the state. *People v. Keokuk, etc., Bridge Co.*, (1919) 287 Ill. 246, 122 N. E. 467.

**State taxation.**—State authorities have the right under this Act to tax moneys derived from the operation of the railroads by the government. *Wabash R. Co. v. Board of Review*, (1919) 288 Ill. 159, 123 N. E. 259, wherein the court said: "By the terms of the act federal control was not to continue to exceed 21 months after the war. We understand the taking over of the operation and control of the railroads by the federal government was a temporary war measure, and that they did not thereby become instruments or agencies of the government for the purpose of carrying into effect powers of the government conferred by the people—at least to the extent that their property was not subject to taxation by the states. It would seem from the provision of section 1 'that other taxes assessed under federal or any other governmental authority' during federal control, 'or on the revenues, or any part thereof, derived from operation, . . . shall be paid out of revenues derived from railway operations while under federal control,' and from the provisions of sections 10, 12, and 15 relating to tax accruals, that it was not the intention of Congress to deprive the states of the power of taxation which they possessed and exercised prior to the passage of the act temporarily taking over, not the ownership, but the operation and control, of railroads."

**"Police regulation."**—The term "police regulation" as used in section 15 is not limited to regulations directly affecting the health, lives and morale of the people, but embrace regulations designed to prevent discrimination and economic oppression. Thus pre-existing intrastate regulations continue in force as lawful police regulation. *State v. Northern Pac. R. Co.*, (N. D. 1919) 172 N. W. 324.

**Effect of armistice on powers conferred on President.**—The Act conferred upon the President extraordinary executive powers rendered necessary by the existence of a state of war. And the termination of hostilities under the armistice did not justify judicial interference to restrain the further exercise of those powers rendered necessary by a state of war. *State v. Northern Pac. R. Co.*, (N. D. 1919) 172 N. W. 324.

#### IV. RIGHT OF ACTION BY RAILROAD

**In general.**—The right of action by a public utility under federal control is not affected by the legislation upon this subject, and it would appear that it may sue either in its corporate capacity, as an agency of the government, or with the Director General of Railroads named as plaintiff. *Louisville & N. R. Co. v. Western U. Teleg. Co.*, (1919) 250 U. S. 363, 63 L. ed. 1032, 39

Sup. Ct. Rep. 513; *United States R. Administration v. Burch*, (1918) 254 Fed. 140. See also *McGregor v. Great Northern R. Co.*, (N. D. 1919) 172 N. W. 84, where it is said: "They may sue and be sued as formerly."

And in *Louisville & N. R. Co. v. Western U. Teleg. Co.*, (1919) 250 U. S. 363, 63 L. ed. 1032, 39 Sup. Ct. Rep. 513, where the action was begun prior to the Federal Control Act, but no decision handed down till 1919, although both defendant and plaintiff were under government control, no substitution was made, but in their corporate capacity the litigants remained upon the record until the final termination of the suit.

#### V. RIGHT OF ACTION AGAINST RAILROAD

**In general.**—Under this Act no restriction is placed upon the right of action against public utilities while under federal control. Whatever uncertainty may exist from the interpretation of the orders of the Director General of Railroads as to the proper forum and other restrictions attempting to impede the rights of litigants, it is generally conceded that a right of action remains unimpaired. *Northern P. R. Co. v. North Dakota*, (1919) 250 U. S. 135, 63 L. ed. 897, P. U. R. 1919D 705, 39 Sup. Ct. 502; *Nueces Valley Town-Site Co. v. McAdoo*, (W. D. Tex. 1919) 257 Fed. 143; *Dahn v. McAdoo*, (N. D. Ia. 1919) 256 Fed. 549; *Jensen v. Lehigh Valley R. Co.*, (S. D. N. Y. 1919) 255 Fed. 795; *Rutherford v. Union P. R. Co.*, (D. C. Neb. 1919) 254 Fed. 880; *Frierse v. Chicago, etc., R. Co.*, (D. C. Neb. 1918) 254 Fed. 875; *Wainwright v. Pennsylvania R. Co.*, (E. D. Mo. 1918) 253 Fed. 459; *Muir v. Louisville & N. R. Co.*, (W. D. Ky. 1918) 247 Fed. 888; *Johnson v. McAdoo*, (E. D. La. 1919) 257 Fed. 757; *Smith v. Babcock & Wilcox Co.*, (N. D. Ohio. 1919) 260 Fed. 679; *Missouri Pac. R. Co. v. Ault*, (Ark. 1919) 216 S. W. 3; *Scarborough v. Louisiana R. & Nav. Co.*, (1919) 145 La. 323, 82 So. 286; *West v. New York, N. H. & H. R. Co.*, (Mass. 1919) 123 N. E. 621; *Cleff v. American Express Co.*, (Mass. 1919) 125 N. E. 162; *Gowan v. McAdoo*, (Minn. 1919) 173 N. W. 440; *Lavalle v. Northern P. R. Co.*, (Minn. 1919) 172 N. W. 918; *Marshall v. Bush*, (1918) 102 Neb. 279, 167 N. W. 59; *Schumacher v. Pennsylvania R. Co.*, (1919) 106 Misc. 564, 175 N. Y. Supp. 84; *Benjamin Moore & Co. v. Atchison, T. & S. F. R. Co.*, (1919) 106 Misc. 58, 174 N. Y. Supp. 60; *Sagona v. Pullman Co.*, (1919) 174 N. Y. Supp. 536; *Bryant v. Pullman Co.*, (N. Y. 1919) 177 N. Y. S. 488; *Fish v. Rutland R. Co.*, (N. Y. 1919) 178 N. Y. S. 439; *McGregor v. Great Northern R. Co.*, (N. D. 1919) 172 N. W. 841; *El Paso & S. W. T. Co. v. Lovick*, (Tex. Civ. App. 1919) 210 S. W. 283; *Rhodes v. Tatum*, (Tex. Civ. App. 1918) 206 S. W. 114; *Le Clair v. Montpelier & W. R. R. Co.*, (Vt. 1919) 106 Atl. 587.

"Both the President in his original proclamation and Congress in the Act of March

21, 1918, clearly contemplated that the liability of the carriers should continue. . . . Since the liability continues, it is competent for a suitor to resort to the ordinary legal remedies to establish it." *McGregor v. Great Northern R. Co.*, (N. D. 1919) 172 N. W. 84.

It is manifest, therefore, although no attachment or levy can be made, that there is no prohibition for actions for damages in accordance with the civil procedure prescribed by the states. *West v. New York, N. H. & H. R. Co.*, (Mass. 1919) 123 N. E. 621, holding that the President's "proclamation does not purport to limit or restrict the right to bring suit on causes of action then existing until the Director General may, by general or special order, otherwise determine. It is plain, in the absence of such order by the Director General, that only the rights of attachment on mesne process and of levy on execution are suspended."

So that, by the legislation under discussion, Congress did not intend either to extinguish or impair vested rights of action, or to authorize the President or his agents to do so. *Benjamin Moore & Co. v. Atchison, T. & S. F. R. Co.*, (1919) 106 Misc. 58, 174 N. Y. Supp. 60.

In *Louisville & N. R. Co. v. Steele*, (1918) 180 Ky. 290, 202 S. W. 878, the right of action under section 10 of the Act of March 21, 1918, is sustained by the court in the following words: "It does not prevent a litigant from bringing this action against the latter in any court of competent jurisdiction, or such court from granting him such relief in the form of a judgment or otherwise, short of the coercive payment or satisfaction of such judgment by the levy of an execution or other like process upon or against any property of the carrier, as the litigant might, but for the passage of the act, under the laws of the state of his residence, have been entitled to. In other words he may, notwithstanding the act, bring his action and obtain judgment against the carrier, but he cannot enforce against the latter the satisfaction of the judgment, when obtained, by execution or similar process. The object of the act of Congress and of the President's proclamation referred to is to prevent, except as allowed by the Director General of the railroad under the control of the government, the seizure or sale of its property, which, if allowed, would interfere with the government's use of such property as required in its efforts to bring the war to a successful issue."

To the same effect, see *Louisville, etc., R. Co. v. Mirck*, (Ky. 1918) 180 Ky. 294, 202 S. W. 879; *Le Clair v. Montpelier, etc., R. Co.*, (Vt. 1919) 106 Atl. 587.

Such an action is not subject to the objection that it is an action against the United States without its consent. *Dahn v. McAdoo*, (N. D. Ia. 1919) 256 Fed. 549. See to the same effect *Rutherford v. Union Pac. R. Co.*, (D. C. Neb. 1919) 254 Fed. 880.

## VI. JURISDICTION AND VENUE OF ACTION BY OR AGAINST RAILROAD

**Jurisdiction generally.**—Jurisdiction of the state and federal courts, it would seem, remains undisturbed by the Act of March 21, 1918. However, the construction of that statute and of the various orders has been such that, in identical circumstances, the federal court and the state court have respectively assumed jurisdiction. Thus it has been held that a suit brought against the Director General of Railroads, his agents and employees, acting in behalf of the government of the United States, pursuant to the acts of Congress and proclamations of the President, in actual control and operation of railroad property, is one under the Constitution and laws of the United States, and within the jurisdiction of the federal courts. *Nueces Valley Town-Site Co. v. McAdoo*, (W. D. Tex. 1919) 257 Fed. 143.

**Federal court.**—In *United States R. Administration v. Burch*, (E. D. S. D. 1918) 254 Fed. 140, the court, on the question of jurisdiction of the federal court, said: "The defendant, in his return to the rule, has raised the question that this court has no jurisdiction of the cause, and cannot enjoin a sale under execution under a judgment in a state court. Inasmuch as this question is a question arising in a case which asks for the enforcement of a right claimed to exist and be given under the terms of an act of Congress, it is evidently an action of a civil nature in equity, brought by an officer of the United States authorized to sue, and arising under the laws of the United States, where it appears upon the face of the bill of complaint that the right claimed by the plaintiff and sought to be enforced arises by virtue of and under a statute of the United States. The question whether or not final process can be levied against this property is one that arises under the very terms of the Act of March 21, 1918; nor is the position that this court has no jurisdiction to stay the execution of a judgment recovered in the state court well taken. It has been laid down that the United States courts, by virtue of their general equity powers, have jurisdiction to enjoin the enforcement of a judgment in the state court upon the usual principles under which courts of equity will enjoin the enforcement of a judgment."

**Citizenship of railroad.**—In *Smith v. Babcock*, (N. D. Ohio 1919) 260 Fed. 679, it was held that the citizenship of the railroad, and not of the Director General, determined the jurisdiction of the federal court; and an action against a railroad under federal control could be brought only in such courts as would have had jurisdiction in the absence of federal control. In this connection *Westenhaven, D. J.*, said: "This section [§ 10] further provides that no defense shall be made in any actions at law or in equity to enforce any liability on the ground that the carrier is an instrumentality or agency of the federal government, and that no such

carrier shall be entitled to transfer any action brought by or against it to any federal court. Obviously this means that right to sue in or remove to the federal court is not restricted or enlarged in consequence of federal control. Construing these provisions together with the entire act, it seems obvious that Congress intended to interfere as little as could be avoided with the situation existing at the time the railroads were taken over, and that the rights and remedies of all persons should be preserved and might be enforced with a minimum of interference with pre-existing rights and remedies. Assuming the existence of a liability it seems evident that it was intended parties should have the right to assert the same in any court, and in the same manner as it might previously have been asserted. This intent extends, not merely to the method of bringing the parties into court, but to the jurisdiction of the court."

**State courts.**—On the other hand, in *Northern P. R. Co. v. North Dakota*, (1919) 250 U. S. 135, 63 U. S. (L. ed.) 897, P. U. R. 1919D 705, 39 S. Ct. 502, it was held that an action against the railroad company and the Director General of Railroads, to enjoin the defendants from putting into effect a schedule of rates, is within the jurisdiction of the state court, since the United States is not a necessary party.

In *Benjamin Moore & Co. v. Atchison, T. & S. F. R. Co.*, (1919) 106 Misc. 58, 174 N. Y. Supp. 60, the court said: "Congress did not intend to authorize the President or his agents to make an order affecting the jurisdiction of the state courts, or affecting the right to maintain actions therein, since it is expressly provided, without qualification of any kind, that actions at law and suits in equity may be brought against carriers and judgments rendered therein 'as now provided by law.'" And see *L. N. Dantzler Lumber Co. v. Texas & P. R. Co.*, (1919) 119 Miss. 328, 80 So. 770.

#### VII. SERVICE OF PROCESS

Service of process on the agent of the government engaged in the operation of a railroad of the carrier under federal control does not constitute service on the railroad because of any former employment. *Southern Cotton Oil Co. v. Atlantic Coast Line R. Co.*, (S. D. Ga. 1919) 257 Fed. 138, wherein the court said: "Under the presidential proclamation of Dec. 26, 1917, the possession, control, and operation of the railroads shall be exercised by and through William G. McAdoo as Director General. When the Director General assumed control, the acts of the former officers and employees, who retained their positions and conducted the details of operation of the railroads, were the acts of the Director General. *Rutherford v. Union P. R. Co.*, (1919; D. C.) 254 Fed. 880. Their employment by the Director General made them exclusively the servants or agents of

the employer. There could be no divided allegiance as agents of the railroad corporation and of the Director General so as to accomplish the purpose of Congress. The acts of Congress, the proclamation of the President, and the general orders of the Director General, neither expressly nor by implication contemplated a dual agency of employees engaged in the operation of the railroads."

#### VIII. REMOVAL OF CAUSE TO FEDERAL COURT

**In general.**—Where the plaintiff, in his complaint, has only stated a cause of action against a domestic corporation, the application for removal is properly denied in view of sec. 10 of the Act of March 21, 1918, providing as follows: "Nor shall any such carrier be entitled to have transferred to a federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the federal control of such carrier." *Hill v. Director General of Railroads*, (N. C. 1919) 101 S. E. 376.

**Injunction to restrain transfer of officers.**—In *Nueces Valley Townsite Co. v. McAdoo*, (1919) 257 Fed. 143, where an injunction was sought to restrain the defendant from removing certain officers from one town to another, it was held that the action was against the Director General of Railroads, his agents and employees, acting in behalf of the government of the United States, pursuant to the Acts of Congress and proclamations of the President, and in actual control and operation of property, and was therefore a suit arising under the Constitution and laws of the United States, and, having been removed to the federal court, would not be remanded to a state court.

#### IX. EXECUTION OF PROCESS AGAINST RAILROAD

**In general.**—The provision in the Act of Congress of March 21, 1918, that "no process, meane or final, shall be levied against any property under such federal control," although it does not prevent the reduction of a claim to judgment, must be construed as prohibiting the issuance of any writ in the nature of levy and execution upon the judgment. Thus, in *Louisville & N. R. Co. v. Steele*, (1918) 180 Ky. 290, 202 S. W. 878, after reciting the provisions of the statute, it was said: "Obviously, the effect of the foregoing provisions of the statute is to entirely suspend the right of issuing and levying executions, attachments, or other like process during the continuance of such control."

To the same effect, see *West v. New York, etc., R. Co.*, (Mass. 1919) 123 N. E. 631; *Johnson v. McAdoo*, (E. D. La. 1919) 257 Fed. 757.

A distinction is to be noted, however, between the provisions of the Act and those of the proclamation of the President of December 26, 1917. In the former the prohibition

as to execution is positive, while in the latter, discretion appears to be vested in the Director General of Railroads. *El Paso & S. W. R. Co. v. Lovick*, (Tex. 1919) 210 S. W. 283.

Where a railroad company is sued for a tort and judgment recovered against it the provision that "no process, mesne or final, shall be levied against any property under such federal control," is effective to prevent the levy of execution without the necessity of the defendant moving for an order that no execution issue against any of the defendant's property now under federal control. *LeClair v. Montpelier, etc., R. Co.*, (Vt. 1919) 106 Atl. 587.

**Voluntary payment by Director General.**—Where in an action under this section judgment is recovered against the Director General, no process will issue thereon that will interfere with the possession of the property under his custody, but he may provide for the payment of the judgment from the income or other funds under his control, or Congress may otherwise provide for its payment as it may see fit. *Dahn v. McAadoo*, (N. D. Ia. 1919) 256 Fed. 549.

See to the same effect *McGregor v. Great Northern R. Co.*, (N. D. 1919) 172 N. W. 841. And see also *Louisville, etc., R. Co. v. Mirch*, (1918) 180 Ky. 294, 202 S. W. 879.

**Garnishment of traffic balance.**—In *Dooley v. Pennsylvania R. Co.*, (1918) 250 Fed. 142, it was held that traffic balances which go to make up the working or liquid capital of a railroad company are not subject to garnishment during federal control, because "the tying up of such fund would clearly be detrimental to the successful operation of a railroad system."

**Specific performance of contract.**—In *Kneeland Bigelow Co. v. Michigan Cent. R. Co.*, (Mich. 1919) 174 N. W. 605, action was brought by a shipper to compel the railroad company to specifically perform a contract entered into before the railroads were placed under federal control. In affirming a decree dismissing plaintiff's bill the court said: "Since this contract was entered into in 1911, a grave change of conditions, for which neither contracting party is responsible and neither anticipated, has imposed upon the defendant company impossibility of further performance on its part, whether temporarily or permanently we need not inquire; while on plaintiff's part the existence of a state of war with resultant governmental interference in taking possession and control of defendant's transportation system has only affected them by advanced traffic rates. This they seek relief from in a court of chancery under a bill for specific performance against a defendant deprived of power to perform by the federal government, which is in absolute control of the transportation system essential to perform and with it fulfilling the contract, except as to the matter of rates, while none of its officials in control and imposing the conditions complained of are parties to the suit. Under

such conditions, a degree of specific performance against the party ousted and incapable of performance would seem to be a vain thing. For disposition of the issue directly involved we deem it sufficient to find and hold that, by a war measure interposition of the sovereign governmental power, this contract was rendered unenforceable, for the time being at least, and so long as such interposition is maintained by vis major."

**Order of corporation commission for removal of depot.**—An order of a corporation commission requiring a railroad company to remove its depot and to replace it by a modern structure will be set aside and the case continued until further orders of the court. *St. Louis, etc., R. Co. v. State*, (Okla. 1918) 170 Pac. 1146; *Chicago, etc., R. Co. v. State*, (Okla. 1919) 180 Pac. 250.

The contrary view, however, was taken in *Commercial Club v. Chicago, etc., R. Co.*, (Minn. 1919) 171 N. W. 312, holding that this Act had no bearing on an order of the state railroad and warehouse commission, directing the railroad to erect a new depot.

**Attachment for jurisdictional purposes.**—The statute and presidential proclamation were not intended to include, nor do they prohibit, the issuance of an attachment for the purpose of obtaining jurisdiction over defendants, preliminary to a trial of the issue. Such a writ is not a process of execution, either mesne or final. See *L. N. Dantzler Lumber Co. v. Texas & P. R. Co.*, (1919) 119 Miss. 328, 80 So. 770.

**Process against outlying lands.**—But the Director General, to be entitled to the protection of that clause of the Act approved March 21, 1918, which provides that no process, mesne or final, shall be levied against any property under federal control, must be in legal possession of such property. Hence it has been held that property which consists of several tracts or lots in a city and adjacent thereto, not necessary to the daily running of a railroad, is not within the provision of the Act. *United States R. Administration v. Burch*, (E. D. S. C. 1918) 254 Fed. 140.

To the same effect, see *Schumacher v. Pennsylvania R. Co.*, (N. Y. 1919) 106 Misc. 564, 175 N. Y. S. 84.

**Stay of condemnation proceedings against railroad.**—Proceedings by a telegraph company to condemn a right of way for a line along the right of way of a railroad under federal control are not subject to be stayed under section 10, and where a district judge stays proceedings in such an action he may be compelled by mandamus to proceed with them. *Postal Tel. Cable Co. v. Call*, (1919 C. C. A. 5th Cir.) 255 Fed. 850.

The goods or private citizens while in the course of transportation are not subject to the premises of the Act or General Order No. 43 which provides "It is therefore ordered that no moneys or other property under federal control or derived from the operation of carriers while under federal control shall

be subject to garnishment or like process in the hands of such carriers or any of them, or in the hands of any employé or officer of the United States Railroad Administration." Consequently the lawful owner of goods may recover them from a railroad company holding them merely for transportation. *Salant v. Pennsylvania R. Co.*, (N. Y. 1919) 177 N. Y. S. 475.

A proceeding to compel the performance of a duty required by the state is not within the contemplation of this Act and judgment will be enforced. *In re Morris Ave. Bridge Co.*, (1919) 105 Misc. 659, 174 N. Y. S. 682.

### 1918 Supp., p. 762, sec. 10.

See notes to section 1 of this Act, *supra*, p. 774.

### 1918 Supp., p. 763, sec. 11.

See notes to section 1 of this Act, *supra*, p. 774.

### 1918 Supp., p. 763, sec. 15.

See notes to section 1 of this Act, *supra*, p. 774.

## RIVERS, HARBORS AND CANALS

### Vol. IX, p. 12, sec. 2476. [First ed., vol. VI, p. 787.]

**Navigable waters defined.**—To same effect as original annotation, see *U. S. v. Brewer-Elliott Oil, etc., Co.*, (W. D. Okla. 1918) 249 Fed. 609.

**Determination of navigability.**—"Navigability does not depend on the amount of tonnage, depth of water, width of the stream, nor the use at some time for commerce. Navigability is determined by natural conditions. *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60, 5 L. R. A. 392, 25 Am. St. Rep. 848. Neither character of craft nor relative ease or difficulty of navigation are tests of navigability. *State v. Pacific Guano Co.*, 22 S. C. 50. 'The test of navigability is navigable capacity without regard to the character of the craft, the business done, the ease of navigation, the surroundings of the stream.' *Heyward v. Farmers Mining Co.*, 42 S. C. 139, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42, 46 Am. St. Rep. 702." *Economy Light, etc., Co. v. U. S.*, (C. C. A. 7th Cir. 1919) 256 Fed. 792.

### Vol. IX, p. 15, sec. 5251. [First ed., vol. VI, p. 790.]

**Application of section.**—A patent to an Indian tribe of lands lying on both sides of a river in Louisiana, does not convey title to the bed of the river, if navigable, in view of the provisions of this section. *U. S. v. Brewer-Elliott Oil, etc., Co.*, (W. D. Okla. 1918) 249 Fed. 609.

### Vol. IX, p. 16, sec. 5255. [First ed., vol. VI, p. 790.]

**Effectiveness of cession a question of fact.**—In *Brickel v. Wright*, (1918) 180 Ky. 181, 202 S. W. 672, the court, referring to the state and federal Acts and joint resolutions relating to the cession of the canal, said: "It will be seen that none of these acts establishes the date when the cession became

effective, or whether in fact it has ever become effective; and there is no proof whatever in the record upon the question, unless it be assumed, as is done for the purposes of this opinion, that the proof of Messrs. Burk and Butler establishes the fact that at the time of the accident the place had been ceded by the state to the federal government."

### Vol. IX, p. 44, sec. 3. [First ed., 1909 Supp., p. 609.]

"Section" erroneously used for "paragraph."—"As to the amount of the fine, it is apparent that in the Act of August 18, 1894, the word 'section' is loosely used for 'paragraph.'" *The 6 S.*, (S. D. N. Y. 1917) 247 Fed. 348.

**Defective machinery.**—Where the dumping of a scow before it reaches its destination is due to a breakdown in the machinery of the tug having it in tow, which could have been avoided by proper inspection, the owner of the tug is liable under this section. *The Columbia*, (C. C. A. 2d Cir. 1918) 255 Fed. 515.

### Vol. IX, p. 49, sec. 4. [First ed., vol. VI, p. 801.]

**Condition precedent to suit in admiralty.**—The conviction and fining of persons offending against the provisions of this Act forbidding the dumping of mud in New York harbor, are not conditions precedent to the maintenance of the suit in admiralty against the vessel, authorized by this section. *The 6 S.*, (1919) 250 U. S. 269, 39 S. Ct. 452, 63 U. S. (L. ed.) —, *affirming* (S. D. N. Y. 1917) 247 Fed. 348.

No criminal proceeding is necessary to fix the liability imposed by the statute. *The 6 S.*, (S. D. N. Y. 1917) 247 Fed. 348, wherein it was said of the statute: "It provides that the boat 'may be proceeded against summarily.' I cannot quite see what

the meaning of the word 'summarily' can be, if it does not include a libel without the condition precedent of a criminal prosecution. The statute is not, it is true, drawn with scientific paucity; but I must still give to all its words some significance, so long as I can, and if I hold that a criminal prosecution must precede a libel, it seems to me to fly in the face of the purpose so expressed."

**Jurisdiction of libel in rem.**—Jurisdiction in a federal court of a libel in rem against a vessel for the penalties prescribed for dumping mud in New York harbor, if not conferred by the provision of the Judicial Code, § 24, subd. 9 (see vol. 4, p. 1048) on the theory that the proceeding was one for the enforcement of a penalty or forfeiture incurred under a law of the United States, is conferred by the provision of this section that the offending vessel may be proceeded against summarily by way of libel in any District Court of the United States having jurisdiction thereof. The 6 S., (1919) 250 U. S. 269, 39 S. Ct. 452, 63 U. S. (L. ed.) —, *affirming* (S. D. N. Y. 1917) 247 Fed. 348.

**Vol. IX, p. 53, sec. 10.** [First ed., vol. VI, p. 813.]

**Intent to supersede state authority.**—To the same effect as the original annotation, see *Watts v. Evansville, etc., R. Co.*, (Ind. App. 1919) 123 N. E. 709, wherein the court said: "Counsel assert that the courts of Indiana are without jurisdiction in the case at bar for the reason that the federal government has entered the field and taken control of the entire subject-matter involved. To sustain their contention they point to sections 9 and 10 of the River and Harbor Appropriation Act of March 3, 1899 (30 Stat. 1151, c. 425), and to section 2 of the similar Act of August 11, 1888 (25 Stat. 423, c. 860). Counsel have not directed us to any decision by any federal court in which any provision of these statutes has been discussed or applied. They have presented to us nothing but the bare statement that by the enactment of said sections the Congress deprived the state of Indiana of all jurisdiction in the premises. Under these circumstances, we can only say that in our opinion by these sections the Congress did not intend to concern itself further than to prevent obstructions and nuisances in navigable streams which would interfere with interstate commerce. It seems unreasonable to say that the Congress intended thereby to assume control of the bottom lands which extend far back from the low-water line."

**Indiscriminate dredging by private parties for sand and gravel** may be prohibited under this section when it is affecting navigation. *McMorran Milling Co. v. C. H. Little Co.*, (1918) 201 Mich. 301, 167 N. W. 990.

**Diversion of water from Niagara river.**—Any diversion of water from the Niagara river on the American side in such quantity as

substantially to interfere with the navigable capacity of that river or the connected lakes, or which in any substantial degree alters or modifies the course, location, or channel of either of these waterways, is prohibited by this section, unless in advance recommended by the chief of engineers and authorized by the Secretary of War. (1913) 30 Op. Atty-Gen. 217.

**Vol. IX, p. 60, sec. 15.** [First ed., vol. VI, p. 817.]

**Vessel anchored in wide channel.**—A vessel anchoring at a point in the channel, where, notwithstanding such anchorage, other vessels navigating with the care the situation required, can safely pass, neither violates this section, nor renders the vessel liable for a collision under the general rules applicable to navigation, although she may to a certain extent obstruct the channel. *The Hesperas*, (E. D. Va. 1918) 252 Fed. 858.

**Liability of owner for failure to mark wreck.**—This statute is a criminal statute, and the failure of duty on the part of the owner of a vessel sunk in navigable waters penalized by it is failure to mark the wreck after knowledge of the fact necessitating the performance of the duty; and the duty imposed upon the owner as a basis for civil liability cannot be greater and will not arise until after knowledge that the vessel is a wreck. *Eastern Steamship Corp. v. Great Lakes Dredge, etc., Co.*, (C. C. A. 1st Cir. 1919) 256 Fed. 497, 168 C. C. A. 3, *affirming* (D. C. Mass. 1917) 250 Fed. 916.

**Vol. IX, p. 78, sec. 7.** [First ed., 1916 Supp., p. 224.]

**Movement and anchorage of vessels in St. Mary's river.**—The authority granted to the Secretary of War by this section to define and establish anchorage areas in waters generally, does not divest the Secretary of Commerce of the specific authority granted him by the Act of April 26, 1906 (see vol. 9, p. 75), to regulate the movement and anchorage of vessels in the St. Mary's river. (1915) 30 Op. Atty-Gen. 459.

**Vol. IX, p. 81, sec. 9.** [First ed., vol. VI, p. 805.]

**Concurrent authority.**—The effect of this section "reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a state, depend upon the concurrent or joint assent of both the national government and the state government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, be-



fore proceeding under such authority, obtain also the assent of the state acting by its constituted agencies." *Economy Light, etc., Co. v. U. S.*, (C. C. A. 7th Cir. 1919) 256 Fed. 792, 168 C. C. A. 138.

**Application of section.**—This section should be construed as applying to streams of actual navigable capacity even though not now used for interstate commerce. *Economy Light, etc., Co. v. U. S.*, (C. C. A. 7th Cir. 1919) 256 Fed. 792, 168 C. C. A. 138.

**Navigability as question for federal and not state court.**—In *Shortell v. Des Moines Electric Co.*, (Ia. 1919) 172 N. W. 649, it was held that whether the Des Moines river was to be treated as a part of the navigable waters of the United States was a question for the federal and not the state courts to determine.

**The Desplaines river in Illinois, being a navigable stream, comes within the provisions of this section, consequently a dam constructed therein without the consent of the United States is illegal.** *Economy Light, etc., Co. v. U. S.*, (C. C. A. 7th Cir. 1919) 256 Fed. 792, 168 C. C. A. 138.

**Vol. IX, p. 86, sec. 18.** [First ed., vol. VI, p. 818.]

**Injury to bridge by vessel.**—A bridge over a navigable stream built in accordance with the laws of the United States, does not become on account of wear, tear and incidental repairs, with unsubstantial variations from the original plans, an unlawful structure, which may be injured by a passing vessel, without such vessel incurring liability to the owner of the bridge, regardless of the fact as to whether such variations or defects were the approximate cause of the injury or not. *Savannah, etc., Trans. Co. v. Klarenn Bridge Co.*, (C. C. A. 4th Cir. 1918) 252 Fed. 499, 164 C. C. A. 415.

**Navigable waters wholly within state.**—Conceding that Congress has the power to take sole and exclusive jurisdiction over navigable waters wholly within a state it has not done so by the enactment of this section which does not restrict or encroach upon the power a state had previously been authorized to exercise. *People v. Metropolitan West Side Elevated R. Co.*, (1918) 285 Ill. 2<sup>d</sup> 6, 120 N. E. 748.

**Vol. IX, p. 93, sec. 4.** [First ed., 1909 Supp., p. 601.]

**Failure to open draw on signal.**—It is the duty of the owner of a drawbridge over a navigable stream to equip the bridge with proper lights and give warning of the position of the bridge and of its opening and closing, and if for any reason the bridge cannot be opened, proper signals should be given to that effect, such as will warn an approaching vessel in time to heave to. Therefore the owner of a bridge is liable for injury to a vessel where

it appeared that on approaching the bridge when the weather was not clear and the lights could not be distinguished for any great distance, the vessel commenced to signal when a mile distant, which signals were repeated at regular intervals, but no reply was received from the bridge until the vessel was too close to turn without avoiding a collision. *Derby v. Staten Island Rapid Transit Co.*, (E. D. N. Y. 1918) 254 Fed. 882.

**Vol. IX, p. 97, sec. 3.** [First ed., 1912 Supp., p. 347.]

**Creates no new cause of action.**—"Section 3 of the dam act was not intended to give a cause of action not already existing, but merely preserved existing rights as against taking or injuring property. The act was not intended to legalize the construction and maintenance of the dam, and at the same time authorize a recovery of damages upon the theory that a lawful act was a public nuisance." *Mcharg v. Alabama Power Co.*, (Ala. 1918) 78 So. 909.

**Vol. IX, p. 111, sec. 2.** [First ed., 1914 Supp., p. 372.]

**Liability of master for injuries to servant.**—An action for personal injuries lies by a servant against his master resulting while in the course of his employment. *Panama R. Co. v. Bosse*, (1919) 249 U. S. 41, 39 S. Ct. 211, 63 U. S. (L. ed.) — (affirming (C. C. A. 5th Cir. 1917) 239 Fed. 303, 152 C. C. A. 291), wherein the court said: "By the Act of Congress of April 28, 1904, c. 1758, § 2, 33 Stat. 429, temporary powers of government over the Canal Zone were vested in such persons and were to be exercised in such manner as the President should direct. An executive order of the President addressed to the Secretary of War on May 9, 1904, directed that the power of the Isthmian Commission should be exercised under the secretary's direction. The order contained this passage, 'The laws of the land, with which the inhabitants are familiar, and which were in force on February 26, 1904, will continue in force in the canal zone . . . until altered or annulled by the said commission;' with power to the commission to legislate, subject to approval by the secretary. This was construed to keep in force the Civil Code of the Republic of Panama, which was translated into English and published by the Isthmian Canal Commission in 1905. By the Act of Congress of August 24, 1912, c. 390, § 2, 37 Stat. 560, 561, 'All laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide.' On these

facts it is argued that the defendant's liability is governed by the Civil Code alone as it would be construed in countries where the civil law prevails and that so construed the code does not sanction the application of the rule *respondet superior* to the present case. But there are other facts to be taken into account before a decision can be reached. On December 5, 1912, acting under the authority of the before-mentioned Act of August 24, 1912, § 3, the President declared all the land within the limits of the Canal Zone to be necessary for the construction, etc., of the Panama Canal and directed the chairman of the Isthmian Commission to take possession of it, with provisions for the extinguishment of all adverse claims and title. It is admitted by the plaintiff in error that the Canal Zone at the present time is peopled only by the employees of the Canal, the Panama Railroad, and the steamship lines and oil companies permitted to do business in the Zone under license. If it be true that the Civil Code would have been construed to exclude the defendant's liability in the present case if the Zone had remained within the jurisdiction of Colombia it does not follow that the liability is no greater as things stand now. The President's order continuing the law then in force was merely the embodiment of the rule that a change of sovereignty does not put an end to existing private law, and the ratification of that order by the Act of August 24, 1912, no more fastened upon the Zone a specific interpretation of the former Civil Code than does a statute adopting the common law fasten upon a territory a specific doctrine of the English courts. *Wear v. Kansas*, 245 U. S. 154, 157. Probably the general ratification did no more than to supply any power that by accident might have been wanting. *Honolulu Rapid Transit & Land Co. v. Wilder*, 211 U. S. 137, 142. In the matter of personal relations and duties of the kind now before us the supposed interpretation would not be a law with which the present 'inhabitants are familiar,' in the language of the President's order, but on the contrary an exotic imposition of a rule opposed to the common understanding of men. For whatever may be thought of the unqualified principle that a master must answer for the torts of his servant committed within the scope of his employment, probably there are few rules of the common law so familiar to all, educated and uneducated alike."

To the same effect, see *Panama R. Co. v. Curran*, (C. C. A. 5th Cir. 1919) 256 Fed. 768, 168 C. C. A. 114; *Panama R. Co. v. Robert*, (C. C. A. 5th Cir. 1919) 256 Fed. 773, 168 C. C. A. 119; *Panama R. Co. v. Pigot*, (C. C. A. 5th Cir. 1919) 256 Fed. 837; *Panama R. Co. v. Toppin*, (C. C. A. 5th Cir. 1918) 250 Fed. 989, 163 C. C. A. 239.

Damages for physical pain may be allowed in such an action. *Panama R. Co. v. Bosse*, (1919) 249 U. S. 41, 39 S. Ct. 211, 63 U. S.

(L. ed.) —, *affirming* (C. C. A. 5th Cir. 1917) 239 Fed. 303, 152 C. C. A. 291.

**Amendment of Penal Code by President.**—The President is prohibited by this section from amending sections 342, 368 and 461 of the Penal Code, and repealing section 47 of the Code of Criminal Procedure of the Canal Zone. (1914) 30 Op. Atty-Gen. 344.

### Vol. IX, p. 111, sec. 3. [First ed., 1914 Supp., p. 372.]

**Partition—Necessity for possession.**—Where land is properly in the possession of the United States under this section, even if a bill for partition or for a sale for division could be made the means of trying a disputed title, a court could not, in a suit between private parties, render an enforceable decree for the partition or sale of the property. *Reina v. Brocho*, (C. C. A. 5th Cir. 1919) 256 Fed. 834.

### Vol. IX, p. 111, sec. 4. [First ed., 1914 Supp., p. 372.]

The term "compensation," as used in this section, refers to salary or wages payable to employees as separate and distinct from the privileges or allowances that may be granted them as to quarters, light and fuel. Consequently, the money value of these privileges should not be taken into consideration in determining the salary or compensation of employees of the Panama Canal. (1916) 30 Op. Atty-Gen. 548.

**Appointment of assistant to district attorney of Canal Zone.**—By virtue of an executive order, dated February 2, 1914, delegating to the governor of the Canal Zone certain powers of appointment, which were conferred upon the President by this section, the governor has authority to appoint, with such official designation as he may deem proper, an assistant to the district attorney of the Canal Zone. (1916) 30 Op. Atty-Gen. 561.

### Vol. IX, p. 113, sec. 6. [First ed., 1914 Supp., p. 375.]

**Panama railroad as private corporation.**—In view of the provisions of this section, the Act of June 25, 1910, ch. 384, and the various departmental regulations and rulings, it is clear that it was intended that the relation between government and the Panama railroad should be that of stockholder to the corporation which issued the stock and not that of principal and agent. The railroad cannot, therefore, claim exemption from liability for personal injuries caused by its negligence on the ground that it is not a private corporation. *Panama R. Co. v. Curran*, (C. C. A. 5th Cir. 1919) 256 Fed. 768, 168 C. C. A. 114. To the same effect, see *Panama R. Co. v. Robert*, (C. C. A. 5th Cir. 1919) 256 Fed. 773, 168 C. C. A. 119.

Vol. IX, p. 114, sec. 7. [First ed., 1914 Supp., p. 375.]

Amendment of Criminal Code by President.—Section 23 of the Code of Criminal

Procedure of the Canal Zone may be amended by the President by virtue of this section, which authorizes him to establish by order rules governing the magistrates' courts. (1914) 30 Op. Atty-Gen. 344.

## SALVAGE

Vol. IX, p. 121, sec. 1. [First ed., 1914 Supp., p. 384.]

**What constitutes salvage service.**—Raising and restoring to commerce a sunken steamer lying at the bottom of a navigable river, narrow and much traveled, though in no immediate peril of destruction and without the employment of means or the incurring of hazards beyond those necessary to the undertaking, is salvage, creating a property right enforceable by process in rem; and this is true whether the service is rendered voluntarily or under contract. *Great Lakes Towing Co. v. St. Joseph-Chicago S. S. Co.*, (C. C. A. 7th Cir. 1918) 253 Fed. 635, 165 C. C. A. 261.

**Saving the hull of a vessel during the process of saving the cargo** is salvage service entitling the salvor to remuneration. *The Wanala*, (D. C. Mass. 1919) 255 Fed. 590.

**Salvage service distinguished from towage.**—For services outside the contemplation of the parties in making the contract for towage, remuneration may be given, and, if they amount to salvage, a salvage award is due. Thus on discovering that a tug is leaking and about to founder if the tug takes it into a harbor and assists in stopping the leak, the service rendered is outside the towage contract and may be recovered for as salvage. *The Joseph F. Chinton*, (C. C. A. 2d Cir. 1918) 250 Fed. 977, 163 C. C. A. 227.

**The elements.**—To same effect as original annotation, see *The John J. Howlett*, (E. D. Pa. 1919) 256 Fed. 971.

The elements which enter in the estimate of salvage are: (1) The value of the property in peril and the proportion of the value lost and saved; (2) the degree of peril from which lives and property are rescued; (3) the value of the property employed by the salvor, and the risk of life and property incurred; (4) the skill and dispatch shown in rendering the service together with the foresight and skill exercised in the preparation to render it; (5) the time consumed and the labor performed by the salvor. *The Blackwall*, 10 Wall. 1, 19 L. ed. 870. The consideration of all these elements should result in an award which will express reasonable actual compensation for the labor, risk, and skill of the salvor and the use of his vessel and appliances, and an added amount based on the degree of peril of property and life and the value of the property saved and lost sufficient to promote the highest degree of

readiness and efficiency for the relief of vessels in distress. *The Kia Ora*, (C. C. A. 4th Cir. 1918) 252 Fed. 507, 164 C. C. A. 423.

**While the actual expense incurred, or loss of time** by a vessel in salvaging another, do not constitute claims for which payment may be demanded, they are elements to be considered in making the award. *The Jelling*, (E. D. N. C. 1918) 253 Fed. 381.

**Danger of injuring some other craft.**—In ascertaining the nature of the salvage service it is fair to consider the difficulty of safely landing the tow and the risk run of injuring some other craft, for such risk is an element of hazard quite the same in principle as the risk of injury to the salving boat itself. *The No. 92*, (C. C. A. 2d Cir. 1918) 252 Fed. 117, 164 C. C. A. 229.

**Amount of salvage.**—It is well settled that the amount of salvage should be sufficient to obtain again the same service. *The Annie Lord*, (D. C. Mass. 1917) 251 Fed. 157, wherein the court said: "The Lord was an abandoned vessel; and the public benefit from saving what might otherwise become a dangerous floating derelict in frequented paths of commerce is entitled to recognition. The saving of life and the temporary abandonment of her voyage by the salving vessel are to be taken into account, as well as the enterprise, courage, and skill displayed by the salvors."

Where there were no elements of heroism or dangers to life, and the only danger to the salving tug was such as was incident in going to the ship ashore, which in the instant case was slight, and no damage was suffered except such as was incidental to pulling on the tug's hawser, an award of \$40,000 to a tug worth \$85,000 for salvaging a ship and cargo worth \$1,000,000 was held to be excessive and was reduced to \$10,000. *The Tordenskjold*, (C. C. A. 5th Cir. 1919) 255 Fed. 672.

**Necessity for completing work.**—It is not necessary, in order to establish a claim to salvage, that the salvor should actually complete the work of saving the property at risk. It is sufficient if he endeavor to do so, and his efforts have a causal relation to the eventual preservation of it. *The Annie Lord*, (D. C. Mass. 1917) 251 Fed. 157.

**Purpose of award.**—"Salvage is both compensation and reward, and while it should not be extravagant, or such as to excite greed, it should be liberal, to encourage prompt, energetic, and efficient service in

the relief of vessels in peril." *Steamer Avalon Co. v. Hubbard Steamship Co.*, (C. C. A. 9th Cir. 1919) 255 Fed. 854.

**Vol. IX, p. 122, sec. 3.** [First ed., 1914 Supp., p. 384.]

**Saving human life.**—In *The Annie Lord*, (D. C. Mass. 1917) 251 Fed. 157, the court said: "The crew of the *Lord* were in no danger of death by drowning, unless by being washed overboard; but they were ad-

mittedly in great danger of death from exposure. They were all in serious condition when rescued. On their own vessel they were without shelter or warm food, and exposed to intense cold and a rough sea. Whether they would have lived until another vessel than the *Oliver* picked them up is mere speculation. The *Oliver* certainly rescued them from a position of great and imminent peril. It seems to me that her action saved human life within the meaning of the statute."

## SEAMEN

**Vol. IX, p. 152, sec. 4526.** [First ed., vol. VI, p. 863.]

**Sinking of vessel by submarine.**—The sinking of an American vessel by a German submarine at a time when war did not exist between the United States and Germany terminated the voyage, and seamen are not entitled to wages after the time of the sinking. *Foreman v. Benas*, (S. D. N. Y. 1917) 247 Fed. 133, wherein it was said: "The proclamation of the Imperial Government as to the 'war zone,' and the subsequent proclamation limiting the number per week and defining the permissible route of American vessels, rendered every American vessel engaged in European trade, which was not armed or under convoy, exposed to daily risk of destruction by German submarines. This was particularly so after the severance of diplomatic relations with this government. I think it is ignoring the substance of things to regard the carrying of contraband without notice to the seamen, where the articles provided for passage through the war zone, as a material variation of the libelants' contract. The torpedoing of the vessel was in my opinion a loss which terminated the voyage, and entitled the libelants, under section 4526 of the Revised Statutes, only to wages prior to that event."

**Vol. IX, p. 156, sec. 4529.** [First ed., 1916 Supp., p. 227.]

**Relation to section 4530.**—This section and section 4530, *infra*, should be construed together in determining the wages due a seaman. *The Cubadist*, (C. C. A. 5th Cir. 1919) 256 Fed. 203, *affirming* (S. D. Ala. 1918) 252 Fed. 658.

The words "within 24 hours after the cargo has been discharged" as used in this section refer to a discharge of cargo upon the completion of the voyage for which the seamen shipped. *The Cubadist*, (C. C. A. 5th Cir. 1919) 256 Fed. 203, *affirming* (S. D. Ala. 1918) 252 Fed. 658.

"After the cargo has been discharged."—The provision of this section that seamen

shall be entitled to their wages in the case of vessels making foreign voyages within twenty-four hours "after the cargo has been discharged" indicates a termination of the period for which the seaman had been employed and does not entitle him to be paid his wages in full up to the time the cargo is discharged at any port or ports at which the vessel calls and unloads her cargo. *The Cubadist*, (S. D. Ala. 1918) 252 Fed. 658.

**Right to one-third of earned wages.**—Under this section a seaman is not entitled to be given a bonus when he is discharged, equal to one-third part of the balance of the wages then owing to him, but the purpose of the statute was to secure the payment to him, at once upon his discharge, of one-third of the balance of the wages then owing him. *The Cubadist*, (S. D. Ala. 1918) 252 Fed. 658.

**Double pay for refusal to pay wages.**—This section applies only where the refusal to pay was willful and without excuse. *The Cubadist*, (S. D. Ala. 1918) 252 Fed. 658, wherein it was said: "There are numerous instances where masters have been known to willfully refuse to pay seamen their wages. In these cases I think it unquestionable that, if the seaman recovers, he should also recover double pay. There are, however, other cases where the master may have just cause to doubt whether the seaman is entitled to demand his pay, or cases where it may be a very close question. I do not think that the statute was intended to penalize any master or vessel for exercising sound judgment and discretion, or to require them to surrender such judgment under a penalty of double pay. I think the language used carries with it the idea that, where the court finds that the master's refusal was willful and without justification or excuse, double pay should be given, but where the master was exercising a reasonable and proper discretion, and the question was doubtful, it reserves to the court the power to pass upon the question of the reasonableness or the sufficiency of the excuse of the master, and give or deny the double pay, accordingly as the court may find the contention of the master to be honest or a mere pretext."

Vol. IX, p. 158, sec. 4530. [First ed., 1916 Supp., p. 228.]

**Constitutionality.**—In *The Strathearn*, (C. C. A. 5th Cir. 1919) 256 Fed. 631, 168 C. C. A. 25, *reversing* (N. D. Fla. 1917) 239 Fed. 583, in original annotation, it was contended that the provision of this section authorizing seamen to demand one-half of their earned wages on the arrival of their ships at American ports, was unconstitutional on the ground that it deprived parties without due process of law of rights under contracts made in foreign jurisdictions. In answering this contention, the court said: "The statute does not purport to affect, and does not affect, the rights of the parties under a contract made in a foreign jurisdiction, except to prevent such contract standing in the way of the enforcement of the domestic law in behalf of and against parties who have subjected themselves to the domestic jurisdiction. 'It is part of the law of civilized nations that, when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement.' *Wildenhus' Case*, 120 U. S. 1, 11, 7 Sup. Ct. 385, 387 (30 L. Ed.) 565. A contract made in Great Britain for the services of a British seaman on a British vessel which goes to an American port is not so far effective as to be enforceable in the latter place, if its enforcement there would result in setting at naught the law of that place. As the foreign contract is incapable of giving the right claimed by virtue of it, the statute in question cannot properly be regarded as depriving a party to the contract of a right under it; the right claimed not being one which was conferred by the contract or otherwise. The obligation of a contract entered into in one jurisdiction does not extend so far as to entitle the parties to such contract to be exempt from the operation of the law of another jurisdiction to which they subject themselves, which law forbids such effect being given to the contract as is sought to be given to it in that jurisdiction."

**What law governs.**—Shipping articles signed before a British consul in an Italian port are governed by British law and not by the *La Follette Act*. *The Hannington Court*, (E. D. N. Y. 1918) 252 Fed. 211.

**Right to one-half wages.**—*Generally.*—The provision of this section authorizing seamen to demand one-half their earned wages on the arrival of their ship at American ports, is not invalid on the ground that it is not within the legislative power of the United States to make, in that it undertakes to nullify contracts entered into between foreigners in a foreign country, in which such contracts are valid and enforceable. The fact that the seamen and the vessel are foreign does not prevent the American law

being applicable to them while both are in an American port. *The Strathearn*, (C. C. A. 5th Cir. 1919) 256 Fed. 631, 168 C. C. A. 25, *reversing* (N. D. Fla. 1917) 239 Fed. 583, in original annotation.

**Time of demand.**—In *The Strathearn*, (C. C. A. 5th Cir. 1919) 256 Fed. 631, 168 C. C. A. 25, *reversing* (N. D. Fla. 1917) 239 Fed. 583 in original annotation, it was held that this section authorizes a demand for wages two days after the arrival of a ship at a port, if more than five days have elapsed since the voyage commenced. In reversing the lower court's decision, it was said: "The provision that 'such demand shall not be made before the expiration of, nor oftener than once in five days,' is not to be given the effect of requiring that five days must have elapsed after the arrival of a ship at a port where it loads or delivers cargo before a demand for half wages can be made with the effect given to it by the statute. Evidently the intention was that such a demand should not have the effect given to it by the statute if it is made within five days 'after the voyage has commenced,' or if made sooner than five days after the making of a previous demand contemplated by the statute. The appellant's demand was not premature."

**Time for compliance with demand.**—A master is entitled to a reasonable time in which to comply with a demand for wages and where he offers and the men accept orders on stores for a part of the demand he is entitled to a reasonable time when a second demand is made for the balance. *The Pinna*, (C. C. A. 5th Cir. 1919) 255 Fed. 642, *affirming* (E. D. La. 1918) 252 Fed. 203, wherein it was said: "A demand, to be legal, must afford the person on whom the demand is made a reasonable time to accede to it. If, upon the second demand, the master had pleaded inability to immediately comply, not coupled with a request for time to put himself in shape to comply, it might be construed to be a refusal to comply, which would entitle the appellants to full wages and a discharge. Upon the ship's arrival in port, the master was entitled to a reasonable time to prepare himself to comply with any demands made upon him for wages. The acceptance of the orders tendered by the master in response to the first demand authorized the master to assume that the men would not insist on further payment, at least until he was notified to the contrary by the second demand. He was not, therefore, in default for not having anticipated and prepared for the second demand. He was entitled to a reasonable time, after the making of the second demand, to get the money to comply with it. This was certainly true, if he requested the extension of such indulgence to him and expressed a purpose to put himself in shape to comply shortly with the demand, if granted, and this is what the record discloses in this case. The purpose of section 4 of the Sea-

men's Act was to furnish a remedy by which sailors could procure a proportion of their earned wages at each port, and not to provide a method by which the shipping articles could be terminated at the will of the seaman, because of a failure on the master's part to instantly comply with a demand by the seaman, which was made with the purpose of procuring the right to demand a discharge from the shipping articles, rather than the payment of half of the earned wages under them."

**Deduction of previous payments.**—The half part of wages then earned which the seaman is entitled to receive is to be computed by dividing the total earnings by two and deducting the amount previously paid, not by making first the deduction and then the division. *The Thor*, (N. D. Cal. 1918) 248 Fed. 942.

**Effect of prior payment.**—It is only a demand for the payment of one-half part of the wages earned which stands in the way of the making of another such demand within five days thereafter. Consequently where on the arrival of a ship in port a demand for less than one-half of the earned wages is complied with, the seaman receiving such payments is not barred from making a further demand within the time prescribed by this section. *Rederiaktiebolaget Transatlantic v. Eklund*, (C. C. A. 5th Cir. 1919) 256 Fed. 95.

**Acceptance of store orders.**—The acceptance by seamen of store orders on the statement of the master that the cash to meet their demands was not at the moment available bars them from disputing the validity of the payment, and such compliance with their demand does not put the master in default, so as to entitle them to full wages and a discharge. *The Pinna*, (C. C. A. 5th Cir. 1919) 255 Fed. 642, *affirming* (E. D. La. 1918) 252 Fed. 203.

**Foreign seamen.**—To same effect as original annotation, see *The Strathearn*, (C. C. A. 5th Cir. 1919) 256 Fed. 631, 168 C. C. A. 25, *reversing* (N. D. Fla. 1917) 239 Fed. 583, in original annotation.

Where a British seaman under contract to make a voyage to this country and return deserts his vessel on arrival in the United States he forfeits all his effects and wages under the British law (Merchants Shipping Act, 1894, sec. 221), and after such desertion he cannot recover by making demand as provided by this section. *The Wells City*, (E. D. N. Y. 1919) 256 Fed. 689.

Foreign seamen on a British ship, who refuse to sign new articles on arrival at a port in the United States, the original articles having been lost overboard, and who refuse to return to the ship when ordered by the master, cannot recover half wages under this section, and may be treated by the master as deserters under the British law. *The Nigretia*, (C. C. A. 2d Cir. 1918) 255 Fed. 56, 166 C. C. A. 384.

**Termination of voyage.**—*Generally.*—Under this section a voyage is ended for any par-

ticular seaman when his period of employment under his contract ends. *The Cubadist*, (S. D. Ala. 1918) 252 Fed. 658.

Under shipping articles describing a voyage from Boston to a Cuban port and to such other ports and places in any part of the West Indies or the Gulf of Mexico as the master might direct, and back to a final port of discharge in the United States, north of Hatteras, for a term of not exceeding six months, the voyage is not terminated until the expiration of the six months' period or the return to a port north of Hatteras. *The Cubadist*, (C. C. A. 5th Cir. 1919) 256 Fed. 203, *affirming* (S. D. Ala. 1918) 252 Fed. 658.

**Cost of transportation to home port.**—Under the treaty between the United States and the Netherlands, May 23, 1878, article 11, providing that the consular authorities of each nation shall have jurisdiction of disputes between masters and crews of vessels of the respective nations concerning wages, exclusive of local authorities, the courts of the United States have no jurisdiction, by virtue of this section, over a dispute between the master and crew of a Dutch vessel concerning the payment of transportation for the crew to Holland. *The Rindjoin*, (C. C. A. 9th Cir. 1919) 254 Fed. 913, 166 C. C. A. 275.

**Costs on libel for wages.**—The failure to comply with the demand for the payment of half the wages earned, entitles seamen to full payment of wages earned, with costs of the libel proceedings for the recovery thereof. *Rederiaktiebolaget Transatlantic v. Eklund*, (C. C. A. 5th Cir. 1919) 256 Fed. 95.

## Vol. IX, p. 166, sec. 4543. [First ed., vol. VI, p. 878.]

**Right to fees.**—A shipping commission is not entitled to receive a fee from the estate of a deceased seaman but must pay the same into the registry of the District Court. *In re MacDonald*, (S. D. N. Y. 1917) 248 Fed. 983, *following* *Lewis v. U. S.*, (1917) 244 U. S. 134, 37 S. Ct. 570, 61 U. S. (L. ed.) 1039, and *overruling* *In re Johnson*, (S. D. N. Y. 1916) 251 Fed. 319.

**Amount of fees.**—An allowance to the shipping commissioner of a fee of \$2 and one per cent of the amount of the wages received is authorized by this section. *In re Johnson*, (S. D. N. Y. 1916) 251 Fed. 319.

## Vol. IX, p. 168, sec. 4547. [First ed., vol. VI, p. 879.]

**Withholding wages during controversy.**—Where there is an actual controversy between the crew and the owner of a vessel as to a claim for extra compensation, as evidenced by the submission of the disputed questions to a shipping commissioner and his decision in favor of the captain, the refusal to pay the sums demanded by the crew does not amount to a wrongful withholding of wages

without sufficient cause. *The Silver Shell*, (E. D. N. Y. 1918) 235 Fed. 340.

**Vol. IX, p. 174, sec. 10.** [First ed., 1916 Supp., p. 232.]

**Application of section.—Advances in foreign port.**—Advances to seamen made by the master of an American vessel in a South American port are not affected by this section. *Neilson v. Rhine Shipping Co.*, (1918) 248 U. S. 205, 39 S. Ct. 89, 63 U. S. (L. ed.) — (affirming (C. C. A. 2d Cir. 1918) 250 Fed. 180, 162 C. C. A. 316, which reversed *The Rhine*, (E. D. N. Y. 1917) 244 Fed. 833), wherein the court said: "The District Court decided in favor of the libellants. 244 Fed. Rep. 833. The Circuit Court of Appeals reversed the decrees. 250 Fed. Rep. 180. The cases are here on writ of certiorari.

"The section of the statute is the same as that involved in the case of *The Talus* [Sandberg v. McDonald], No. 392, ante, 185. The difference is that the advances were made by the master of an American vessel in a South American port, whereas in *The Talus* the advancements were made to foreign seamen in a British port. The same general considerations as to the interpretation of the statute which controlled in the decision of the case of *The Talus* are applicable here and need not be repeated.

"That American vessels might be controlled by congressional legislation as to contracts made in foreign ports may, for present purposes at least, be conceded. It appears that only by compliance with the local custom of obtaining seamen through agents can American vessels obtain seamen in South American ports. This is greatly to be deplored, and the custom is one which works much hardship to a worthy class. But we are unable to discover that in passing this statute Congress intended to place American shipping at the great disadvantage of this inability to obtain seamen when compared with the vessels of other nations which are manned by complying with local usage.

"The statute itself denies clearance papers to vessels violating its terms. This provision could only apply to domestic ports and is another evidence of the intent of Congress to legislate as to advances made in our own ports."

**Foreign vessels.**—This section only applies to foreign vessels "while in waters of the United States" and does not make invalid the contracts of foreign seamen so far as advance payments were made in a foreign country where the law sanctioned such contract and payment. *Sandberg v. McDonald*, (1918) 248 U. S. 185, 39 S. Ct. 84, 63 U. S. (L. ed.) — (affirming (C. C. A. 5th Cir. 1918) 248 Fed. 670, 160 C. C. A. 570, which reversed *The Talus*, (S. D. Ala. 1917) 242 Fed. 954), wherein the court said: "The Dingley Act of 1884 (23 Stat. 55, 56), which is

the origin of this section, contains terms much like those found in this act. That statute, as the present one, in the aspect now before us, was intended to prevent the evils arising from advanced payments to seamen, and to protect them against a class of persons who took advantage of their necessities and through whom vessels were obliged to provide themselves with seamen. These persons obtained assignments of the advanced wages of sailors. In many instances this was accomplished with little or no service to the men who were obliged to obtain employment through such agencies. In the Dingley Act it was made unlawful to pay seaman's wages before leaving the port at which he was engaged. In the present act it is made unlawful to pay seaman's wages in advance of the time when he has actually earned the same. The Act of 1884 by its terms applied as well to foreign vessels as to the vessels of the United States, and masters of foreign vessels violating the law were refused clearance from any port of the United States. The present statute is made to apply as well to foreign vessels while in the waters of the United States as to vessels of the United States.

"In the present statute, in the section from which we have just quoted, masters, owners, consignees, or owners of foreign vessels are made liable to the same penalties as are the like persons in case of vessels of the United States. Such persons in case the vessels are those of the United States or foreign vessels, seeking clearance in ports of the United States, are required to present their shipping articles at the office of clearance, and no clearance is permitted unless the provisions of the statute are complied with.

"The Act of 1884 came before the United States District Court for the Southern District of New York in the case of *The State of Maine*, 22 Fed. Rep. 734. In a clear and well-reasoned opinion by Judge Addison Brown the law was held not to apply to the shipment of seamen on American vessels in foreign ports. After some amendments in 1898, not important to consider in this connection, the matter came before this court in the case of *Patterson v. Bark Eudora*, 190 U. S. 169, and it was held to apply to a British vessel shipping seamen at an American port, and, furthermore, that the act, as thus applied to a foreign vessel in United States waters, was constitutional. . . . Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 357. In *Patterson v. Bark Eudora*, supra, this court declared such legislation as to foreign vessels in United States ports to be constitutional. We think that there is nothing in this section to show that Congress intended to take over the control of such contracts and payments as to foreign vessels except

while they were in our ports. Congress could not prevent the making of such contracts in other jurisdictions. If they saw fit to do so, foreign countries would continue to permit such contracts and advance payments no matter what our declared law or policy in regard to them might be as to vessels coming to our ports.

"In the same section, which thus applies the law to foreign vessels while in waters of the United States, it is provided that the master, owner, consignee, or agent of any such vessel, who violates the provision of the act, shall be liable to the same penalty as would be persons of like character in respect to a vessel of the United States. This provision seems to us of great importance as evidencing the legislative intent to deal civilly and criminally with matters in our own jurisdiction. Congress certainly did not intend to punish criminally acts done within a foreign jurisdiction; a purpose so wholly futile is not to be attributed to Congress. *United States v. Freeman*, 239 U. S. 117, 120. The criminal provision strengthens the presumption that Congress intended to deal only with acts committed within the jurisdiction of the United States.

"It is true the act provides for the abrogation of inconsistent treaty provisions, but this provision has ample application treating the statute to mean what we have here held to be its proper construction. It abolishes the right of arrest for desertion. It gives to the civil courts of the United States jurisdiction over wage controversies arising within our jurisdiction. These considerations amply account for the treaty provision. See *Treaties in Force*, ed. 1904, index, p. 969.

"It is said that the advances in foreign ports are against the policy of the United States and, therefore, not to be sanctioned here. As we have construed this section of the statute; no such policy as to foreign contracts legal where made is declared."

**Vol. IX, p. 180, sec. 20.** [First ed., 1916 Supp., p. 251.]

"**Seaman having command.**"—To the same effect as the original annotation, see *The Colusa*, (C. C. A. 9th Cir. 1918) 248 Fed. 21, 160 C. C. A. 161, *affirming* (N. D. Cal. 1917) 241 Fed. 968, cited in the original note.

The first officer of a vessel is not a fellow servant of a seaman, but is the agent of the owner in so far as the security of the vessel's gear is concerned, and if the seaman is injured because of its defective condition it is either the fault of the owner for installing faulty gear or of his agent for failure to inspect it and keep it in proper condition, and in either event the owner is liable. *Corrado v. Pedersen*, (N. D. Cal. 1918) 249 Fed. 105.

"**Those.**"—The word "those" as used in this section refers to seamen and not to

those injured. Hence, a longshoreman employed from the land to assist in loading the vessel is not within the meaning of the statute. *The Hoquiam*, (C. C. A. 9th Cir. 1918) 253 Fed. 627, 165 C. C. A. 253.

**Failure to furnish light to watchman.**—Where a muleteer is ordered to act as night watchman and is injured by falling in the dark because of the failure of those in authority to provide him with a light, the ship is liable under this section for his injury. *The Baron Napier*, (C. C. A. 4th Cir. 1919) 249 Fed. 126, 161 C. C. A. 178.

**Vol. IX, p. 191, sec. 4568.** [First ed., vol. VI, p. 893.]

**Substitution of equivalents.**—The owner is not liable under this section for a failure to provide proper food where it appears that on a shortage of food the best substitutes obtainable at the ports where the vessel was when the shortage occurred, were provided; nor is he liable because of poor cooking when every effort to engage a competent cook was made. *The Silver Shell*, (E. D. N. Y. 1918) 255 Fed. 340.

**Recovery — Burden of proof.**—To same effect as original annotation, see *The Silver Shell*, (E. D. N. Y. 1918) 255 Fed. 340.

**Vol. IX, p. 195, sec. 4569.** [First ed., vol. VI, p. 895.]

**Medicine and medical treatment.**—An action will not lie against the ship for an error of diagnosis on the part of the officers with respect to an injury to one of the crew, but the vessel should not be absolved from liability if the ignorance of the officers is merely a basis for their utter failure to appreciate that they should do something to supplement their own lack of knowledge. *The Van Der Duyn*, (E. D. N. Y. 1918) 251 Fed. 746, wherein it appeared that the libellant, a coal passer, had his right arm fractured, but the ship's officers treated it as a lacerated bruise, and on the arrival of the ship at Havana five days later had the arm examined by a doctor but did not send the libellant to a hospital, but brought him to New York, where he received hospital treatment on his own initiative, the ship's officers in the meantime having charged him with shamming. The court said: "But undoubtedly the libellant suffered additional pain and discomfort, and was not given considerate treatment by the officers of the vessel, who concluded that he was shamming, and who looked upon the injury as a mere bruise, or laceration of the flesh. The treatment, while useful in preventing infection, was not that which a possibly broken arm should have received, and the evidence supports a finding that the officers were not



justified in relying upon their own opinion or in assuming from the examination given by the quarantine doctor at Havana that no other treatment was necessary. Their failure to take such steps as the situation evidently called for, while unintentional on their part, can nevertheless not be overlooked, and the vessel is certainly liable for that failure, as the vessel owed it to the seaman to take reasonable precautions and to furnish reasonable aid, even to the extent of taking the man to the nearest place for remedy."

Vol. IX, p. 203, sec. 4580. [First ed., vol. VI, p. 902.]

**Effect of certificate of discharge.**—Although a consular certificate of discharge is only prima facie evidence of the facts stated therein, yet a libellant, who sues to recover for wages and transportation because of his discharge in a foreign port, must offer proof sufficient to overcome this prima facie case in order to be entitled to recover. The Oregon, (E. D. N. Y. 1918) 254 Fed. 752.

## SHIPPING AND NAVIGATION

Vol. IX, p. 252, sec. 4132. [First ed., 1914 Supp., p. 373.]

The word "outfit" and the word "equipment," used in this section, are practically synonymous. U. S. v. Richard & Co., (1917) 8 U. S. Cust. App. 231.

**Spare engine parts.**—Although engines for operating the auxiliary lighting plants of ships built in this country must be regarded as parts of the vessels, and not as outfit or equipment for them, still spare or repair smaller wearing parts for such engines, such parts being carried in duplicate by such vessels, are admissible free of duty as "outfit and equipment" of vessels built in the United States, under this section. U. S. v. Richard & Co., (1917) 8 U. S. Cust. App. 231.

Vol. IX, p. 257, sec. 4141. [First ed., vol. VII, p. 16.]

**Situs for purpose of taxation.**—Registry is not conclusive as to situs for the purpose of local personal property taxation. Galveston v. Haden, (Tex. Civ. App. 1919) 214 S. W. 766.

Vol. IX, p. 292, sec. 2. [Crew-space.] [First ed., 1916 Supp., p. 228.]

"After the passage of the Act."—To same effect as original annotation, see The San Joan, (C. C. A. 2d Cir. 1918) 250 Fed. 93, 162 C. C. A. 265, affirming (S. D. N. Y. 1917) 241 Fed. 288.

The words "this Act" as used in this section refer to the Act of March 3, 1897, the original enactment of this section, and the requirements as to crew space on vessels, prescribed in the amendment to this section by the Act of March 4, 1915, ch. 153, sec. 6, apply to all vessels constructed after the passage of the Act of March 3, 1897. (1916) 30 Op. Atty-Gen. 558.

Vol. IX, p. 296, sec. 4197. [First ed., vol. VII, p. 45.]

**Clearances in general.**—The ship before it leaves port must obtain its "clearance" from the collector of the port. Clearances have a history in the maritime law extending over hundreds of years. A clearance is an important document, even in times of peace. It is particularly so in time of war. It certifies the fact that a vessel has complied with the law and is authorized to leave port. It contains the name of the master of the vessel, and of the port to which it is going. It bears an official seal and is a ship's passport, which entitles it to go from one end of the sea to the other, except that it cannot enter a blockaded port. Its regularity is the first thing that is inspected in time of war when the boarding officer of a belligerent vessel boards the ship to determine whether she is on a lawful voyage. Hamburg-American Steam Packet Co. v. U. S., (C. C. A. 2d Cir. 1918) 250 Fed. 747, 163 C. C. A. 79.

Vol. IX, p. 340, sec. 8. [First ed., vol. VII, p. 67.]

**Continuity of voyage.**—Foreign vessels which transport passengers from San Juan, Porto Rico, to the port of New York, are liable to the fine imposed by this section, as amended by the Act of 1898, although the passengers go ashore for brief stays at intervening foreign ports. (1913) 30 Op. Atty-Gen. 44.

Vol. IX, p. 341, sec. 1. [First ed., vol. VII, p. 68.]

**Transportation by land and water.**—The words of this section by their plain, natural import, refer to a voyage entirely by water by vessels between ports of the United States. It follows that the transportation of merchandise on through bills of lading by Ameri-

can vessels from Seattle to Skagway, thence by rail over the White Pass and Yukon route across the international boundary to Whitehorse, in Yukon Territory, and thence by foreign vessels down the rivers, across the international boundary again, to Fairbanks, would not violate the provisions of this section. (1913) 30 Op. Atty-Gen. 3.

**Vol. IX, p. 343, sec. 14.** [First ed., 1909 Supp., p. 655.]

**Liability of tug for injury to tow.**—In *Aldrich v. Pennsylvania R. Co.* (C. C. A. 2d Cir. 1918) 255 Fed. 330, 166 C. C. A. 500, discussing the liability of a tug for injury to a vessel which it has taken in tow, the court said: "While the general rule respecting the duty and liability of one undertaking towage services for another is that he is bound to exercise reasonable skill and care, such as a prudent navigator would exercise in similar service until it is accomplished, and he is responsible for any damage which may result to the tow as a result of the failure to perform the responsibilities of such an undertaking, he is not an insurer and required to use the highest possible degree of skill or care. . . . The burden is on the one who asserts negligence to prove it, and the mere fact that a barge has been damaged while in tow does not raise the presumption that the tug has been at fault."

**Vol. IX, p. 346, sec. 1.** [First ed., 1912 Supp., p. 352.]

I. Introductory.

II. Definition and nature of maritime lien.

III. Person entitled to lien.

V. "Repairs, supplies or other necessities."

VII. Repairs, etc., furnished to vessel.

VIII. Necessity that credit was given to vessel.

I. INTRODUCTORY (p. 347)

**Purpose of Act.**—In the *South Coast*, (C. C. A. 9th Cir. 1917) 247 Fed. 84, 159 C. C. A. 302, it was said that the Act obviated the doubt which at one time existed as to a lien for supplies furnished on the personal order of the owner. The court said: "Prior to the adoption of the Act of Congress of June 23, 1910 (36 Stat. 604), relating to liens upon vessels for repairs, supplies, or other necessities, there was much confusion respecting the law, as to whether a lien would attach where the necessities and supplies, etc., were ordered by the master when the owner was personally present, or whether such a lien was susceptible of being impressed orally by the owner in case the supplies, etc., were furnished through his personal order on the credit of the ship. In the first instance, it was thought that it would not attach because, the owner being present,

the presumption seemed to prevail that there was want of authority in the master to bind the vessel. But, if the ship were in a foreign port and the owner were not present, the authority of the master to bind the ship would exist through necessity, that the ship might be repaired and provisioned in order to go forward upon its voyage. *Thomas et al. v. Osborn*, 19 How. 22, 15 L. ed. 534; *The Kalorama*, 10 Wall. 204, 212, 213, 19 L. ed. 941; *The Underwriter*, (D. C.) 119 Fed. 713, 755. In the second instance, according to many authorities, the personal order of the owner gave rise to the presumption that the supplies were furnished on his personal credit. *The St. Jago de Cuba*, 9 Wheat. 409, 6 L. ed. 122. And it was not even clear that the owner could impose a lien upon the vessel by oral agreement. *The Iris*, 100 Fed. 104, 40 C. C. A. 301; *Cuddy v. Clement*, 113 Fed. 454, 51 C. C. A. 288. But all this controversy has been put at rest, or rather obviated, by the statute, which imposes a lien in favor of the person furnishing repairs, supplies, etc., 'upon the order of the owner or owners, . . . or of a person by him or them authorized.'"

II. DEFINITION AND NATURE OF MARITIME LIEN (p. 348)

A contract cannot afford the necessary basis for a maritime lien, unless it is maritime in its nature, so as to be cognizable in admiralty; and it is not enough that the contract is maritime as to some of its provisions—it must be maritime in its entirety. *The Walter Adams*, (C. C. A. 1st Cir. 1918) 253 Fed. 20, 165 C. C. A. 40.

**Executory contract.**—So long as a contract remains wholly executory, the vessel and cargo are subject to no lien which can be enforced in rem. *The Rancagua*, (C. C. A. 5th Cir. 1919) 256 Fed. 843.

So where a contract was for the libellant's services as a stevedore and was maritime in its nature, it was decided that performance under it was required to confer a lien enforceable by proceedings in rem against the vessel and cargo, if their ownership was such that they could be subjected to a lien, it being declared that contracting to render such service was not the rendering of them. *The Rancagua*, (C. C. A. 5th Cir. 1919) 256 Fed. 843.

III. PERSON ENTITLED TO LIEN (p. 348)

**Architects.**—It has been said that if the person who did the work of repairing a vessel should include a charge for drawing plans it would evidently give him a lien therefor and that it would follow that the work was a part of the repairs even when done for a third party. So it has been held that an architect is entitled, under this section, to a lien for work done in preparing plans for repairs to the hull, engines, boilers, machinery, etc., of a vessel. *The Schuykill*, (E. D. N. Y. 1918) 249 Fed. 781.

# V. "REPAIRS, SUPPLIES OF OTHER NECESSARIES" (p. 349)

**Presumption of necessity.**—It seems to be settled law that, unless repairs and supplies are necessary to render the vessel seaworthy to enable her to proceed on her voyage, the master is not authorized, as between himself and the owners, to procure them on the credit of the owners or of the vessel. But the necessity for credit will be presumed where it appears that the repairs and supplies were ordered by the master, and that they were then necessary for the ship when lying in port, or to fit her for an intended voyage, unless it be shown that the master had funds, or that the owners had sufficient credit, and that the repairer, furnisher, or lender knew those facts, or one of them, or that such facts and circumstances were known to him as were sufficient to put him upon inquiry, and to show that if he had used due diligence he would have ascertained that the master was not authorized to obtain any such relief upon the credit of the vessel. *The South Coast*, (C. C. A. 9th Cir. 1917) 247 Fed. 84, 159 C. C. A. 302.

**Towage is not a necessary within the meaning of this Act.** *The Hatteras*, (C. C. A. 2d Cir. 1918) 255 Fed. 518, 166 C. C. A. 586.

**Supplies furnished in home port.**—The lien given by this section applies in the case of supplies furnished in the home port. In this connection it is said: "Congress could have had but one intent in the passage of this act. It was to give a lien for supplies, etc., to the person furnishing the same, upon the vessel to which same was furnished, under the circumstances set out in the act. If such was not the intent, why specify the conditions under which the supplies, etc., were to be furnished? Theretofore the lien for supplies furnished to a vessel in her home port was dependent upon the statutes of the several states, and Congress, in the fifth section of the act, specifically supersedes all such state statutes. This action alone, even if the words of the act were doubtful, would be very persuasive of the intent to give a maritime lien for supplies furnished a vessel, whether in her home port or not. I have examined the cases of *The St. Jago de Cuba*, 9 Wheat. 409, 6 L. ed. 122, *The Sinaloa*, (D. C.) 209 Fed. 287, and *L. C. Transp. Co. v. Gulf Refining Co.*, 211 Fed. 336, 128 C. C. A. 15, but find nothing in them adverse to this construction of the act of Congress." *The Bud III*, (S. D. Fla. 1918) 250 Fed. 918.

This Act applies only to repairs, supplies and other necessities furnished the vessel at the home port, and not to damages for a breach of contract for a charter. *Corsica Transit Co. v. W. S. Moore Grain Co.*, (C. C. A. 8th Cir. 1918) 253 Fed. 689, 165 C. C. A. 283.

**The letting of a barge to be used by a company in dredging operations has been held not to be a furnishing of repairs, supplies or other necessities so as to support a libel against a dredge with which it was used and**

**in connection with which use it was sunk.** *The Dixie*, (C. C. A. 5th Cir. 1918) 249 Fed. 46, 161 C. C. A. 106.

**Effect on lien of acts of seller under conditional contract of sale.**—Where a libellant has a lien for supplies furnished a vessel on the order of a person in possession under a conditional contract of sale, such lien cannot be displaced by any act of the seller in taking possession of the boat on an alleged default in payments and in advertising and selling it subsequent to the time the lien attached. *The Bud III*, (S. D. Fla. 1918) 250 Fed. 918.

# VII. REPAIRS, ETC., FURNISHED TO "VESSEL" (p. 351)

**Supplies furnished for specified vessel.**—Where specific supplies or materials have been furnished to the owner upon a distinct understanding that they were for a specified vessel, and the owner has, after delivery to him, appropriated them to the vessel so designated between the parties, they have been held to have been furnished to her in the sense of the statute; and maritime liens for them under it have been sustained. *The Walter Adams*, (C. C. A. 1st Cir. 1918) 253 Fed. 20, 165 C. C. A. 40.

# VIII. NECESSITY THAT CREDIT WAS GIVEN TO VESSEL (p. 352)

Where coal was delivered to a corporation and there was no understanding as to the coal so delivered, or any definite part of it, that it was for either of the vessels libeled, or for all of them, or even for all the vessels in a fleet, as distinguished from the factories; and, except that the coal was understood to be for use in its business as carried on at those places, its ultimate disposition was left as above for determination by the corporation subsequently to the making of the agreement regarding coal for the season, and subsequently to both its shipments and its delivery, and the shipments were all charged by the libellant on its books to the corporation, without any entries charging any of it either to a specific vessel, or to specific vessels, or to the fleet; and they were billed to the corporation only, without any reference to vessels or fleet, it was held that no maritime lien on any vessel was created. *The Walter Adams*, (C. C. A. 1st Cir. 1918, 253 Fed. 20, 165 C. C. A. 40.

# Vol. IX, p. 355, sec. 3. [First ed., 1912 Supp., p. 353.]

**Charterer bound by contract to protect against liens.**—The fact that the charter party binds the charterer to save the owner harmless from liens does not negative the authority of a master appointed by the charterer to procure repairs or supplies on the credit of the vessel. *The South Coast* (C. C. A. 9th Cir. 1917) 247 Fed. 84, 159 C. C. A. 302, *affirming* (N. D. Cal. 1916) 233 Fed.

327) wherein it was said: "Many ships sail under charter, either verbal or in form of regularly drawn charter parties, and it is usual and customary for the charterer in either event to disburse the necessary expenses of the ship; and of this all persons furnishing supplies, etc., to a chartered ship must be deemed to have notice. But notwithstanding this notice, or even knowledge that the ship is under charter, we cannot believe that it was the intentment of the statute or of the law that the furnisher should, because of that fact, be deprived of his lien when advancing necessary repairs or supplies in good faith to enable the ship to engage in her accustomed traffic. Nor do we believe that it was the intentment of the statute or of the law thus to impose so vital a hindrance upon maritime shipping, and unless there is something more in the charter party, that unalterably inhibits the master or the charterer from incurring any expenditures on the credit of the ship that may become a lien thereon, the master's ordinary authority is not impaired or abbreviated; nor can the right of the furnisher of repairs, etc., to extend credit to the ship, and his consequent lien, be so subverted. The terms of the present charter party as respects the furnishing of repairs, supplies, etc., are only those usual to most charter parties, and by reason of the provision that the charterer will hold the owner harmless from all liens against the vessel, there is an implication of authority on the part of the charterer to incur such expenses on the credit of the vessel. True it is that the owner attempted to prevent the libellant from advancing the supplies on the credit of the vessel; but this was an invasion of the charterer's rights under the charter party, and was unavailing to subvert the master's authority in the premises."

### 1918 Supp., p. 788, sec. 9.

The business situation which Congress had in mind in passing this section was one in which vessels would be acquired by the board, and operated under charter or lease from it, or sold by it outright. *The G. A. Flagg*, (D. C. Mass. 1919) 256 Fed. 852.

**Construction.**—The basic intention seems clear from the language of paragraph 2 of this section, that merchant vessels should gain no exemption from the ordinary legal liabilities because of any interest which the United States might have in them. *The G. A. Flagg*, (D. C. Mass. 1919) 256 Fed. 852.

**"Purchased, chartered or leased."**—A vessel operating under a charter executed by agents of the United States Shipping Board to a coal company—even if the agreement were merely one whereby the shipper paid a stipulated rate per ton for the cargo carried—is "purchased, chartered, or leased" from such board within the meaning of the provision of the Shipping Board Act of Sep-

tember 7, 1916, that vessels so purchased, chartered or leased, while employed solely as merchant vessels, shall be subject to all laws, regulations and liabilities governing merchant vessels, whether the United States is interested therein as owner or otherwise. *The Lake Monroe*, (1919) 250 U. S. 246, 39 S. Ct. 460, 63 U. S. (L. ed.) —.

#### **"Employed solely as a merchant vessel."**

—The restrictive provision of this section, that vessels purchased, chartered or leased from the United States Shipping Board, while employed solely as merchant vessels, shall be subject to all the laws, regulations and liabilities governing merchant vessels, whether the United States is interested therein as owner or otherwise, must be deemed to apply to a vessel requisitioned by the President through the Emergency Fleet Corporation, under authority of the Urgent Deficiency Appropriation Act of June 15, 1917, documented in the name of the United States, and then employed by the President through the Shipping Board and the Emergency Fleet Corporation under charter to a private concern, in view of the provisions of the Act of July 15, 1918, amending said section 9, but re-enacting this provision almost verbatim, and of the Act of July 18, 1918 (see *ante*, p. 340), conferring upon the President power to prescribe charter rates and freight rates, and to requisition vessels, which defines the term "charter" as meaning any agreement, contract, lease or commitment by which the possession or services of a vessel are secured for a period of time, or for one or more voyages, whether or not a demise of the vessel. *The Lake Monroe*, (1919) 250 U. S. 246, 39 S. Ct. 460, 63 U. S. (L. ed.) —.

Assignment to the New England coal trade at a time when the government, through the fuel administration, was rationing the coal supply of the country, of a vessel operated under a charter executed by agents of the United States Shipping Board to a coal company, does not justify the view that she was not employed solely as a merchant vessel, within the provision that vessels purchased, chartered or leased from the United States Shipping Board shall, while employed solely as merchant vessels, be subject to all laws, regulations and liabilities governing merchant vessels, whether the United States be interested therein as owner in whole or in part, or holding a mortgage, lien or other interest therein. *The Lake Monroe*, (1919) 250 U. S. 246, 39 S. Ct. 460, 63 U. S. (L. ed.) —.

**Liability of vessel to libel.**—A vessel requisitioned by the United States Shipping Board Emergency Fleet Corporation and by it chartered to the government of France is liable for collision while being navigated under that charter. *The Florence H.*, (S. D. N. Y. 1918) 248 Fed. 1012.

**Exemption of vessel from arrest.**—A vessel to which title was taken in the name of

the United States and was thus registered by the Shipping Board was held to be exempt from arrest as the property of the United States on a libel against the vessel to recover damages for personal injuries sustained while she was proceeding without cargo to a port in this country "for entering upon the public service of the United States." *The G. A. Flagg*, (D. C. Mass. 1919) 256 Fed. 852.

**Liability for collision of vessel chartered by Shipping Board.**—The liability of a merchant vessel operated under a charter executed by agents of the United States Shipping Board to a private concern to be subjected to judicial process in admiralty for

the consequences of a collision was among those recognized by the provision that vessels purchased, chartered or leased from the United States Shipping Board, while employed solely as merchant vessels, shall be subject to all laws, regulations and liabilities governing merchant vessels, whether the United States is interested therein as owner or otherwise. *The Lake Monroe*, (1919) 250 U. S. 246, 39 S. Ct. 460, 63 U. S. (L. ed.) —.

**Burden of proof.**—The general rule being that a government vessel is exempt from arrest, it devolves on a libellant to establish that a vessel comes within the excepted class in this section. *The G. A. Flagg*, (D. C. Mass. 1919) 256 Fed. 852.

## SOLDIERS' AND SAILORS' CIVIL RELIEF

### 1918 Supp., p. 812, sec. 100.

**Constitutionality.**—"There can be no question of the constitutionality of the act. It is a war measure within the power of Congress, therefore the supreme law of the land." *Hoffman v. Charlestown Five Cents Sav. Bank*, (1918) 231 Mass. 324, 121 N. E. 15.

### 1918 Supp., p. 813, sec. 103.

**Forfeiture of bail bond.**—The Act does not prevent the forfeiture of a bail bond where the principal, though in the military service, could have obtained a furlough and made no effort to do so. *Briggs v. Com.*, (1919) 185 Ky. 340, 214 S. W. 975. The court said: "As stated in the act itself, it is intended as a protection for those in the military service of the United States in order to prevent prejudice or injury to their civil rights. No civil rights of the defendants are involved here, but even so Congress could hardly have intended to extend protection in a case presenting facts such as this, where the parties affected could have prevented the default had they made any effort so to do."

### 1918 Supp., p. 814, sec. 200 (1).

**Construction of provision as to affidavit.**—This provision does not affect the right of a court to assume jurisdiction, and therefore where it appears that the defendants, against whom a judgment by default was entered, were not in service, they are not entitled to have the judgment set aside because the affidavit provided for in this section was not filed. *Howie Min. Co. v. McGary*, (N. D. W. Va. 1919) 256 Fed. 38. In construing this section the court said: "The plaintiff has, upon this motion, tendered an affidavit of one of its attorneys that neither of these defendants had been or were in the service contemplated by the act during the war, and it is not contended by defendants themselves

that they, or either of them, are or have been in such service.

"They contend, in effect, however, that in all cases where defendants fail to appear this statute goes to the jurisdiction of the court—that it has no power, while its provisions are in force, to enter judgment against any defendants until the affidavit, or one of them, required by the act, has first been filed by the plaintiff."

"If this construction contended for by defendants' attorney be true, this act must inevitably have very sweeping, far-reaching effect, not only during this period of the war, but for years thereafter; for it is safe to say that in the inferior courts of the country many hundreds, if not thousands, of judgments have been taken where the affidavit has not been filed, all of which would become absolutely void. In such case, it might be doubted whether the act could be maintained as constitutional even as war-time legislation, but it is not deemed necessary here to discuss that proposition. There are several reasons why I do not regard it as applicable to this case:

"First. By the terms of this section itself a question arises at once as to what character of cases is meant by the words 'default of an appearance' by the defendant. There are a large number of cases constantly brought in our courts by publication of notice or summons, such as divorce cases in personam, or attachment cases in rem, where no personal service is had upon a defendant, in which, however, the courts are by law authorized to proceed to decree and judgment. This statute in construction could very well be restricted in application to such, for when one has been, in person, properly served with process, he is presumed to be in court, and the legal obligation upon him to appear and make his defense, if he has any and desires to do so, becomes imperative. It can hardly be presumed that Congress intended that one, for instance, not

in service, so served, and upon whom such obligation in consequence rests, should, by reason of being even afterwards called to service, be relieved of the instant legal obligation upon him that he had theretofore incurred.

"Second. Be this as it may, it seems clear that the terms of the act should be construed together, with a view to ascertain the reasonable purpose designed to be accomplished by it. It cannot be questioned that it is exclusive in its terms, designed solely for the benefit of certain persons for the time being in certain defined classes of military and naval service, their sureties, indorsers, and guarantors, and no others. This is made very clear by the sections of article 1 of the act; further, that it does not pretend to abrogate the contracts of such persons, but only to suspend the enforcement thereof by legal proceedings for a specified period; that the entering of such judgment or decree against such persons may notwithstanding be by the court done, provided it has appointed an attorney to represent such person in service to protect his interest, and has required of plaintiff a bond to indemnify the defendant in such service 'against any loss or damage that he may suffer by reason of any judgment, should the judgment be thereafter set aside in whole or in part.'

"Third. If action is brought against such person in service, the court in which it is pending, in its discretion, on its own motion, or upon application of such defendant in service, or someone for him, shall stay the prosecution of the action for the period specified, 'unless, in the opinion of the court, the ability of the plaintiff to prosecute the action, or the defendant to conduct his defense, is not materially affected by reason of his military service,' and in case of executions, attachments, and garnishments, like stay may, in the discretion of the court, under like conditions, be granted, and attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment, may be vacated. Where the person in military service is a co-defendant with others, the plaintiff may nevertheless, by leave of court, proceed against the others. From all these provisions, taken together, it seems to be clear that Congress had no intention by this act to either destroy or limit the inherent jurisdictional right of the courts to try cases, or enforce rights and remedies, against people generally, but only to secure certain security for those certain persons in military and naval service who might otherwise by reason of service be subject to injustice and oppression.

"Fourth. To fully establish the view herein taken, it would seem that the terms of the fourth clause of this article 2 [§200] of the act are conclusive. This clause reads as follows:

"(4) If any judgment shall be rendered in any action or proceeding governed by this

section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment.'

"In view of all these provisions, I conclude that this statute does not affect in any way the right of the courts to assume jurisdiction over individual citizens not engaged in the service specified by the statute; that in case they have or do assume such jurisdiction over one in such service, it is their duty, in case attention is called to the fact, by either the defendant in service or someone for him, to see to it that such defendant is properly represented by attorney and the action is stayed unless his interests will not be materially affected or he is by bond indemnified; that in case judgment is taken against him he has full remedy under this fourth clause to have such judgment vacated; that none of these provisions can in any way inure to the benefit of persons not in such service and, therefore, unless one or the other of these defendants can show that he was in such service at the time this judgment was rendered the failure of the plaintiff to file affidavit that such was not the case becomes wholly immaterial, so far as any right on their part is concerned, to disturb or cause this judgment to be set aside."

### 1918 Supp., p. 815, sec. 201.

**Motion to set aside divorce.**—In *State v. Klene*, (Mo. 1919) 212 S. W. 55, it was held a proper exercise of discretion to refuse to stay a motion by a wife to set aside on the ground of fraud a decree of divorce rendered against her, though the husband was absent in the service and was unable to procure a leave of absence.

### 1918 Supp., p. 815, sec. 203.

**Conflict with state law.**—The right to proceed in civil court against a person in the military service of the United States must be determined in accordance with this act, and a state statute in conflict with this section is void. *Konkel v. State*, (1919) 168 Wis. 335, 170 N. W. 715, wherein the court said: "There can be no doubt that Congress in the exercise of the powers conferred

upon it may prescribe the conditions under which persons in the military service of the United States shall be subject to the process of courts, whether state or federal. Such provision seems necessarily implied from the provisions expressly granted, to maintain an army and navy. No question as to the validity of the Soldiers' and Sailors' Civil Relief Act is raised, and we see no ground upon which its validity could be successfully assailed. It is equally within the power of a state to confer upon persons in the military service of the United States certain privileges and immunities respecting the process of its courts. The United States and the states have a concurrent right in respect to the subject matter here under consideration. The question then arises whether or not there is a conflict between chapter 469 and the Soldiers' and Sailors' Civil Relief Act, for, if there be a conflict, the act of Congress, by subdivision 2 of article 6 of the Federal Constitution, is made the supreme law of the land. *Gibbons v. Ogden*, (1824) 9 Wheat. 1, 6 U. S. (L. ed.) 23. We think it must be held that the laws clearly conflict. *New York Cent. R. Co. v. Winfield* (1917) 244 U. S. 147, 87 S. Ct. 546, 61 U. S. (L. ed.) 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D 1139. In the first place, they speak upon identically the same subject matter; that is, the exemption of persons in the military service of the United States from the process of civil courts. The Soldiers' and Sailors' Civil Relief Act prescribes what that exemption shall be in the courts of the United States and of the states, including the state of Wisconsin. Chapter 469 prescribes what that exemption shall be within the state of Wisconsin, and it prescribes a different exemption than that prescribed by the Soldiers' and Sailors' Civil Relief Act."

### 1918 Supp., p. 817, sec. 302 (1).

**Property affected.**—This section is not limited to property used by a soldier or sailor or by his dependents for business or dwelling purposes. *Hoffman v. Charlestown Five Cents Sav. Bank*, (1918) 231 Mass. 324, 121 N. E. 15, wherein the court said: "The defendant's first contention is that section 302 here in question is 'limited to property used by a soldier or sailor or by his dependents for business or dwelling purposes.' But there is no such limitation in that section. The contention is based on a note made by persons who assisted in making the draft of the bill which resulted in the act here in question. See special April number of the Massachusetts Law Quarterly at page 212. It would seem from this note that the original draft of section 302 contained such a limitation. But after the bill was introduced in the House of Representatives the judiciary committee 'produced a new bill' See Massachusetts Law Quarterly, ubi supra, at page 204. The explanation would seem to

be that the note which applied to the draft has been published as a note to the act, and the limitation in question never became a part of the section as it was enacted."

**Equitable owners of mortgages.**—The Act applies to persons in the military service of the United States who are equitable as well as those who are legal owners of property covered by mortgages within the Act. A person may be the equitable owner of the property notwithstanding that an agreement which brought his equitable ownership into being was within the statute of frauds and that statute was not satisfied. This is because the statute of frauds is a defense which is personal to the maker of the contract and cannot be set up by a third person. *Hoffman v. Charlestown Five Cents Sav. Bank*, (1918) 231 Mass. 324, 121 N. E. 15.

### 1918 Supp., p. 817, sec. 302 (2).

**Review of discretion.**—The discretion of the trial court in refusing a further stay, after a writ of restitution has been suspended for three months, will not be interfered with. *Gilluly v. Hawkins*, (Wash. 1919) 182 Pac. 958.

### 1918 Supp., p. 818, sec. 302 (3).

**Relief from foreclosure of mortgage made in violation of clause 3.**—In *Hoffman v. Charlestown Five Cents Sav. Bank*, (1918) 231 Mass. 324, 121 N. E. 15, which was a bill in equity brought in behalf of an officer in the military service of the United States outside the commonwealth to get relief from the foreclosure of a mortgage made in violation of the clause, the appeal was from a decree dismissing the bill. It was held that the decree appealed from must be reversed and a decree entered enjoining the defendant from conveying the property covered by the mortgage in question to the person who bought it at the attempted foreclosure sale set forth in the bill. Contentions of the defendant based upon a finding of the master that the defendant had no notice or reason to suppose that the plaintiff was the owner of the property, and that the plaintiff's agent in care of the property had full knowledge of the foreclosure sale and acquiesced in and in fact approved of it, were overruled. As to the first contention the court said: "There is nothing in the section here in question which limits its provisions to owners of record or to cases where the mortgagee in fact knew or had reason to know who the owner of the property was. The act in terms includes every case where the mortgaged property is 'owned by a person in the military service at the commencement of the period of military service and [is] still so owned by him.' If the section is construed to apply in every case where the owner is in the military service of the United States whether the mortgagee did or

did not know who the owner was, it would seem on the face of it to be a drastic statute. The fact of the owner (when he is ascertained) being or not being in the military service of the United States is a fact which it is at least as hard for the mortgagee to find out as it is for the mortgagee to find out who the owner of the property is. Yet without question there is no such limitation as to that fact. When the relief given by clause 3 of section 302 is taken into account the section construed as stated above is not a drastic one. The section does not forbid the foreclosure of mortgages on property owned by persons in the military service of the United States. What the section does forbid is the foreclosure of such a mortgage under a power of sale (contained in it) 'unless [the sale under the power is made] upon an order of sale previously granted by the court and a return thereto made and approved by the court.' Clause 3 of section 302 was enacted to secure to every person in the military service of the United States who owns property subject to a mortgage within the act the relief to which he is entitled under the act. The defendant has urged against this construction of the section that if that be the true construction of it the result is that until the termination of the time specified in the act no mortgage can be foreclosed by any mortgagee except under an order of court and it cannot be that that was the intention of Congress. We are of opinion that this is the result of the true construction of the act, for in that way alone can a mortgagee be certain that the foreclosure of his mortgage will not be made in violation of the act. We are of opinion that since this is the result of the true construction of the act this must be taken to have been the intention of Congress." As to the second contention the court said: "The protection given by the act is given to the person in the military service of the United States. The right given to him is personal to him. For that reason the knowledge, acquiescence and approval of the plaintiff's agent for the care of the property is of no consequence."

**Foreclosure of mortgage under power of sale without order of court.**—The necessity of a previous order of sale by the court in the case of a foreclosure of a mortgage under power of sale is dependent on whether the mortgagor is in the military service of the United States. If he is not then no previous order of sale by the court is necessary. But in an action of specific performance to require the defendant to accept title to land agreed to be purchased, if the defendant refuses to carry out the contract on the ground that plaintiff's title was not good because obtained through the foreclosure of a mortgage under power of sale without a previous order of sale by the court, it is for the plaintiff to show that the mortgagor was not in the military service at the time of the foreclosure. *Morse v. Stober*, (Mass.

1919) 123 N. E. 780, wherein the court said: "The act of Congress does not require in terms that all mortgages upon real estate be foreclosed under order of court. Grave constitutional questions might lie in the way of an act of such sweep. It does provide that 'no sale under a power of sale' to enforce an obligation originating prior to the date of the approval of the act of Congress, 'and secured by mortgage . . . upon real or personal property owned by a person in the military service [as defined in the act] at the commencement of the period of the military service and still so owned by him,' 'shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court.'"

"[2, 3] It was held in *Hoffman v. Charlestown Five Cents Sav. Bank*, (1918) 231 Mass. 324, 121 N. E. 15, that the act of Congress applies to equitable as well as legal interests constituting property in real estate and owned by a person in military service, without limitation as to use or amount, whether known to the mortgagee or not, and whether appearing of record or not. The act of Congress in this regard takes no account of our statutes as to registration of deeds. The foreclosure of a mortgage by sale, under a power of sale affecting any such property right of a person in military service, is forbidden by the act unless made under order of court as therein provided. It further was said in that opinion:

"Clause 3 of section 302 was enacted to secure to every person in the military service of the United States who owns property subject to a mortgage within the act the relief to which he is entitled under the act. The defendant has urged against this construction of the section that if that be the true construction of it the result is that until the termination of the time specified in the act no mortgage can be foreclosed by any mortgagee except under an order of court and it cannot be that that was the intention of Congress. We are of opinion that this is the result of the true construction of the act, for in that way alone can a mortgagee be certain that the foreclosure of his mortgage will not be made in violation of the act. We are of opinion that since this is the result of the true construction of the act this must be taken to have been the intention of Congress."

"This construction of the act of Congress (in the absence of a contrary decision by the Supreme Court of the United States) must be accepted as sound. It does not mean, however, that in all cases it is and must be impossible to satisfy a court of equity beyond a reasonable doubt that no person in the military service of the United States had any interest in the property subject to the mortgage which has been foreclosed. The meaning of the decision in *Hoffman v. Charlestown Five Cents Savings*



Bank is that the safe course for the mortgagee is to foreclose his mortgage under the order of a court of equity. It is only by pursuing that course that he gets a record title not open to successful attack under the said act of Congress, and therefore in that way alone can he be certain that the foreclosure of his mortgage will not be made in violation

of that act of Congress. But it is not a proposition unprovable in the nature of things or practically impossible to show beyond doubt in a court of equity that no person in the military service of the United States had an interest in the premises described in a mortgage foreclosed without order of court."

## STEAM VESSELS

**Vol. IX, p. 464, sec. 4488.** [First ed., 1916 Supp., p. 234.]

**When section took effect.**—This section under the provisions of section 18 of this Act (see vol. 9, p. 236), became effective on November 4, 1915, as to United States vessels and March 4, 1916, as to all other vessels. (1915) 30 Op. Atty.-Gen. 334.

**Foreign vessels within section.**—When not actually carrying passengers, neither foreign cargo nor foreign passenger steam vessels leaving ports of the United States are subject to the regulations prescribed by this section. Only foreign private steam vessels carrying passengers from any port of the United States to any other place or country, which are not exempt by reason of the conditions set forth in R. S. sec. 4400 (see vol.

9, p. 418), are subject to said regulations. (1915) 30 Op. Atty.-Gen. 441.

**Fishing vessels.**—A steam vessel used in transporting persons for hire from New York city to and from the fishing banks in the Atlantic Ocean from 8 to 10 miles outside the lower bay of New York harbor, is subject to the provisions of this section. (1916) 30 Op. Atty.-Gen. 537.

**Vol. IX, p. 475, sec. 1.** [First ed., 1914 Supp., p. 387.]

**Article XI of the Service Regulations** annexed to the international radiotelegraphic convention, which was ratified by the United States Senate on January 22, 1913, does not affect a modification of the terms of this section. (1913) 30 Op. Atty.-Gen. 84.

## SURETY COMPANIES

**Vol. IX, p. 499, sec. 2.** [First ed., vol. VII, p. 201.]

**The process must be served personally** on the resident agent. U. S. v. Southern Dredging Co., (D. C. Del. 1918) 251 Fed. 400, wherein the court said: "The act of Congress contemplates the service of process upon the agent, or if that be impracticable, upon the clerk of the district court. As the service upon the clerk of the court is manifestly a personal service, so in the absence of any provision for substituted service it must be a personal service upon the resident agent. I know of no principle or authority to justify

the contention that service may be made in any other manner than personally on the resident agent or the clerk of the court . . . Under the act of Congress in question process 'may' be served upon the resident agent of a foreign surety corporation, or upon the clerk of the district court. But while this provision is permissive in form it is mandatory, if the statutory remedy is to be enforced. To secure such enforcement process must be so served. And service in this connection means personal service, there being no statutory or other authority for a resort to substituted service."

# TELEGRAPHS, 'TELEPHONES AND CABLES

Vol. IX, p. 505, sec. 5263. [First ed., vol. VII, p. 205.]

## III. STATE AND MUNICIPAL REGULATION (p. 510)

**Workmen's Compensation Act.**—A state may subject an interstate telegraph company operating within its borders to the provisions of a Workmen's Compensation Act. *State v. Postal Tel. Cable Co.*, (1918) 101 Wash. 630, 172 Pac. 902.

## IV. TAXATION

### 1. In General (p. 511)

To the same effect as the original annotation, see *People v. State Board of Tax Com'rs*, (1918) 224 N. Y. 167, 120 N. E. 192.

### 3. State and Municipal License Tax (p. 513)

**General license tax.**—A reasonable tax upon the maintenance by a telegraph company, which has accepted the provisions of this section of poles and wires erected and maintained by it within the limits of a city pursuant to authority granted by municipal ordinance, is not an unwarranted burden upon interstate or foreign commerce, or upon the functions of the telegraph company as an agency of the federal government, and does not infringe rights conferred by such Act of Congress. *Mackay Tel., etc., Co. v. Little Rock*, (1919) 250 U. S. 94, 39 S. Ct. 428, 63 U. S. (L. ed.) —, *affirming* (1917) 131 Ark. 306, 199 S. W. 90.

The fact that a municipal license tax is imposed upon poles of a telegraph company that stand upon a railway right of way as well as upon those that stand upon the city streets is not sufficient to condemn the ordinance, especially where the highest court of the state finds that the telegraph line as laid along the railway right of way crosses a street car line and several highways coming into the city and that for the protection of travelers it is necessary that there shall be local governmental supervision of the telegraph lines crossing these highways. *Mackay Tel., etc., Co. v. Little Rock*, (1919) 250 U. S. 94, 39 S. Ct. 428, 63 U. S. (L. ed.) —, *affirming* (1917) 131 Ark. 306, 199 S. W. 90.

A municipal license tax of 50 cents a year for each pole maintained by a telegraph company within the city is not unreasonable in amount, even though it be made to apply to poles standing upon private property or upon a railway right of way as well as to poles erected in the city streets. *Mackay Tel., etc., Co. v. Little Rock*, (1919) 250 U.

S. 94, 39 S. Ct. 428, 63 U. S. (L. ed.) —, *affirming* (1917) 131 Ark. 306, 199 S. W. 90.

A municipal telegraph franchise ordinance which imposes the same pole tax that is exacted by a general ordinance from other companies maintaining poles in the city cannot be said necessarily to deny the equal protection of the laws merely because such general ordinance has not been enforced against such other companies in the same manner that it is proposed to enforce the franchise ordinance. *Mackay Tel., etc., Co. v. Little Rock*, (1919) 250 U. S. 94, 39 S. Ct. 428, 63 U. S. (L. ed.) —, *affirming* (1917) 131 Ark. 306, 199 S. W. 90.

Acceptance of the Post Roads Act by a telegraph company does not give it immunity from municipal taxation. *Western Union Tel. Co. v. Decatur*, (Ala. App. 1918) 81 So. 199.

## 1918 Supp., p. 834. [Government control, etc.]

**In general.**—Congress possessed the right under the war power to confer upon the President by this joint resolution, the power to take over and operate telephone and telegraph systems as a war emergency measure. And the courts may not inquire into an asserted excess or abuse of discretion by the President in exerting the authority conferred upon him. *Dakota Cent. Telephone Co. v. South Dakota*, (1909) 250 U. S. 163, 39 S. Ct. 507, 63 U. S. (L. ed.) — (*reversing* (S. D. 1919), 171 N. W. 277, *followed* in *Kansas v. Burleson*, (1919) 250 U. S. 188, 39 S. Ct. 512, 63 U. S. (L. ed.) —; *Burleson v. Dempsey*, (1919) 250 U. S. 191, 39 S. Ct. 511, 63 U. S. (L. ed.) —; *MacLeod v. New England Telephone, etc., Co.*, (1919) 250 U. S. 195, 39 S. Ct. 511, 63 U. S. (L. ed.) —, *affirming* (1919) 232 Mass. 465, 122 N. E. 567, 4 A. L. R. 1662.

**Construction.**—This Act, being a war measure, should be liberally construed. *Southwestern Tel., etc., Co. v. Houston*, (S. D. Tex. 1919) 256 Fed. 690.

**"Police regulations."**—This term is used in its primary or narrow, rather than in its broader, sense, and hence the police power of the states was not encroached on by vesting in the President authority to make rates. *Southwestern Tel., etc., Co. v. Houston*, (S. D. Tex. 1919) 256 Fed. 690.

"By adopting the proviso to the resolution here in question, and under which the President must operate, if at all, the telegraph and telephone systems of the country as public utilities, it was the intention of the Congress to cause the control of the several

states over the operation of the telegraph and telephone systems within their borders, to be interfered with only to the extent necessary to safeguard the transmission by the government of its own messages, and the issuance of the stocks and bonds of such telegraph and telephone systems as might be taken charge of by the President, and 'the lawful police regulations,' therein referred to, are not limited to such only as promote the public health, morals, or safety, but extend also to such as promote the public convenience or the general welfare, within which is embraced a regulation fixing the tolls to be charged for intrastate messages." *State v. Cumberland Telephone, etc., Co.*, (Miss. 1919) 81 So. 404.

**Federal decisions as controlling state courts.**—In the interpretation of this Act by state courts federal decisions must be looked to in deciding federal questions. *Groesbeck v. Michigan State Telephone Co.*, (Mich. 1919) 172 N. W. 799.

**Effect of federal control on right of condemnation.**—The control of the United States over the lines of a telegraph company does not affect the right of the company to institute condemnation proceedings, as the government's action under this section affects only the physical existing lines of the company and does not extend to a taking over of its corporate entity and franchises. *Postal Tel. Cable Co. v. Call*, (C. C. A. 5th Cir. 1919) 255 Fed. 850.

**Exercise of President's discretion not reviewable.**—The authority to enter into a contract for compensation under this section which is conferred on the President involves the exercise of his own judgment, and where such authority is vested in him and he has exercised it the courts have no power to inquire whether he acted wisely or to the best advantage. *Southwestern Tel., etc., Co. v. Houston*, (S. D. Tex. 1919) 256 Fed. 690.

**Regulation of intrastate rates.**—The Postmaster General by virtue of this joint resolution has authority and power to prescribe local telephone rates applicable only to a municipality without reference to the laws of the state. And a state court has no jurisdiction to restrain a proposed increase of rates made by the Postmaster General on the ground that such increase had not been obtained by the method prescribed by the laws of the state. *Groesbeck v. Michigan State Telephone Co.*, (Mich. 1919) 172 N. W. 799.

**An injunction lies to restrain the Postmaster General of the United States from putting in force intrastate rates and regulations for telephone messages on telephone lines under federal control.** *State v. Dakota Cent. Telephone Co.*, (S. D. 1919) 171 N. W. 277, wherein the court said: "It is contended by plaintiff that the term 'lawful police regulations' is there used in its broad sense, which includes the power of rate regulation. *Chesapeake Telephone Co. v. Man-*

*ning*, (1902) 186 U. S. 238, 22 S. Ct. 881, 46 U. S. (L. ed.) 1144. It is contended by the defendants that such term is there used in its narrow sense as referring simply to the public safety, health, and morals. Leaving out of consideration for the moment the two exceptions mentioned therein, we may observe that if by that proviso the Congress intended that the states should continue to exercise their undoubted powers to reasonably regulate the intrastate rates and charges of telephone companies, then the power to fix such rates did not pass to the President nor to his representative the Postmaster General. If by that proviso Congress intended to deprive the states of the power to regulate rates for intrastate messages, then, but not until then, we would have to consider the power and authority of Congress so to do. In our opinion Congress intended the former. The act and the proviso should be so construed unless the contrary clearly appears. The contrary should not be assumed by mere implication. . . . It is further urged that the assumption of control and operation imply the taking over of all revenues, and that by reason of the taking over of the revenues of the companies Congress intended to assume authority to fix all rates, interstate and intrastate. The contention ignores the second proviso of the resolution. The resolution says nothing about the taking over of the revenues. The provisions of the contracts entered into between the Postmaster General and the telephone company are not persuasive of the correct interpretation of the proviso; but, even if the act does contemplate the taking over of all revenues, interstate and intrastate, that fact is not entitled to weight in construing the terms of the proviso, because that fact would not at all be inconsistent with its dependency on the right of the states to continue to regulate intrastate rates. Intrastate rates, as well as interstate rates, established under the authority of law are entitled to the benefit of a presumption that they are fair and reasonable. How can it be said to be inconsistent with the assumption of the revenues for Congress to declare that such assumption was subject to the reasonable rates lawfully established? It is further urged that, by the several steps taken by Congress, by the President, and by the Postmaster General, the properties taken over have become the properties of the United States government unshackled from state authority, and that this action is in reality one against the United States, which cannot be maintained in this court because Congress has not given its assent thereto. The answer is that, even if the property has become the property of the United States government, the government's title thereto is incumbered by the reserved power of the state to regulate intrastate rates. When, therefore, the Postmaster

General seeks to promulgate rates, and the defendant telephone company seeks to carry them out, in defiance of the state laws, they are wrongdoers, and are amenable to the laws of this state. The action is not one against the United States or its property, but is one seeking to restrain the commission of an authorized act."

In granting an injunction against an increase of rates in violation of a state law the court in *State v. Cumberland Telephone, etc., Co.*, (Miss. 1919) 81 So. 404, said: "The injunction here sought is not against the President in person, but against a subordinate officer who seeks to justify his contemplated action by the claim of power delegated to him by the President. This claim does not of itself oust the court of jurisdiction, but must be established by the appellees, and this they cannot do for the reason that the President himself has not been vested by the resolution of the Congress here in question with any power to disregard the police regulations of the several states, nor to authorize any subordinate so to do; but, on the contrary, the resolution expressly enjoins him to observe them, from which it necessarily follows that no such power has been or can be delegated by the President to a subordinate. . . . The appellants did not ask the court below to interfere with the official discretion of the Postmaster General, but in the language of Judge Hughes in *Philadelphia Co. v. Stimson*, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570, 'challenged his authority to do the things of which complaint is made. The suit rests upon the abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.'"

*Intrastate telephone rates.*—Authority to take complete possession and exclusive control, with the right to the entire operating revenues, was conferred upon the President by this joint resolution, and state control over intrastate telephone rates ceased with the exercise by the President of his authority notwithstanding the proviso in such resolution that nothing therein contained shall be construed "to amend, repeal, impair, or affect existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transmission of government communications, or the issue of stocks and bonds by such system or systems." *Dakota Cent.*

*Telephone Co. v. South Dakota*, (1919) 250 U. S. 163, 39 S. Ct. 507, 63 U. S. (L. ed.) — (*reversing* (S. D. 1919), 171 N. W. 277), *followed* in *State v. Burleson*, (1919) 250 U. S. 188, 39 S. Ct. 512, 63 U. S. (L. ed.) —; *Burleson v. Dempsey*, (1919) 250 U. S. 191, 39 S. Ct. 511, 63 U. S. (L. ed.) —; *MacLeod v. New England Telephone, etc., Co.*, (1919) 250 U. S. 195, 39 S. Ct. 511, 63 U. S. (L. ed.) —, *affirming* (1919) 232 Mass. 465, 122 N. E. 567, 4 A. L. R. 1662.

*Parties to suit during government control.*—An action to enjoin the collection of alleged excessive rates cannot be maintained against the agents of the Postmaster General in charge of a telephone system; the Postmaster General himself being a necessary party. *Southwestern Bell Telephone Co. v. State*, (Okla. 1919) 181 Pac. 487. The court said: "The congressional resolution under consideration in this case was enacted as a war measure, giving to the President the power to take possession of the entire telephone system, including all property and appurtenances, whenever he deemed such action necessary and expedient, and to operate such system in such manner as he deemed necessary and desirable, for national security and defense. The petition alleges that he did take possession, and is now, through the Postmaster General, operating the entire telephone system. A decree restraining his agents from carrying out orders in the manner of operation would be, in effect, to interfere with his operation and control, and for that reason the Postmaster General, through whom the President is in actual possession, is a necessary and indispensable party to the action."

*Effect of turning back of cables to owners on pending litigation.*—The turning back to the cable companies of all their property previously taken over by the President under the authority of this joint resolution renders moot the controversy presented by bills to enjoin the Postmaster General or his representatives from interfering with the property of the cable companies under direction of the President, and requires that decrees below, dismissing the bills for want of equity, be reversed by the federal Supreme Court on appeal and the cases remanded, with directions to set aside the decrees and to substitute decrees dismissing the bills without prejudice and without costs. *Commercial Cable Co. v. Burleson*, (1919) 250 U. S. 380, 39 S. Ct. 512, 63 U. S. (L. ed.) —, *reversing* (S. D. N. Y. 1919) 255 Fed. 99.

## TIMBER LANDS AND FOREST RESERVES

Vol. IX, p. 587, sec. 1 (H). [First ed., vol. VII, p. 314.]

For decisions relating to the selection of lieu lands see *State v. Hyde*, (1918) 88 Ore. 1, 169 Pac. 757, 171 Pac. 582, Ann. Cas. 1918E 688.

Vol. IX, p. 590, sec. 4. [First ed., vol. X, p. 405.]

**Rights of way for transmission lines.**—This section does not invest the Secretary of the Interior with authority to grant rights of way for transmission lines through the national forests for the distribution of electrical power. (1914) 30 Op. Atty.-Gen. 263.

**Right of way for mining purposes—Incidental use of electricity.**—Under this section a right of way may be granted through the national forests when the objective is to employ the right of way in a process of "milling and reduction of ores," and it is unobjectionable that the intermediate purpose is to generate and use electricity. (1915) 30 Op. Atty.-Gen. 358.

**Foreign corporation as entitled to water power permit.**—A mining corporation, organized and existing under the laws of Canada, is not entitled to a water power permit within the Okanogan National Forest in the state of Washington. (1916) 30 Op. Atty.-Gen. 581.

Vol. IX, p. 591, sec. 1. [First ed., 1909 Supp., p. 662.]

**Adverse claims.**—An entry of public lands under this section will prevail over a subsequent mining location on a finding of facts, in effect, that the land in controversy is not mineral but agricultural land. *Meyers v. Pratt*, (C. C. A. 9th Cir. 1919) 255 Fed. 765.

Vol. IX, p. 598, sec. 7. [First ed., 1912 Supp., p. 392.]

**Acquisition of forest watershed lands by condemnation.**—Construing this Act in connection with the Act of Aug. 1, 1888 (vol. 8, p. 1111), it has been held that the present Act must be read as contemplating and intending the acquisition of forested watershed lands by condemnation. *U. S. v. Graham*, (W. D. Va. 1917) 250 Fed. 499, wherein, in reply to an objection that the Secretary of Agriculture was only authorized

to purchase at a price to be fixed by the National Forest Reserve Commission, it was further declared that there was no reason why the commission may not as well fix the price it is willing to pay after a report by the commissioners of condemnation, as after negotiations in pais with landowners.

**Mode of ascertaining value of land.**—Commissioners appointed in a proceeding under this section to ascertain the value of land are not necessarily restricted to the value agreed on between the government and some of the claimants, there being nothing in the law which forbids the condemnation commissioners to report the full value of the land and the full damage done by taking it and the Forest Reserve Commission having power to refuse to pay the money into court if the condemnation commissioners fix too high a valuation. *U. S. v. Graham*, (W. D. Va. 1917) 250 Fed. 499.

Vol. IX, p. 606, sec. 1. [*Timber and Stone Lands Act.*] [First ed., vol. VII, p. 300.]

**Annulment of patent on mineral land.**—To annul a patent under the Timber and Stone Lands Act as wrongfully covering mineral land, it must appear that at the time of the proceedings which resulted in the patent "the land was known to be valuable for mineral"; that is to say, it must appear that the known conditions at the time of those proceedings were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end. If at that time the land was not thus known to be valuable for mineral, subsequent discoveries will not affect the patent. The inquiry must be directed to the situation at that time, as were the applicant's proofs and the finding of the land officers. *U. S. v. Porter Fuel Co.*, (C. C. A. 8th Cir. 1917) 247 Fed. 769, 159 C. C. A. 627.

Vol. IX, p. 629, sec. 8. [First ed., vol. VII, p. 306.]

**Traffic in timber.**—Residents of the states named in this section were not authorized to traffic in timber upon the public lands, no matter what use may have been the purpose to make of it. *Caldwell v. U. S.*, (1917) 53 Ct. Cl. 33.

## TRADE COMBINATIONS AND TRUSTS

Vol. IX, p. 644, sec. 1. [First ed., vol. VII, p. 336.]

### III. Construction of Act.

1. In general.
3. Words and terms defined and construed.

### V. Application of Act.

2. Application in particular instances.
  - a. Combinations and contracts to affect prices and terms of sale.
  - d. Labor unions.
  - e. Railroads.
  - f. Miscellaneous cases.

### VI. Proceedings under Act.

1. In general.
2. Indictments.

### III. CONSTRUCTION OF ACT

#### 1. In General (p. 647)

**Scope of Act generally.**—To the same effect as the original annotation, see *Buckeye Powder Co. v. E. I. Du Pont De Nemours Powder Co.*, (1918) 248 U. S. 55, 39 S. Ct. 38, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 3d Cir. 1915) 223 Fed. 881, 139 C. C. A. 319; *Pulp Wood Co. v. Green Bay Paper, etc., Co.*, (1910) 168 Wis. 400, 170 N. W. 230.

"Unlawful agreement is the essence of the offense of combination or conspiracy under the Sherman Act. It is what separates what is permitted from what is forbidden. To hold it illegal for persons in the same business and same trade organization, after exchanging information and views, to act in the same way, but independently of each other, on buying, selling, or prices, would extend the scope of the act beyond anything heretofore decided, and beyond its proper meaning, and would cause the greatest confusion and uncertainty.

"The necessary agreement or understanding may, of course, be tacit as well as expressed; its existence may be inferred—and, even in criminal cases, often is inferred—from the conduct of the parties. *Eastern States Lumber Ass'n v. U. S.*, *supra*; *U. S. v. Naval Stores Co.* (C. C.) 172 Fed. 455, 460. Concert of action among the members of an association, in particular such as are set forth in this indictment, strongly suggests agreement; but, if that is the construction which the prosecution places upon the defendants' conduct, it ought to be so stated." *Per Morton, J.*, in *U. S. v. Piowaty*, (D. C. Mass. 1917) 251 Fed. 375.

#### 3. Words and Terms Defined and Construed (p. 649)

"**Restraint of trade.**"—These principles may be briefly stated as follows: First, The contract in question involved interstate com-

merce, and hence the federal statute is the statute to be applied to the case, although little, if any, difference is to be observed in the result in the present case whether the state or the federal statutes, or both, apply. Second. The words "restraint of trade" in the federal statute have the same meaning which they had at common law, namely, acts, contracts, agreements or combinations which operate to the prejudice of the public interests by unduly restricting competition or by unduly obstructing the due course of trade. *Pulp Wood Co. v. Green Bay Paper, etc., Co.*, (1919) 168 Wis. 400, 170 N. W. 230.

### V. APPLICATION OF ACT

#### 2. Application in Particular Instances

##### a. Combinations and Contracts to Affect Prices and Terms of Sale (p. 660)

**Price control by manufacturer.**—Conduct of a manufacturer which, as intended, has the effect of procuring adherence on the part of its wholesale and retail customers to resale prices fixed by it, does not offend against the unlawful combination provisions of this section, where there was no agreement which obligated any dealer not to resell except at the fixed prices, his course in this respect being affected only by the fact that he might, by his action, incur the displeasure of the manufacturer, who could refuse to make further sales to him. *U. S. v. Colgate*, (1919) 250 U. S. 300, 39 S. Ct. 465, 63 U. S. (L. ed.) —, *affirming* (E. D. Va. 1918) 253 Fed. 522, wherein the court said: "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell. 'The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases.' *U. S. v. Trans-Missouri Freight Ass'n*, (1897) 166 U. S. 290, 320, [17 S. Ct. 540, 41 U. S. (L. ed.) 1007, 1020]. 'A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade.' *Eastern States Retail Lumber Dealers' Ass'n v. U. S.*, (1914) 234 U. S. 600, 614, [34 S. Ct. 951, 58 U. S. (L. ed.) 1490, 1500]."

A contract of absolute sale, made by a manufacturer, of its various manufactured preparations, in which the purchaser agrees to sell all goods purchased "at regular retail prices to be indicated by it" (the manufacturer), where its entire product is sold throughout the country only by means of like restrictive contracts, operates as a "restraint of trade," unlawful as to interstate commerce under Act of Congress of July 2, 1890, ch. 647, 26 Stat. 209, upon the subject of trusts and restraints of interstate trade. *Hunt v. W. T. Rawleigh Medical Co.*, (Okla. 1918) 176 Pac. 410.

#### Refusal to do business with certain dealers.

—The refusal of a manufacturer to sell to dealers who will not maintain suggested prices, or will sell to other dealers and not merely to the consumer, is not a violation of this Act. *Baron v. Goodyear Tire, etc., Co.*, (S. D. N. Y. 1919) 256 Fed. 571, wherein the court said: "There is no restriction upon title alleged. The selected dealers who got the merchandise could do as they pleased with it. No agreement among the dealers to fix prices or restrict sales to the consumer is set forth. The sole gravamen of the action is the attempt of the defendants to prevent price cutting by refusing to sell to dealers who did not maintain the suggested price. The enforcement of the Sherman Act, if that act were read literally, would reach nearly every commercial enterprise. To understand the act at all, we must view it in the light of the decisions. There is no decision of an appellate court construing the Sherman Act, to which I have been referred, that prevents a single trader from rejecting a customer because he did not like the prices at which the customers resold, or otherwise disapproved of his mode of conduct. Nor does the fact that a single trader extends his policy of refusing to sell to any one of many customers who may cut prices impose any additional legal liability. It is impossible to see how a single person may choose one customer or reject one customer with impropriety, and not separately select or reject a number of customers with equal freedom."

#### d. Labor Unions (p. 664)

**Agreements between labor union and employers.**—In *Shinsky v. O'Neil*, (Mass. 1919), 121 N. E. 790, an action involving an agreement between employers, lasters and a labor organization known as the United Shoe Workers of America, the Sherman Anti-Trust Act was not brought into the case by the plaintiff and the agreement was held valid. No opinion was expressed as to whether it would have been held valid had that Act been involved. The court laid down these rules governing agreements such as the facts in the case showed: "It is established that workmen can combine to get the advantage of bargaining for their common benefit in respect to the terms and conditions upon and under which they should work. It is further

established that if they are successful in getting the bargain they wish they can insert in the agreement setting forth that bargain a clause providing that all work of the employer shall be given to them or that a preference shall be given to them in the employment of workmen."

#### e. Railroads (p. 665)

**Agreement regarding routing of troops.**—Neither this section or section 2 of this Act, nor section 5 of the Interstate Commerce Act of Feb. 4, 1887 (see vol. 4, p. 404) prevents the Navy Department from agreeing with many railroads, or prevents such railroads from agreeing among themselves, that a common agent of the roads may for a definite period direct the routing of federal troops. (1915) 30 Op. Atty-Gen. 381.

#### f. Miscellaneous Cases (p. 669)

**Sole agencies.**—To same effect as original annotation, see *Baron v. Goodyear Tire, etc., Co.*, (S. D. N. Y. 1919) 256 Fed. 571.

### VI. PROCEEDINGS UNDER ACT

#### 1. In General (p. 677)

**Survival of right of action.**—On this question it has been said: "The Sherman Law is silent as to the survival of the right of action. As there is no other statute of the United States in point, whether the action survives or not must be determined by the principles of the common law, regardless of the law of Louisiana. *Schreiber v. Sharpless*, 110 U. S. 80, 3 Sup. Ct. 423, 28 L. Ed. 65; *Michigan Central R. R. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176.

"At common law as a general rule all actions ex delicto abate with the death of either party. Exception was made in some cases, as where the decedent had been deprived of particular property and his estate diminished by the wrongful act. But this was on the theory that the duty of the wrongdoer to return the property created a quasi contract.

"The general rule is not disputed by plaintiffs, but they contend a cause of action based on the Sherman Law is sui generis and does not sound in tort. With this I cannot agree. In my opinion this case is identical in principle with other cases based on fraud and deceit, which have always been held to come under the general rule. And, as it cannot be said Mrs. Burguières was damaged in any particular property or that there was an implied promise on the part of defendants to reimburse her, it follows that the cause of action abated with her death." *Caillouet v. American Sugar Refining Co.*, (E. D. La. 1917) 250 Fed. 639.

#### 2. Indictments (p. 679)

**Overt acts.**—To same effect as original annotation, see *U. S. v. Norris*, (N. D. Ill. 1918) 255 Fed. 423.

**Sufficiency in general.**—The agreement being the crime, that must be charged, and nothing more. If the indictment relates the elements of the agreement in sufficiently clear terms, defendants are informed of what they are required to meet. They need not be told what means or measures they had decided on to carry out their agreement, or that any act was done by any person in the execution of the agreement. *U. S. v. Norris*, (N. D. Ill. 1918) 255 Fed. 423.

The indictment should allege an unlawful agreement in violation of the Act. *U. S. v. Plovaty*, (D. C. Mass. 1917) 251 Fed. 375, wherein the court said: "The government's contention that the indictment alleges an agreement to which the defendants were parties is based principally on the word 'concerted.' It is a word which unquestionably is often used in a sense implying agreement. But it is also used to describe similar action by different persons with the same object in view, not proceeding from agreement between them. An unorganized mob may be said to make a 'concerted' attack. If the indictment as a whole were obviously based on the assumption of an agreement to which the defendants were parties, it might be that the language used would be sufficient; but that is not this case. There is no allegation or direct suggestion that the defendants acted under agreement with each other. The absence of such an averment is apparently not due to inadvertence; it seems to be studiously avoided. The indictment appears to have been drawn on the theory that agreement was not essential. Its language and tenor are not such that the averment of one can be found by implication—certainly not with such clearness and definiteness as the defendants are plainly entitled to upon such an important allegation."

former competitive market, is held to have been unlawful under section 2 of said anti-trust statute, even though such combination may have produced beneficial results in increasing and making more steady the supply of pulp wood, in preventing ruinous competition and ruthless sacrifice of natural resources, in enabling the paper makers to make larger contracts for pulp wood and extend their field of supply into Minnesota and Canada, in reducing operation expenses, in making the annual supply sufficient and dependable, and in facilitating the readjustment of freight rates. All contracts which formed essential or convenient parts of the machinery of such combination must be held void. Thus, in an action by one of the purchasing agencies against a paper manufacturer for breach of certain provisions of contracts between them by which defendant was to pay, for spruce pulp wood delivered to it, its pro rata share of the cost thereof to plaintiff, including expense of operating and interest on the capital used, it is held that there can be no recovery for such breach. It being admitted that defendant has paid the reasonable value of the pulp wood delivered to it, the action cannot be considered as one brought to recover the value of goods sold. Claims, embraced in such action, based on defendant's breach of provisions in said contracts relating to hemlock pulp wood cannot be severed from the other claims, although no effort is found to have been made by the combination to control the output of hemlock. The inclusion of hemlock pulp wood in its contracts being one of the means found necessary or convenient to accomplish the illegal purpose of the combination, the contracts are void in that respect also. *Pulp Wood Co. v. Green Bay Paper, etc., Co.*, (1919) 168 Wis. 400, 170 N. W. 230.

## Vol. IX, p. 687, sec. 2. [First ed., vol. VII, p. 340.]

- I. In general.
- II. Particular instances.

### I. IN GENERAL (p. 687)

**Section 1 contrasted.**—The first section deals with contracts in restraint of trade, while this deals with monopolizing and attempting to monopolize it. *Buckeye Powder Co. v. E. I. Du Pont De Nemours Powder Co.*, (1918) 248 U. S. 55, 39 S. Ct. 38, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 3d Cir. 1915) 223 Fed. 881, 139 C. C. A. 319.

### II. PARTICULAR INSTANCES (p. 694)

**Paper manufacturers and pulp-wood purchasing agencies.**—A combination between pulp-wood purchasing agencies and a large number of paper manufacturers, which attempted to and did establish a purchasing monopoly and fixed the prices in the spruce pulp-wood market of a large part of the upper peninsula of Michigan, destroying the

## Vol. IX, p. 701, sec. 4. [First ed., vol. VII, p. 344.]

- II. Who may maintain action.
- IV. Remedies and relief.

### II. WHO MAY MAINTAIN ACTION (p. 702)

**Who may sue to enjoin.**—To same effect as original annotation, see *Venner v. Pennsylvania Steel Co.*, (D. C. N. J. 1918) 250 Fed. 292.

### IV. REMEDIES AND RELIEF (p. 704)

**Modification of decree by consent.**—Where a decree had been granted by consent, in a suit to dissolve an association to which the defendants, among other persons, belonged, as illegal under this act, enjoining them from continuing a license under certain patents, the court refused to modify the decree so as to allow the defendants, two of whom were owners of the patents in question, jointly to grant licenses to manufacture and sell articles embodying the patents, on the contention that one of the patents was broad enough to dominate the other, that any



device manufactured under the latter would infringe the former and that the patents were therefore not competitive. *U. S. v. Discher*, (S. D. N. Y. 1919) 255 Fed. 719, wherein the court further said: "At all events such a matter as this should hardly be determined in a case where the petitioners, instead of being antagonists interested in holding either patent invalid, are consenting to have the patents both regarded as valid and noncompetitive. I could at best reach a superficial conclusion without the aid of testimony as to the practicability of either the Discher or Turner and Crabill devices, or the commercial success of such mechanisms as substantially followed their drawings. To modify the decree to which the defendants consented with their eyes open, I should have convincing proof that it is unjust and burdensome. While a different conclusion might perhaps be reached if the Turner and Crabill patent were held valid and to infringe the Discher patent after litigation against infringers conducted in good faith, where full testimony was before the court, I have been unable, after careful perusal of the matters submitted to me, to regard the present proof as justifying relief."

## Vol. IX, p. 712, sec. 5. [First ed., vol. VII, p. 344.]

- I. Construction and application generally.
- II. Right to sue.
- III. Pleading, practice and procedure.
- IV. Evidence.

### I. CONSTRUCTION AND APPLICATION GENERALLY (p. 713)

**Nature of suit to recover treble damages.**—To same effect as original annotation, see *Venner v. Pennsylvania Steel Co.*, (D. C. N. J. 1918) 250 Fed. 292.

A defendant is "found" in a district within the meaning of this section if he has an office and does business within the district. *Venner v. Pennsylvania Steel Co.*, (D. C. N. J. 1918) 250 Fed. 292.

It is essential, in civil actions for penalties under this Act, as well as in prosecutions thereunder, that the restraint of trade intended or accomplished shall be unreasonable in extent or shall be directly aimed at interstate traffic. *McLatchy v. King*, (D. C. Mass. 1917) 250 Fed. 920.

### II. RIGHT TO SUE (p. 717)

**Who may sue to enjoin.**—A person who shows no injury to himself other than as a member of the general public is not entitled to prosecute an action. *Ketchum v. Denver, etc., R. Co.*, (C. C. A. 8th Cir. 1917) 248 Fed. 106, 160 C. C. A. 246.

### III. PLEADING, PRACTICE AND PROCEDURE (p. 719)

**Limitation.**—The provision of section 5 of the Clayton Act (see 9 Fed. Stat. Ann. 2d ed. 737) respecting the running of the

statute of limitations and the suspension under certain circumstances is not retrospective in its operation. *Buckeye Powder Co. v. E. I. Du Pont De Nemours Powder Co.*, (1918) 248 U. S. 55, 39 S. Ct. 38, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 3d Cir. 1915) 223 Fed. 881, 139 C. C. A. 319.

**Election of section.**—In *Buckeye Powder Co. v. E. I. Du Pont De Nemours Powder Co.*, (1918) 248 U. S. 55, 39 S. Ct. 38, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 3d Cir. 1915) 223 Fed. 881, 139 C. C. A. 319, which was an action brought by the plaintiff in error to recover triple damages under this section, resulting in a judgment for the principal defendant the E. I. Du Pont de Nemours Powder Company, one of the exceptions complained of the court's sustaining a motion at the end of the trial that the plaintiff should elect whether it would rely upon the first or the second section of the Sherman Act. Overruling this exception the court said: "The first section deals with contracts in restraint of trade, the second with monopolizing and attempting to monopolize it. The declaration, after stating the organization of the plaintiff in January, 1903, for the purpose of manufacturing and selling powder, particularly black blasting powder, alleges a long previous conspiracy on the part of various companies to monopolize the trade in explosives, which ended in the organization of the E. I. DuPont de Nemours Powder Company in May, 1903, in order more completely to carry out that end. It is alleged that the defendants and others have carried out that end, and that in pursuance of it they did acts, detailed at great length, for the purpose of compelling the plaintiff to join them or else go out of business. That, with an allegation that they succeeded and forced the plaintiff to sell out at a loss, is the whole scope of the declaration. There was a motion to strike it out for duplicity, but the motion was overruled on the ground that the declaration was as we have stated. 196 Fed. Rep. 514. The trial proceeded on that footing without complaint. So far as contracts bore upon the supposed attempt to subject plaintiff to the monopoly the jury was allowed to consider them. The case was fully tried upon the ground taken by the plaintiff at the outset and the only one on which it could hope to succeed. The plaintiff did not ask to amend. It is unnecessary to advert to the statement of the judge that in his opinion the exception to be considered should have the whole record behind it, or whether, as has been suggested, the second section is not the only one addressed to transactions such as were alleged. *Northern Securities Co. v. United States*, 193 U. S. 197, 404. When the plaintiff, after the ruling of the judge, went through the form of electing to rely upon acts done contrary to § 2 of the statute, it simply adhered to the interpretation of its declaration that it had accepted at the beginning and had endeavored to sustain throughout.

Portions of the charge are criticised in this connection for pointing out to the jury that § 2 embraced not only monopoly but attempts to monopolize. But this was wholly to the plaintiff's advantage, as it explained that if the plaintiff was driven out of business by the defendant's acts it was entitled to recover if those acts were done in the course of an attempt to monopolize, whether or not they were crowned with success. It allowed the jury to consider everything that indicated such an attempt."

**Pleading in general.**—It is necessary that the declaration, in an action under this section, should state facts showing unreasonable interference with interstate trade. It should show the extent of the interstate trade either actually or relatively. *McLatchy v. King*, (D. C. Mass. 1917) 250 Fed. 920.

**Duplicity.**—A declaration in a civil action for the penalty under this act, which sets out both a conspiracy to restrain trade and an actual restraint of trade, is not bad for duplicity or uncertainty, it being declared that it seems not only proper but necessary to allege both the conspiracy and its results in order to establish a cause of action. *McLatchy v. King*, (D. C. Mass. 1917) 250 Fed. 920.

Where a complaint sets out in one cause of action facts which may be regarded as violations of this section and the Clayton Act (9 Fed. Stat. Ann. 730), the defendants are entitled to have these commingled causes of action separately stated, in different counts, so that they may better prepare for trial and have the advantage by demurrer of eliminating one count from consideration if a demurrer should be sustained. *Baron v. Goodyear Tire, etc., Co.*, (S. D. N. Y. 1918) 256 Fed. 570.

**Parties defendant.**—Members of the listing committee of an association are liable for setting in motion against the plaintiffs organized action illegal under this act and a recovery may be had against them without joining either the association or the members thereof as defendants. *McLatchy v. King*, (D. C. Mass. 1917) 250 Fed. 920.

#### IV. EVIDENCE (p. 724)

**Judgments.**—The provisions of section 5 of the Clayton Act (see 9 Fed. Stat. Ann. 2d ed. 737) respecting the admissibility in evidence of judgments in government suits and the weight to be given such evidence have no retrospective operation. *Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co.*, (1918) 248 U. S. 55, 39 S. Ct. 38, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 3d Cir. 1915) 223 Fed. 881, 139 C. C. A. 319.

#### Vol. IX, p. 729, sec. 11. [First ed., 1914 Supp., p. 379.]

**Determination of violation of anti-trust laws.**—Under the provisions of this section, the question whether the person or corpora-

tion who owns, operates or controls any vessel seeking passage through the canal is doing business in violation of the anti-trust laws is to be determined by the final judgment or decree of a court of the United States of competent jurisdiction. Hence, where a vessel seeking passage through the canal is owned or operated by persons against whom no judgment that they have violated the anti-trust laws has been rendered by a court of competent jurisdiction, there is upon the officials of the canal no duty to refuse to permit the vessel to pass. And where the vessel is operated or controlled by a person or company against whom a judgment has been rendered under the anti-trust laws in a court of competent jurisdiction, if the proceeding was at the instance of the United States and resulted in a decree designed to restore competitive conditions, and no question has been raised by the United States in appropriate judicial proceedings as to noncompliance with such decree, it should not be refused passage through the canal. (1915) 30 Opp. Atty.-Gen. 355.

#### Vol. IX, p. 730, sec. 1. [First ed., 1916 Supp., p. 267.]

**Pleading — Duplicity.**—Where a complaint sets out in one cause of action facts which may be regarded as violations of the Sherman Anti-Trust Act (9 Fed. Stat. Ann. 644) and this Act (Clayton Act), the defendants are entitled to have these commingled causes of action separately stated in different counts, so that they may better prepare for trial and have the advantage by demurrer of eliminating one count from consideration if a demurrer should be sustained. *Baran v. Goodyear Tire, etc., Co.*, (S. D. N. Y. 1918) 256 Fed. 570.

#### Vol. IX, p. 731, sec. 2. [First ed., 1916 Supp., p. 268.]

**What constitutes price discrimination — Different prices to manufacturer and retail dealer.**—A sale by a manufacturer of his products to other manufacturers, who use the articles produced by him in their products, at a less price than he sells them to dealers who buy in much smaller quantities for resale to the individual consumer, is not a violation of this section. This principle has been applied in the case of sales by a manufacturer of automobile tires to manufacturers of automobiles at a less price than he sold them to dealers for resale to the consumer. *Baran v. Goodyear Tire, etc., Co.*, (S. D. N. Y. 1919) 256 Fed. 571, wherein the court said: "There is nothing in the complaint to show how the alleged discrimination might substantially lessen competition, and it certainly could not tend to create a monopoly. Every manufacturer holds a monopoly in the goods of his own manufacture, but there is no allegation

that the defendants have a monopoly 'in any line of commerce,' to use the term of the Clayton Act. Manufacturers of automobiles ordinarily would buy tires in much larger quantities than dealers, and consequently the defendants could generally afford to sell to such manufacturers at a lower price than to dealers. The manufacturers sell to dealers, and the latter to the consumer. There is apparently no competition between the manufacturers of tires and the dealers, nor is it alleged that any exists. The differentiation in price would not therefore substantially lessen competition. If such would be the effect, it must be set forth in some discernible way, and not in the mere language of the statute. There is no unreasonable arrangement set forth, nor is it made apparent how competition may be substantially lessened, or how the defendants were doing more than to select 'their own customers in bona fide transactions and not in restraint of trade.' More than mere sweeping conclusions in the language of the statute should be alleged to subject parties to trial."

**Vol. IX, p. 733, sec. 3.** [First ed., 1916 Supp., p. 269.]

**Sale of magazines.**—This section is not violated by the refusal of the publishers of a magazine to allow its district agents to furnish retail dealers and newsboys with a magazine published by a competitor without first obtaining the former's approval, where it appears that such prohibition is set forth in the contracts between the company and its agents, and that although under such contract the agents are "purchasers" of its magazines, they are also part of an elaborate sales force conceived and organized by the company. *Pictorial Review Co. v. Curtis Pub. Co.*, (S. D. N. Y. 1917) 255 Fed. 206.

**Sale of patterns.**—A contract whereby, in consideration of the granting by a company making patterns of an agency for the sale of its patterns, the grantee agreed "not to sell or permit to be sold on its premises during the term of the contract any other make of patterns" and not to sell the company's patterns "except at label prices" has been held to be within the prohibition of this Act. *Standard Fashion Co. v. Magrave Houston Co.*, (D. C. Mass. 1918) 254 Fed. 493.

**Vol. IX, p. 737, sec. 5.** [First ed., 1916 Supp., p. 737.]

**Retrospective operation of section.**—The provisions of this section respecting judgments as evidence and the running of the statute of limitations have no retrospective operation. *Buckeye Powder Co. v. E. I. Du Pont De Nemours Powder Co.*, (1918) 248 U. S. 55, 39 S. Ct. 38, 63 U. S. (L. ed.) —,

*affirming* (C. C. A. 3d Cir. 1915) 223 Fed. 881, 139 C. C. A. 319.

**Vol. IX, p. 737, sec. 6.** [First ed., 1916 Supp., p. 272.]

**Organizations mentioned must conduct business in lawful manner.**—The organizations mentioned in this section are not privileged to adopt methods of carrying on their business which are not permitted to other lawful associations. *U. S. v. King*, (D. C. Mass. 1916) 250 Fed. 908.

**Sufficiency of indictment.**—In *U. S. v. King*, (D. C. Mass. 1916) 250 Fed. 908, the defects in an indictment and the conclusion of the court appear from the following extract from the opinion: "The indictment alleges that 'said association . . . was made up of persons and concerns engaged in shipping' certain potatoes commonly called Aroostook county potatoes. It does not allege that the association was composed of persons raising such potatoes, nor that a single member of it was an actual producer of them. The basis on which the organization is founded is that its members shall be 'shippers' of Aroostook county potatoes. They may be farmers, commission merchants, or independent dealers. Nor does it appear whether the association has capital stock, nor whether it is conducted for profit. Its business and activities are not completely set forth in the indictment. These considerations would be enough to require me to hold that the organization is not shown, upon the allegations of the indictment, to be within the Clayton Act."

**Vol. IX, p. 745, sec. 16.** [First ed., 1916 Supp., p. 745.]

**Extent of relief.**—"The suits covered by this section are limited to those seeking preventative relief; i. e., injunction 'against threatened loss or damage.' *Fleitmann v. Welsbach Co.*, 240 U. S. 27, 36 Sup. Ct. 233, 60 L. Ed. 505; *Union Pac. R. Co. v. Frank*, 226 Fed. 906, 141 C. C. A. 510. No other equitable suits at the instance of private parties are expressly authorized by the Clayton Act; and, as the relief sought in the present supplemental bill is not of a preventative character but to annul a consummated transaction, none of the venue provisions of the Sherman or Clayton Acts is available to him under that bill. To obtain that character of relief in a federal court, the plaintiff must bring his suit in the district whereof the defendant is an inhabitant, as provided by section 51 of the Judicial Code. The service of process upon the Bethlehem Company cannot be sustained on the ground that the supplemental bill presents a federal question." *Venner v. Pennsylvania Steel Co.*, (D. C. N. J. 1918) 250 Fed. 292.

## TRADEMARKS

Vol. IX, p. 747, sec. 1. [First ed., 1909 Supp., p. 676.]

**Power of Congress to legislate.**—Property in trademarks and the right to their exclusive use rest upon the laws of the several states, and depend upon them for security and protection; the power of Congress to legislate on the subject being only such as arises from the authority to regulate commerce with foreign nations and among the several states and with the Indian tribes. *United Drug Co. v. Theodore Rectanus Co.*, (1918) 248 U. S. 90, 39 S. Ct. 48, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 6th Cir. 1915) 226 Fed. 545, 141 C. C. A. 301.

**Character of property in.**—"There is no such thing as property in a trademark except as a right appurtenant to an established business or trade in connection with which the mark is employed. The law of trademarks is but a part of the broader law of unfair competition; the right to a particular mark grows out of its use, not its mere adoption; its function is simply to designate the goods as the product of a particular trader and to protect his good will against the sale of another's product as his; and it is not the subject of property except in connection with an existing business. *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 412-414." *United Drug Co. v. Theodore Rectanus Co.*, (1918) 248 U. S. 90, 39 S. Ct. 48, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 6th Cir. 1915) 226 Fed. 545, 141 C. C. A. 301.

Vol. IX, p. 753, sec. 5. [First ed., 1914 Supp., p. 400.]

I. In general.

II. Particular words, names, marks, or symbols.

2. Personal and corporate names.
3. Descriptive words.
5. Geographical names.
7. Similar names.

I. IN GENERAL (p. 755)

**Trademark defined.**—A trademark is a design or mark rather than a container or package, and hence the shape and appearance of a package or wrapping cannot be made the subject of a trademark. *Societe Anonyme, etc. v. Puziello*, (E. D. N. Y. 1918) 250 Fed. 928.

**Effect of registration.**—The allowance of a trademark by the Patent Office furnishes a strong presumption of its validity. All presumptions, however, from the action of the Patent Office are overcome by the great weight of evidence, and therefore where words are used which according to the common understanding are merely descriptive of the desirable qualities of the article, the pre-

sumption will not control. *Chapin-Sacks Mfg. Co. v. Hendler Creamery Co.*, (C. C. A. 4th Cir. 1918) 254 Fed. 553, 166 C. C. A. 111.

Registration of a trademark establishes prima facie ownership in the registrant, and places burden of proof on one claiming prior use. *Rice-Stix Dry Goods Co. v. Schwarzenbach-Huber Co.*, (1918) 47 App. Cas. (D. C.) 249. To same effect, see *Fulton Waterworks Co. v. Bear Lithia Springs Co.*, (1918) 47 App. Cas. (D. C.) 437, also holding that a registrant acquires no vested right in a trademark by registration.

**Use under assignment from dissolved partnership.**—Use of a word as a trademark cannot be predicated upon an assignment of the mark by the former member of a dissolved copartnership, who on dissolution of the firm did not continue its business. Under such circumstances the mark becomes abandoned and subject to appropriation by anyone. *Rice-Stix Dry Goods Co. v. Schwarzenbach-Huber Co.*, (1918) 47 App. Cas. (D. C.) 249.

### II. PARTICULAR WORDS, NAMES, MARKS, OR SYMBOLS

#### 2. *Personal and Corporate Names* (p. 759)

The words "Stark Trees" in a striking and characteristic form and arrangement constitute a valid trademark. *Stark Bros. Nurseries, etc., Co. v. Stark*, (W. D. Mo. 1918) 248 Fed. 154.

**Use of name and photograph.**—The use of the name and photograph of a person coupled with words descriptive of the goods may, when the required consent to the use of the photograph has been obtained, be the subject of a valid trademark by another. *M. B. Fahey Tobacco Co. v. Senior*, (C. C. A. 3d Cir. 1918) 252 Fed. 579, 164 C. C. A. 495.

#### 3. *Descriptive Words* (p. 762)

**Generic name.**—To same effect as first paragraph of original annotation, see *Chapin-Sacks Mfg. Co. v. Hendler Creamery Co.*, (C. C. A. 4th Cir. 1918) 254 Fed. 553, 166 C. C. A. 111.

The terms "Arch Builder" and "Heel Leveler" are susceptible of exclusive appropriation as trademarks for insoles for shoes since they are used in a secondary sense. *Wonder Mfg. Co. v. Block*, (C. C. A. 9th Cir. 1918) 249 Fed. 748, 161 C. C. A. 658.

The words "High-Efficiency" as a trademark for safety relief valves are more descriptive than suggestive, and hence are not registerable. *In re Crosby Steam Gage, etc., Co.*, (1918) 47 App. Cas. (D. C.) 382.

The word "Infallible" when used in connection with smokeless powder is within the rule as to the use of descriptive words and therefore is not subject to protection as a

trademark. *Hercules Powder Co. v. Newton*, (S. D. N. Y. 1918) 254 Fed. 906.

The word "Kanelasses," as applied to cane molasses or syrup, is not registerable as a trademark, as the provision of this section prohibiting the registration of descriptive words cannot be avoided by resorting to phonetic spelling. *In re American Sugar Refining Co.*, (1918) 47 App. Cas. (D. C.) 375.

The word "Leghornette" as applied to hats is descriptive, and is, therefore, not registerable as a trademark. *Elishewitz v. Leyser Green Co.*, (1917) 47 App. Cas. (D. C.) 193.

The word "Pollyanna" as applied to a series of books is descriptive, and therefore not registerable as a trademark, where one of the series is a book bearing that title. *In re Page Co.*, (1917) 47 App. Cas. (D. C.) 195.

"Spearmint" is a common noun, denoting flavor, and is therefore not susceptible of appropriation as a trademark. *L. P. Larson, Jr., Co. v. Wm. Wrigley, Jr., Co.*, (C. C. A. 7th Cir. 1918) 253 Fed. 914, 166 C. C. A. 14.

The word "Tag" in connection with a physical tag has been held to be descriptive and may not become the subject of an exclusive trademark. *M. Werk Co. v. Grosberg*, (C. C. A. 6th Cir. 1918) 250 Fed. 968.

The words "The Velvet Kind" applied to ice cream are descriptive and not the subject of a valid trademark. *Chapin-Sacks Mfg. Co. v. Hendler Creamery Co.*, (C. C. A. 4th Cir. 1918) 254 Fed. 553, 166 C. C. A. 111.

#### 5. Geographical Names (p. 764)

When name has secondary meaning.—To same effect as first paragraph of original annotation, see *McIlhenny Co. v. Gaidry*, (C. C. A. 5th Cir. 1918) 253 Fed. 613, 165 C. C. A. 239.

#### 7. Similar Names (p. 766)

Similarity.—The test in a trademark opposition is not whether there will be a likelihood of a purchaser confusing the products, but whether confusion in the mind of the purchaser will arise as to the source from which they came. *Williams v. Kern*, (1918) 47 App. Cas. (D. C.) 441.

The unnecessary adoption of a part of a plaintiff's trademark—a part so substantial as to have become a tradename or nickname for the goods—is generally regarded as an infringement. *Ammon v. Narragansett Dairy Co.*, (D. C. R. I. 1918) 252 Fed. 276.

A word may not be denied registration as a trademark for ice cream cones, which are made wholly without milk or any dairy product, and are used as containers for ice cream, because of the prior use of the same word by another person as a trademark for dairy products, such as condensed and evaporated milk and cream. *Borden's Condensed Milk Co. v. Eagle Mfg. Co.*, (1917) 47 App. Cas. (D. C.) 191.

Prior use by a party of the word "Hub" as a trademark for rubber boots and shoes

requires denial of registration by another party of the same word as a trademark for leather shoes; the question being, not whether rubber and leather goods should be separately classified, but whether the marks of the parties are so similar as to tend to create confusion in trade when used on footwear generally, or on particular grades of footwear. *Boston Rubber Shoe Co. v. Abramowitz*, (1917) 47 App. Cas. (D. C.) 199.

**Illustrations—Beverages.**—In the following cases, involving the name applied to a beverage, the name first given was held to be infringed by the names which follow: "Coca-Cola"—"Coca and Cola" and "El-Cola," *Coca-Cola Co. v. Duberstein*, (S. D. Ohio 1918) 249 Fed. 763. "Virginia Dare"—"Virginette," *Garrett v. A. Schmidt, Jr.*, etc., *Wine Co.*, (N. D. Ohio 1919) 256 Fed. 943.

**Food products and confectionery.**—In the following case, involving the name applied to a food product or confection, the name first given was held to be infringed by the name which follows: "Success"—"Success," *Williams v. Kern*, (1918) 47 App. Cas. (D. C.) 441 (flour.)

**Musical instruments.**—In the following case, involving the name applied to a musical instrument, the name first given was held to be infringed by the name which follows: "Orchestrola"—"Orchestrelle," *Thomas Mfg. Co. v. Aeolian Co.*, (1918) 47 App. Cas. (D. C.) 376.

**Pencil sharpeners.**—In the following case, involving the name applied to a pencil sharpener, the name first given was held not to be infringed by the name that follows: "Junior"—"Stewart Junior," *Automatic Pencil Sharpener Co. v. Stewart Mfg. Co.*, (C. C. A. 7th Cir. 1918) 249 Fed. 52, 161 C. C. A. 112.

**Wearing apparel.**—In the following case, involving the name applied to wearing apparel, the name first given was held to be infringed by the name which follows: "Dri-Shod"—"Dry-Socks," *Kirkendall v. Mayer Boot, etc., Co.*, (1918) 47 App. Cas. (D. C.) 245.

**Miscellaneous articles.**—In each of the following cases, involving the name applied to the article indicated in parentheses after the case, the name first given was held to be infringed by the name which follows: "Listerine"—"Mentho-Listine," *Lambert Pharmacal Co. v. Mentho-Listine Chemical Co.*, (1917) 47 App. Cas. (D. C.) 197 (mouth wash and tooth powder); "Duxbak"—"Duxbak," *Schieren Co. v. Whittemore Bros. Corp.*, (1918) 47 App. Cas. (D. C.) 247 (paste or liquid dressing for shoes).

### Vol. IX, p. 779, sec. 13. [First ed., vol. X, p. 412.]

**Retroactive.**—To same effect as original annotation, see *Fulton Waterworks Co. v. Bear Lithia Springs Co.*, (1918) 47 App. Cas. (D. C.) 437.

**Grounds for cancellation.**—The invasion of a party's right to register a trademark by the wrongful registration of the same mark to another implies damage, and is sufficient ground for cancellation. *Great Bear Spring Co. v. Bear Lithia Springs Co.*, (1918) 47 App. Cas. (D. C.) 434.

**Effect of cancellation.**—The cancellation of a registration does not extinguish a right which the registration did not confer but which exists independently of it, as for instance an exclusive right to the use of a symbol or device as a trademark. *McIlhenny v. Galdry*, (C. C. A. 5th Cir. 1918) 253 Fed. 613.

## Vol. IX, p. 780, sec. 16. [First ed., vol. X, p. 413.]

**Test of infringement.**—To same effect as first paragraph of original annotation, see *Garrett v. A. Schmidt, Jr., etc.*, *Wine Co.*, (N. D. Ohio 1919) 256 Fed. 943.

**Application to noncompeting goods.**—Where a trademark is registered to be applied to "chemicals, medicines and pharmaceutical preparations" no relief can be granted under the registration against its use on cigars. *Peninsular Chemical Co. v. Levinson*, (C. C. A. 6th Cir. 1917) 247 Fed. 658, 159 C. C. A. 560.

**Descriptive name in general use before registration.**—In *Shipley v. Hall*, (E. D. Pa. 1919) 256 Fed. 539, it was held that where the plaintiff, a number of years before registering the name "Bethabara Wood" as a trademark, had arbitrarily selected and adopted it as a means for identifying certain wood used in his business, and such name by general use had become a descriptive name for the wood, he was not entitled to the exclusive right to use the name.

**Jurisdiction of federal courts**—*Diversity of citizenship* is not necessary to give jurisdiction to an action to protect a registered trademark. *Stark Bros Nurseries, etc., Co. v. Stark*, (W. D. Mo. 1918) 248 Fed. 154.

Where the bill is based on diverse citizenship the court has jurisdiction to give relief against the infringement of a common law trademark. *Ingersoll v. Doyle*, (D. C. Mass. 1917) 247 Fed. 620.

"So far as it seeks to recover for the alleged infringement of plaintiff's trademark, and for unfair competition in trade, it is well settled that the federal courts have no jurisdiction of such controversies between citizens or corporations of the same state. *Elgin National Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365; *Warner v. Searle & Hereth Co.*, 191 U. S. 195, 24 S. Ct. 79, 48 L. ed. 145; *Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co.*, 134 Fed. 571, 67 C. C. A. 418, affirmed 201 U. S. 166, 26 S. Ct. 425, 50 L. ed. 710; *Ungles-Hoggette Mfg. Co. v. Farmers' Hog & Cattle P. Co.*, 232 Fed. 116,

146 C. C. A. 308." *Shrauger v. Phillip Bernard Co.*, (N. D. Ia. 1917) 247 Fed. 547.

**Defenses**—*Misrepresentation of quality.*—To same effect as original annotation, see *Koke Co. v. Coca-Cola Co.*, (C. C. A. 9th Cir. 1919) 255 Fed. 894.

**Accounting for damages.**—To same effect as second paragraph of original annotation, see *Gallet v. R. & G. Soap, etc., Co.* (C. C. A. 2d Cir. 1918) 254 Fed. 802, 166 C. C. A. 248.

Although the plaintiff may obtain an injunction it does not necessarily follow that an accounting will be ordered. So it has been refused where the evidence fails to show any intention on the part of the defendant to deceive the public or to appropriate plaintiff's good will or trade reputation and there is no evidence in the case to show that in fact the goods of the defendant were ever mistaken for those of the plaintiff, or that any person was ever deceived in the purchase of goods by the use of the defendant's marks, or that the defendant has interfered with the plaintiff's market, or deprived it of any profits, or to show any elements of actual fraud. *Ammon v. Narragansett Dairy Co.*, (D. C. R. I. 1918) 254 Fed. 208. See also (D. C. R. I. 1918) 252 Fed. 276.

**Scope of order for accounting.**—In respect to an order relating to an accounting it is said to be within the discretion of the court to require the defendant to disclose in his account such facts as are necessary to show not only his own profits from his wrongdoing but also the extent of the injury otherwise done by him to the plaintiff. So he may be required to include in his account the names and addresses of all purchasers of goods bearing the infringing trademark. *O. & W. Thum Co. v. Dickinson*, (W. D. Mich. 1918) 254 Fed. 219, wherein the court said: "The claim of defendant that he ought not to be required to disclose the names and addresses of his customers might rest upon a somewhat more substantial foundation, if the profits made by him in the manufacture and sale of the infringing goods alone were involved; but the accounting is ordered to ascertain both his gains and profits and the damages suffered by plaintiff. In a recent petition defendant has averred that he has made no profits. If his averment is true, and he cannot now gainsay its truth, plaintiff will be limited in its recovery to the damages (as distinguished from the infringer's profits) it has sustained. An important element of such damages, if any, may be sales of goods bearing the infringing trade-mark, which have prevented sales by plaintiff of its own goods to its own customers. Whether any such sales have been made cannot be learned until after the discovery of the names of the purchasers of infringing goods from defendant. An account merely stating dates, amounts, and prices would afford little, if any, assistance in the determination of this important question. To hold that plaintiff

is not entitled to such information until after the filing of his account and exceptions thereto, and not even then unless, possibly, it can be obtained from an examination of the defendant either viva voce or upon interrogatories, would be to create and to invite the delays which the rule was intended to prevent."

**Recovery of profits.**—To same effect as original annotation, see *M. B. Fahey Tobacco Co., v. Senior*, (C. C. A. 3d Cir. 1918) 252 Fed. 579, 164 C. C. A. 495, *modifying and affirming* (E. D. Pa. 1917) 247 Fed. 809.

**Estoppel.**—The abandonment of a suit with knowledge of the expenditure of money and labor in the promotion by the defendant of the sale of goods under the name complained of as an infringement in a locality in which plaintiff had made no effort for custom has been regarded as a sufficient waiver or

estoppel to prevent a decree for profits. *Chapin-Sacks Mfg. Co. v. Hendler Creamery Co.*, (C. C. A. 4th Cir. 1918) 254 Fed. 553, 166 C. C. A. 111.

**Vol. IX, p. 786, sec. 18.** [First ed., vol. X, p. 414.]

**Scope of review.**—Whether, upon inspection, it can be said as matter of law that the admitted acts of the defendant are a wrong of which the plaintiff can complain, is the only question which the Federal Supreme Court will consider in a trademark or unfair competition suit in which both courts below have found for the defendant. *Joseph Schlitz Brewing Co. v. Houston Ice, etc., Co.*, (1919) 250 U. S. 28, 39 S. Ct. 401, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 5th Cir. 1917) 241 Fed. 817, 154 C. C. A. 519.

## TRADING WITH THE ENEMY

**1918 Supp., p. 847, sec. 1.**

**Purpose of Act.**—This Act of Congress must be construed in the light of two purposes: (1) to absolutely prevent any act which would result in a detriment to the United States in the progress of the war; and (2) not to permit or compel any act which would result in an injury to an individual alien enemy, which act would in no wise benefit the United States in the progress of the war. *Keppelmann v. Keppelmann*, (N. J. 1918) 103 Atl. 27.

"The intent of the 'Trading with the Enemy Act' was, of course, to shut off trade and financial aid from the enemy, but the problems involved were so many and varied in character that large discretion was conferred upon the President." *U. S. v. Meinel*, (S. D. N. Y. 1919) 256 Fed. 396.

"The broad general purposes of the Trading with the Enemy Act included the prohibition of commercial relations, except in some circumstances under executive license, and the capture and custody of enemy property, so as to prevent the advantage which would come to the enemy of using such resources. In order to carry out the extremely important purposes of the act, rendered necessary by the exigencies of war, the statute has devised a series of steps by which, in the first place, enemy property is laid hold of, and, secondly, then administered. Congress apparently held the view that a preliminary 'hearing' would not be practicable; but, to safeguard against acts which in law might be arbitrary, an 'investigation' was preliminarily required. In the effort to protect those who, in one form or other, transferred property to the Custodian, Congress included certain provisions intended to safeguard the persons so trans-

ferring property to the Custodian. The language of the statute seems to have been carefully selected, with a view, on the one hand, of being comprehensive as to subject-matter, and, on the other, of being particular as to details of execution." *American Exch. Nat. Bank v. Palmer*, (S. D. N. Y. 1919) 256 Fed. 680.

"Nowhere in the act is there evidence of any legislative intent that the purpose of seizing or taking enemy property under the act is to furnish our government with means to prosecute the war. The final disposition of such property as has been or will be taken under the act will be governed by treaty arrangements or congressional legislation or both. In a broad sense, the United States is a trustee to hold enemy property taken under the act, until such time as the United States, in orderly course, shall determine the final disposition thereof. It is fair to assume that any treaty will safeguard the rights of American citizens whose property has been seized in enemy countries, and therefore that the provisions of such treaty will, in this respect, be reciprocal. Undoubtedly resources captured under this act could, as an incident, be used by the United States in the course of its prosecution of the war; but the fundamental purpose of the act was to prevent the enemy from having the advantage of such resources as might be susceptible of capture under the act." *American Exch. Nat. Bank v. Palmer*, (S. D. N. Y. 1919) 256 Fed. 680.

**Effect of Act no powers of attorney.**—Powers of attorney for collection of money, executed prior to the existence of a state of war, rendering principals enemy aliens, may continue to be valid, notwithstanding the state of war, and notwithstanding the Trading with the Enemy Act, and may be exer-

cised without violating the rules of public policy. But where it is obviously against the interests of the principal that the agency should continue, or where its continuance would impose some new obligation or burden, the assent of the principal to the continuance of the power after the war broke out will not be presumed, but must be proved, either by his subsequent ratification or in some other manner. It is plainly against the interest of alien principals that their attorneys in fact give refunding bonds to executors of an estate and receive their legacies and turn the same over to the alien property custodian, so it will not be presumed that such principals desire the agency of their attorneys in fact to continue. That alien enemies have been made parties to a suit and served by publication and mailing under license of war trade board, and have interposed no defense by counsel as authorized by the Trading with the Enemy Act, is insufficient to constitute an election to continue powers of attorney to citizens to receive their legacies. But it being to the interest of enemy alien principals that their attorneys in fact represent them in proceedings to determine accounting and distribution of their shares in an estate, consent to continuance of a pre-war power of attorney therefor will be presumed. *Keppelmann v. Keppelmann*, (1918) 89 N. J. Eq. 390, 105 Atl. 140.

### 1918 Supp., p. 847, sec. 2.

"Enemy" as used in this section was held not to apply to a resident of New Jersey who while born in Germany and a subject of that nation was not an officer, official or agency of Germany, or of any political or municipal subdivision thereof. *Tortoriello v. Seghorn*, (N. J. 1918) 103 Atl. 393, wherein the court said: "This is an action to compel the specific performance of a contract for the sale of certain real estate on Warwick street in the city of Newark, where all the parties reside. The facts in the case are undisputed. Defendants, however, refused to perform their contract and convey the premises in question to complainant, because they claim they are advised that to do so would make them subject to the penalties of fine and imprisonment imposed by the act of Congress, approved October 6, 1917, and known as the Trading with the Enemy Act, as they are not citizens of the United States and were born in the German empire, and are considered subjects of that country, with which this country is at war; and they further claim that they have been advised that by reason of their German citizenship they are considered alien enemies, and are not permitted under the act to complete their contract and convey their property. . . . It is true that some text-books on international law and some of the older cases hold that the natives, citizens, and subjects of one belligerent are enemies of the country with which it is at war; and that such persons cannot ordi-

narily trade in or transact business within such country. The more modern, and I believe the better, view is, that since the Congress has assumed jurisdiction over the subject and has enacted legislation with respect thereto, such legislation, and not the theories and speculations of writers, however eminent, should control in determining the status of aliens while this country is at war. Our statute relating to aliens was enacted in 1817 to correct conditions growing out of the War for Independence and the War of 1812 with Great Britain. This act, among other things, expressly authorizes aliens to purchase and hold real estate in this state (C. S. p. 39), and while it prohibits an alien from purchasing lands while this country is at war with any state or power of which such alien is a subject, yet such purchases made by an alien (as in this case) before the war or after it are permitted, and an alien may 'have and to hold the same to him or her and his or her heirs and assigns forever, as fully to all intents and purposes as any natural-born citizen of the United States may or can do.' And it will be noted that while there are restrictions imposed upon the purchase of real estate during the war, no such restraint is imposed on the sale or alienation of real estate, no matter when acquired. Congress in the Trading with the Enemy Act, aside from the power thereby vested in the President, has made the test of enemy character depend upon residence, or official or agency relation, and not upon nationality, or mere alienage. The President by his proclamation has extended the ban upon trading only to such aliens as have been or may be arrested and interned in the custody of the War Department for the duration of the war; and with his intimate knowledge of the situation, he has not yet found it necessary to include within the meaning of the word 'enemy' other individuals who may be natives, citizens, or subjects of the German Empire. As a result of this forbearance, aliens not so classified have been at liberty to continue in the pursuit of their business and trade, including the receipt, banking and expenditure of money belonging to them, without the slightest governmental interference or supervision. Such being the case, there is no reason apparent why an exception should be made with respect to transactions relating to real estate; and if such an exception is to be made, I cannot think of a satisfactory reason why the courts should assume the prerogative of making it, as the Congress has expressly vested that power in the President; and we require no assurance that he will wisely exercise it when and as the exigencies of the situation call upon him for action."

"Alien enemy."—In *Lutz v. Van Heynigen Brokerage Co.*, (Ala. 1918) 80 So. 72, it was said with respect to a German subject who had resided in the United States and who had been interned: "As affecting civil rights and liabilities, it is said to be clear law that



it is not his nationality, but the fact that he carries on business or voluntarily resides in an enemy country, that makes an alien enemy. *Porter v. Frendenberg*, 1 L. R. K. B. Div. [1915] 857. Therefore plaintiff was not to be considered as an alien enemy prior to his internment; but consideration of the causes for which such internment may have been ordered lead to the conclusion that plaintiff's internment reduced him substantially to the status of an alien enemy as defined above."

This section recognizes residence or doing business in hostile territory as the test of an alien enemy for the purpose of trading. *Krachanake v. Acme Mfg. Co.*, (1918) 175 N. C. 435, 95 S. E. 851, Ann. Cas. 1918E 340, L. R. A. 1918E 801.

*Who is alien enemy.*—A citizen of Germany, who came to this country in 1885 and then took out his first naturalization papers, which were subsequently destroyed by fire, who, previous to and at the time of the declaration of war with Germany, was working for one of the packing house companies of Kansas City, and who immediately after that declaration was, by the federal authorities, given a permit to reside in the packing house district and to work for the packing house, is not declared to be an "alien enemy" by the act of Congress of October 6, 1917 (chapter 106, § 2, 40 Stat. 411) and is entitled to prosecute an action under the Workmen's Compensation Act of this state. *Wolf v. Cudahy Packing Co.*, (1919) 105 Kan. 317, 182 Pac. 395.

*Plaintiff, a citizen of Germany residing in this state and earning his living here, sued for damages sustained by reason of a collision between his motorcycle and an automobile van. At the trial it appeared that he was born in Germany, had never been naturalized in this country, and was living and working in this state as aforesaid. It was held that it was improper to nonsuit him on the ground that he was an alien enemy, first, because the defense had not been pleaded or otherwise entered upon the record; secondly, because the alien enemy rule is not applicable to a citizen of an enemy country peaceably residing and doing business here with the implied license and permission of our government; there being nothing to show that he was within any of the classes denounced by the Trading with the Enemy Act or any presidential proclamation. Heiler v. Goodman's Motor Express Van, etc., Co.*, (1918) 92 N. J. L. 415, 105 Atl. 233, 3 A. L. R. 336.

*Infant son.*—In *Krachanake v. Acme Mfg. Co.*, (1918) 175 N. C. 435, 95 S. E. 851, Ann. Cas. 1918E 340, L. R. A. 1918E 801, it was held that an infant son, residing in North Carolina with his father, a native of Austria-Hungary, a country with which the United States was at war, but who himself was born in Canada, was not an "alien enemy," and could sue in that state. It was further held that his father could bring the

action, as next friend, because a next friend was not a party in the legal sense. The court said: "The first question presented by the appeal is as to the right of the plaintiff, a native of Austria-Hungary, and resident in this state, to maintain an action in our courts, as next friend, to recover damages for personal injury to his infant son. The plaintiff left Hungary fifteen years ago, and since then has lived two years in Ohio, eight years in Canada, and five years in this state. There is neither allegation nor evidence that he has been guilty of any act or utterance unfriendly to the United States, and, so far as the record discloses, he is a quiet law-abiding laborer. He comes, however, within the classification of an alien enemy, because the country to which he owes allegiance is at war with the United States; and conceding that his son, who was seven years old at the time of his injury, stands in the same relation to this government as his father, which does not seem to be the American rule (12 Mod. Am. L. 143; Case of Carl Gundlich, 12 Mod. Am. L. 698), can the action be maintained?

"The question is new in this court, but it has been considered so frequently and with such unanimity of opinion in England and America, and the conclusion reached has been so clearly recognized by the President in his proclamation after the declaration of war against Germany and Austria-Hungary, and by Congress in the Trading with the Enemy Act, that but little is left for us to do except to give the result of our investigations. The statement is often made by the law-writers that an alien enemy cannot sue, and upon the ground that to permit a recovery would strengthen and add to the resources of the hostile government, and correspondingly weaken our government; but when reference is had to the facts it is found that the principle is predicated upon residence in the country at war with ours, and that it has no application to the alien enemy resident here, who may be interned and held as a prisoner of war without the right to apply for the writ of habeas corpus, and whose property may be taken into custody by the government. See note to *Daimler Co. v. Continental Tyre Co.*, Ann. Cas. 1917C 193, where the authorities are collected.

"The test, therefore, of the right to sue, which has been universally adopted, is residence, and not nationality, where the alien enemy is and not what he is. This was substantially declared in 1697 in *Wells v. Williams*, 1 Ld. Raym. 282, and was approved in 1813 in an opinion by Chancellor Kent in *Clarke v. Morey*, 10 Johns. (N. Y.) 70, and in 1915 in an opinion by Lord Reading, Chief Justice of England, in *Porter v. Frendenberg*, 1 K. B. 857, Ann. Cas. 1917C 215. The learning upon the question will be found in these two opinions, and in an interesting article in the *Yale Law Journal* of December, 1917, written by Mr. Picciotto of the Inner Temple, London, and in the notes

to Daimler Co. v. Continental Tyre Co., Ann. Cas. 1917C 193. . . .

"The father is not, however, a party in the legal sense. He is an officer appointed by the court to protect the interest of his son, who is the real plaintiff (*Hockoday v. Lawrence*, (1911) 156 N. C. 322, 72 S. E. 387); and the son is ten years of age, and was born in Canada, a province of Great Britain, with which we are in alliance; and, while most of the European countries have adopted the rule that nationality follows parentage, 'the United States and Great Britain follow the older territorial rule, according to which nationality is primarily determined by the place of birth.' 12 Mod. Am. L. 143."

"Trade."—Notwithstanding that the word "trade" has been defined to include the payment of a debt and the receipt of property, before the performance of the act became illegal, it must be in behalf of, or for the benefit of, the alien enemy. *Keppelmann v. Keppelmann*, (1918) 89 N. J. Eq. 390, 105 Atl. 140.

### 1918 Supp., p. 850, sec. 4.

**Suspension of operation of act.**—Communication with the enemy relating to routine matters of business was lawful under this Act for a period of thirty days after October 6, 1917. *U. S. v. Meinel*, (S. D. N. Y. 1919) 256 Fed. 396.

### 1918 Supp., p. 853, sec. 7 (a).

**Failure to report to Alien Property Custodian—jurisdiction of offense.**—The duty imposed to make report to the Alien Property Custodian, involves the duty to make such report in the district of his residence; and a failure to make it was an offense against the United States, committed in that district. *Rumely v. McCarthy*, (1919) 250 U. S. 283, 39 S. Ct. 483, 63 U. S. (L. ed.) —, affirming (S. D. N. Y. 1919) 256 Fed. 565.

### 1918 Supp., p. 854, sec. 7 (b).

**Power of alien enemy to defend.**—The provisions of this section empowering an alien enemy to "defend by counsel any suit in equity or action at law which may be brought against him" includes an heir at law who is one of the contestants in a proceeding brought by an executrix for the proof and allowance of a will. *Riddell v. Fuhrman*, (Mass. 1919) 123 N. E. 237, wherein the court said: "If it be assumed in favor of the appellants, but without so deciding, that a petition for the proof and allowance of a will of a deceased citizen of this commonwealth is 'a suit or action at law or in equity' (*Peters v. Peters*, (1851) 8 Cush. (Mass.) 529), and that the Trading with the Enemy Act is binding upon the courts of this commonwealth because enacted pursuant to the war powers of the federal government

(*Selective Draft Law Cases*, (1918) 245 U. S. 366, 38 S. Ct. 159, 62 U. S. (L. ed.) 349, L. R. A. 1918C 361, Ann. Cas. 1918B 856). it is plain that the words of that act not only do not prohibit the prosecution of this petition to a final decision, but expressly authorize the one of the appellants who is an alien enemy to appear and defend her rights through counsel."

**Stay of distribution proceeding.**—Where in a distribution proceeding the published notice summons all persons claiming an interest to admit or deny the claim of heirship advanced by the petitioner, an alien enemy is entitled to appear and obtain a continuance until the end of the war. *In re Henrichs*, (Cal. 1919) 179 Pac. 883.

**Staying application for administration.**—An application for the appointment of an administrator will be stayed where it appears that the deceased left no property in the state and that the only reason for the appointment of an administrator is to prosecute a suit for damages for the benefit of heirs who are alien enemies resident in enemy country. *Galveston, etc., R. Co. v. Blankfield*, (Tex. 1919) 211 S. W. 808. The court said: "The prosecution of this proceeding by an alien enemy being against public policy, it is the duty of the courts to stay the proceedings when the fact that the plaintiff is an alien enemy is made to appear at any stage of the proceedings, and it is not necessary that any plea or exception to the proceedings should have been made by the defendant. While the court, upon the fact being made to appear that the plaintiff was an alien enemy, might be authorized to dismiss the proceedings, the less harsh practice of suspending the proceedings until the end of the war is now the proper practice. *Watts v. Unione Austriaca Di Navigazione*, 248 U. S. 9, 39 S. Ct. 1, 63 L. ed. —."

**Compelling issuance of fishing license.**—Under the proclamations of the President as to the privileges accorded to resident natives of Austria-Hungary during the war a declarant alien who is a native of that country is entitled to a fishing license under the Washington statute and may sue for mandamus to enforce his right thereto. *State v. Darwin*, (1918) 102 Wash. 402, 173 Pac. 29, L. R. A. 1918F 1012.

**Order in writ of error in suit by alien enemy.**—Where pending a writ of error to review a judgment, the outbreak of war makes the plaintiff an alien enemy, the judgment will be modified to require payment to the clerk of the trial court, to be by him turned over to the Alien Property Custodian. *Birge-Forbes Co. v. Heye*, (C. C. A. 5th Cir. 1918) 248 Fed. 636, 160 C. C. A. 536.

### 1918 Supp., p. 856, sec. 7 (c).

**Bank deposits.**—"Money" undoubtedly, under some circumstances, would have a very broad meaning, but under this section of the Act, whatever else might come under the

definition of money, it is plain that, where the relation of bank depositor and bank exists, an ordinary deposit is not money within the meaning of this section. *American Exch. Bank v. Palmer*, (S. D. N. Y. 1919) 256 Fed. 680.

A debt may possibly be designated as property in the sense of the assets of an estate or of a creditor, but as used in this section of the Act the word "property" undoubtedly refers to a tangible res, or some evidence of debt, or share in property, such perhaps as, on the one hand, a note or bill of exchange, and, on the other hand, a certificate of stock or an undivided interest in real property, but a debt arising out of the obligation of a bank to a depositor is held not to be property. *American Exch. Nat. Bank v. Palmer*, (S. D. N. Y. 1919) 256 Fed. 680.

### 1918 Supp., p. 856, sec. 8 (c).

**Alien custodian's authority and right.**—Under Trading with the Enemy Act, and executive order of February 26, 1918, the Alien Property Custodian's authority is over the property of and interests of alien enemies in property, and not in property in which they have an interest, so that the custodian's interest in the right of alien enemies to legacies is to receive such shares from the trustees upon giving the refunding bonds required of beneficiaries to protect creditors and executors, since they are not protected by section 7, subdivisions c, e. *Keppelmann v. Keppelmann*, (1918) 89 N. J. Eq. 390, 105 Atl. 140.

### 1918 Supp., p. 858, sec. 9.

**Purpose of section.**—"This section was intended to cover and include property the title to which was in an enemy, and which had been transferred or paid to the custodian, either voluntarily or following a requirement. It is the citizen's right in enemy's property in the custodian's hands that is being considered. It is to prevent placing enemy property beyond the reach of American citizens or nonenemies, who may have a right or an interest in or a lien upon the property of an enemy in the custodian's possession. The section was not intended to include nonenemies owning property in the United States in which no enemy had an interest, and which therefore was not required to be reported or transferred to the custodian." *American Exch. Nat. Bank v. Palmer*, (S. D. N. Y. 1919) 256 Fed. 680.

**Who is debtor.**—Where cotton was sold and the proceeds of the sale were deposited in a bank for the benefit of the owner of the cotton, when determined, the money was declared to belong to the owner, who held title under an assignment of bills of lading, and the obligation of the bank to pay it over to the owner created the relation of debtor and creditor. *City Nat. Bank v. Dresdner Bank*, (S. D. Ala. 1919) 255 Fed. 225.

### 1918 Supp., p. 859, sec. 10.

**Continuance at request of alien enemy plaintiff of a suit begun before the war** will be refused where the plaintiff has been interned. *Lutz v. Van Heynigen Brokerage Co.*, (Ala. 1918) 80 So. 72, wherein it was said: "In the present case, it has been observed, an alien enemy plaintiff invokes the power of the court to order a suspension for the duration of the war. Plaintiff, by reason of his nationality, apprehends a serious handicap in the prosecution of his suit, and suggests on appeal that the policy which allows him to further maintain an action begun before a state of war was declared should in fairness grant his motion for a suspension, and this suggestion he seeks to reinforce by reference to the generally unsatisfactory nature of a showing for an absent witness and the necessity for his personal presence at the trial. This statement of plaintiff's contention and the adjudications to which we have referred suffice to show that the policy with which those adjudications were concerned has no application to the question raised by plaintiff's motion in the case under consideration. That peculiar policy laid thus out of view, we do not perceive any sufficient reason for holding that the trial court in its action upon plaintiff's motion should have treated it differently from the motion of any other plaintiff who, pending the trial of his suit, is so unfortunate—we speak not of the fortune of the government, whether good or bad—as to subject himself to confinement in a 'penitentiary, prison, jail, military camp or other place of detention.'"

### 1918 Supp., p. 865, sec. 17.

**Determination of what is enemy property.**—The congressional assumption, as shown by this section providing that federal courts may make orders and decrees necessary to enforce the Act, is that the courts should determine what is or what is not enemy property. *Keppelmann v. Keppelmann*, (1918) 89 N. J. Eq. 390, 105 Atl. 140.

**Interpleader.**—A bank may maintain a bill of interpleader where money deposited with it by an American citizen is claimed by the Alien Property Custodian as belonging to an alien enemy. Regarding such right of the bank it was said: "Under this section, this court no doubt could have made a formal rule to cover procedure in just such a case as this, and what can be done by rule obviously can be done by decree. If on facts of the character set forth in this complaint, procedure by bill of interpleader is sanctioned, the purposes of the statute are satisfied, and the rights of American citizens safeguarded. . . . The amount on deposit with the plaintiff bank is in every sense captured. The bank seeks to deposit that amount in court, where it cannot be withdrawn without an appropriate decree of a court of competent jurisdiction. If the

court should find that the deposit is enemy-owned, then the amount representing that deposit can never reach the enemy. If the court, on the other hand, should find that the deposit belongs to defendant Simon, an American citizen, the situation will be that

Simon, nevertheless, cannot have this fund pending a final decree, and thus the United States will be protected against this resource reaching the enemy." *American Exch. Nat. Bank v. Palmer*, (S. D. N. Y. 1919) 256 Fed. 680.

## TREASURY DEPARTMENT

Vol. IX, p. 834, sec. 7. [First ed., vol. VII, p. 382.]

"Public moneys."—Moneys received by the Federal Reserve Board under section 10 of the Federal Reserve Act of December 23,

1913, ch. 6 (see vol. 6, p. 826) are "public moneys" within the meaning of this section and section 10 of this Act (see vol. 9, p. 805), and consequently are subject to audit by one of the auditors of the Treasury Department. (1914) 30 Op. Atty-Gen. 308.

## WAR DEPARTMENT AND MILITARY ESTABLISHMENT

Vol. IX, p. 958, sec. 1199. [First ed., vol. VII, p. 995.]

**Power to reverse not given.**—The word *revise*, as here used, does not confer the power to reverse. "It is not reasonable to suppose that the exercise of such an important power would be conferred in vague and doubtful terms, or that it lurks behind the word '*revise*.' Applying the rule '*noscitur a sociis*,' the word '*revise*' is to be read in connection with the words that precede and follow it, and, thus read, the duty it imposes is analogous to the duty of receiving and recording the proceedings. Had it been intended by the statute to introduce such a marked innovation into the pre-existing functions of that officer, and to convert a staff officer or the head of a bureau into a judicial officer having the ultimate decision in all cases of military offenses, the power to affirm, reverse, or modify the proceedings of courts-martial would have been lodged in plain and explicit language. The language employed is more appropriate to indicate the discharge of clerical duties.

"It is not intended to intimate that it is not the province and the duty of the Judge Advocate General to revise the proceedings of courts-martial so far as may be necessary to rectify errors of form, and to point out errors of substance which, in his judgment, should be corrected by the proper authorities, nor is it doubted that, as to all such topics as are within the purview of his official scrutiny, his opinion is entitled to that respectful consideration which is due to the dignity and importance of the position which he holds." *Ex p. Mason*, (N. D. N. Y. 1882) 256 Fed. 384.

Vol. IX, p. 1028, sec. 27. [First ed., 1918 Supp., p. 947.]

**Enlistment of minors.**—*Enlistment in National Guard.*—Assuming that this section is applicable to enlistment in the National Guard, its effect is, at most, to make such enlistment voidable by the parent. It does not make the enlistment void, and where, after the son becomes eighteen years old, the National Guard unit is mustered into the service of the United States, the father cannot secure his discharge. *Reed v. Cushman*, (C. C. A. 1st Cir. 1918) 251 Fed. 872, 164 C. C. A. 88, wherein the court said: "If the petitioner could have avoided it, he made no attempt whatever to do so while Cushman remained under the age of 18 years, although there can be no doubt from the evidence before us that he knew Cushman had enlisted as early as April 17, 1917, more than two months before his eighteenth birthday. . . . We are unable to agree with the petitioner's contention that his right to avoid his son's enlistment, whether in the National Guard or the Army of the United States, remained open to him from March 8, 1917, until his son should reach the age of 21. Congress has declared that the Militia of the United States shall consist of all able-bodied citizens between the ages of 18 and 45, and that the National Guard, being one of three classes into which such Militia is divided, shall consist of the regularly enlisted Militia between the ages before specified. See sections 57 and 58 of the National Defense Act. Members of the National Guard are subject to draft into the military service of the United States in time of war, and when so drafted.

but not before, they become part of the Army of the United States and stand discharged from the Militia. Sections 1, 111, of the same act. The right of a father to the services of his minor son are subject to these provisions. In view of them it may be doubted whether enlistment in the National Guard, without mustering into the military service of the United States, can be regarded as an enlistment such as section 27 of the act referred to. It would seem that such enlistment does no more than enroll the enlisted man in a class subject in time of war to be mustered into the military service of the United States, if over the age of 18 years at the time of such mustering in. After the father of a minor under 18 has knowingly permitted his son to remain a member of such class until after he has reached the prescribed age at which its members become subject to be mustered into the military service of the United States, and until after such mustering in has then taken place, we think that, even if he might have avoided the original enlistment in the National Guard, he had no right to avoid the different status later created after the age of eighteen had been reached."

**Vol. IX, p. 1044, sec. 3.** [First ed., vol. VII, p. 998.]

**Promotion of army officers.**—This Act does not make it obligatory upon the President to promote to a vacancy existing in the grade of lieutenant-colonel the senior officer in the next lower grade, if, in his opinion, the record of the officer has been such as to indicate that he is disqualified for promotion. (1913) 30 Op. Atty-Gen. 177.

**Vol. IX, p. 1095, sec. 1.** [*Transportation of troops in time of war, etc.*] [First ed., 1918 Supp., p. 975.]

**Purpose.**—An inspection of the whole statute, as well as of this clause, shows that the purpose and intent of the statute was to provide for the speedy and expeditious transportation of troops, war material, and equipment; and for that purpose to give possession of the systems of transportation to the government, through the Secretary of War, with power to use such systems for such transportation to the exclusion, as far as may be necessary, of all other traffic, either in passenger or freight thereon. U. S. Railroad Administration v. Burch, (E. D. S. C. 1918) 254 Fed. 140.

**Extent of President's powers as judicial question.**—The extent of the President's powers is a judicial question. "All acts done and all property taken possession of within the adjudicated extent of the powers al-

lowed might be a ministerial question; but as to the extent of those powers, and whether the powers were given, must always, under the Constitution of the United States, remain a judicial question, and one to be decided by the courts of the land." U. S. Railroad Administration v. Burch, (E. D. S. C. 1918) 254 Fed. 140.

**Property which may be taken possession of.**—"It is evident that the purpose of the statute giving such enlarged powers, to be exercised during the emergency of war, was not for the purpose of taking possession of any property which might be owned by the different corporations operating and owning systems of transportation, and which property was wholly independent of transportation uses, and neither incidental nor necessary for them, but was simply to allow the government to get control of everything necessary or appropriate for transportation purposes. . . .

"The position of counsel for the complainant is that the statute and the proclamation must be considered to include all property of a railroad. If this contention were correct, it would cover all moneys of the railroad in its possession, when possession was taken under the proclamation of the President. It would also cover all personal property, including stocks in industrial corporations, if any such were owned by the railroad at that time.

"A fair construction of the statutes, and of the proclamation itself, however, would not appear to warrant any such inference that their provisions include such property. The language appears to be clearly limited to transportation systems, and to property which was used for transportation purposes, including therein all property fairly incidental or necessary for use in effecting such purposes. Separated, disconnected, unutilized tracts of land would not appear to come within this definition." U. S. Railroad Administration v. Burch, (E. D. S. C. 1918) 254 Fed. 140.

**For cases construing Presidential proclamations regarding federal control,** see Dooley v. Pennsylvania R. Co., (D. C. Minn. 1918) 250 Fed. 142; U. S. Railroad Administration v. Burch, (E. D. S. C. 1918) 254 Fed. 140.

**Vol. IX, p. 1108, sec. 1224.** [First ed., vol. VII, p. 1010.]

**Leave of absence to enable officer to undertake prohibited employment.**—The Secretary of War is prohibited by this section from granting leave of absence to an officer of the Engineer Corps in order that he may be employed by the Interstate Commerce Commission to assist in the valuation of properties of common carriers under the Act of March 1, 1913, ch. 92 (see vol. 4, p. 495). (1913) 30 Op. Atty-Gen. 184.

**Vol. IX, p. 1136, sec. 1.** [First ed., 1918 Supp., p. 1010.]

**I. Construction of Selective Service Act.**

1. Right to compel military service.
2. Persons subject to conscription.
3. Exemptions.
4. Determination of liability to conscription.
5. Offenses against Conscription Law.

**I. CONSTRUCTION OF SELECTIVE SERVICE ACT**

**1. Right to Compel Military Service (p. 1139)**

**Constitutionality of Act.**—To same effect as original annotation, see *U. S. v. Olson*, (W. D. Wash. 1917) 253 Fed. 233; *Sugar v. U. S.*, (C. C. A. 6th Cir. 1918) 252 Fed. 74, 164 C. C. A. 186, *affirming* (E. D. Mich. 1917) 243 Fed. 423.

In *Frama v. U. S.*, (C. C. A. 2d Cir. 1918) 255 Fed. 28, 166 C. C. A. 356, it was contended that a conviction for a conspiracy to evade the provisions of section 6, *infra*, by holding a mass meeting, making speeches thereat and distributing pamphlets, violated the constitutional guaranty of free speech. Answering this contention, the court said: "The free speech secured federally by the First Amendment means complete immunity for the publication by speech or print of whatever is not harmful in character, when tested by such standards as the law affords. For these standards we must look to the common-law rules in force when the constitutional guaranties were established and in reference to which they were adopted. By legislative action the boundaries of unpunishable speech have doubtless and often been much enlarged; but the constitutional limit remains unchanged, and what the legislature has done it can undo. Legal talk-liberty never has meant, however, 'the unrestricted right to say what one pleases at all times and under all circumstances.'"

**In general.**—This Act is supplemental to the Act of June 3, 1916. It authorizes voluntary enlistments in all the military branches of the government, and also authorizes the President to draft into the military service of the United States the various military organizations and individuals falling within the classes therein prescribed, "for the period of the existing emergency." Like the Act of June 3, 1916, it mentions the various military organizations, and distinguishes between the regular army and the other military organizations. It is apparent that Congress by the passage of this Act recognized a dividing line between the professional soldier who serves "in peace and war" and the man who enlists for the term of "the emergency" under the Act of May 18, 1917. *State v. Moorhead*, (1918) 102 Neb. 276, 167 N. W. 70.

**Necessity of registrants remaining at homes.**—This Act does not require persons registering thereunder to remain in their per-

manent homes and actual places of legal residence until drafted into the military service of the United States, nor did the selective service regulations prescribed by the President make such a requirement. *U. S. v. Wheeler*, (D. C. Ariz. 1918) 254 Fed. 611.

**2. Persons Subject to Conscription (p. 1140)**

To same effect as second paragraph of original annotation, see *Ex p. Lamachia*, (D. C. N. J. 1918) 250 Fed. 814.

**Registrant's status.**—In *Ex p. McDonald*, (E. D. Wis. 1918) 253 Fed. 99, regarding the status of registrants, it was said: "The selective service law had a purpose of enabling the raising of an army, and it defines certain persons who are liable to be called. It does not give them any status, as a military status, solely by virtue of their being within certain ages. They retain the ordinary status which they have as civilians and citizens unless and until it is changed through the operation of law. In other words, the law defines those who are liable to selection, and that, by necessary implication, means that when they are selected as prescribed by the law, they enter the service. Unless and until they are selected, they are not in the service, and enjoy their ordinary civil rights and privileges; and if this be true, it must be true of those who have never been called, and of those who, having been called, are not selected, either because of deferment or rejection."

See to same effect, *Ex p. Henry*, (E. D. Wis. 1918) 253 Fed. 208.

**Classification.**—Where a registrant, after being inducted into military service, is discharged from service through error, he should be placed by his local board in the same position in which he was prior to such discharge. *Ex p. Fischer*, (D. C. N. J. 1918) 253 Fed. 159.

**"Regular or ordained minister of religion."**—Where a person has been granted an exemption as "a regular or ordained minister of religion" to which he is not entitled, it is not only within the power but it is the duty of the local board properly to classify the registrant when its attention is called to the error. *Ex p. Short*, (N. D. Cal. 1918) 253 Fed. 839.

**Marriage subsequent to registration** will not operate to defeat the government's right to his services. *Ex p. Tinkoff*, (N. D. Ill. 1918) 254 Fed. 222, *affirmed* (C. C. A. 7th Cir. 1918) 254 Fed. 225, 165 C. C. A. 513.

**3. Exemptions (p. 1141)**

**Regular or ordained minister of religion.**—A person is not entitled to an exemption as "a regular or ordained minister of religion" where it appears that at the date of his questionnaire he had not been engaged in ministerial work for several months. *Ex p. Short*, (N. D. Cal. 1918) 253 Fed. 839.

**"Dependent" defined.**—"A dependent is one who is sustained by another; one who relies upon another for support; a person who is not self-sustaining." U. S. *c.* McHugh, (W. D. Wash. 1917) 253 Fed. 224.

A person is not a dependent if he has money or means from which he could get support, or has property which could be converted into means of support or is able to support himself by physical labor irrespective of means or money. U. S. *v.* McHugh, (W. D. Wash. 1917) 253 Fed. 224.

**Persons having dependents.**—A registrant who has persons designated by this Act dependent upon him for support is entitled to exemption. U. S. *v.* McHugh, (W. D. Wash. 1917) 253 Fed. 224.

**Person convicted of crime.**—To same effect as original annotation, see *Ex p.* Henry, (E. D. Wis. 1918) 253 Fed. 208.

**Proof of alienage.**—"The Selective Service Act provides that all male persons within the prescribed ages shall be subject to registration, 'and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this act provided.' In brief, the act makes persons of the prescribed age subject to draft, unless exempted or excused by the designated authority. It does not follow that a nondeclarant alien is ineligible to military duty under the act, or that he is automatically exempted from service. The facts which bring him within the exempted class must be affirmatively proved by him before his local board, the tribunal created by the act, to which is given power to hear and determine, subject to review by appeal to a district board, 'all questions of exemption under this act,' and the decision of the district board is made final." *Napore v. Rowe*, (C. C. A. 9th Cir. 1919) 256 Fed. 832.

**Effect of improper refusal of exemption.**—Where a registrant was admittedly within the class of persons liable for service under this Act, his claim that he was wrongfully held for service because he was not granted exemption based on the ground of the dependency of his wife on him for support was held not to relieve him of his obligation to obey army orders or to observe its discipline or from liability to punishment for disregarding them. *Ex p.* Tinkoff, (D. C. Mass. 1919) 254 Fed. 912.

#### 4. Determination of Liability to Conscription (p. 1141)

**Power of boards generally.**—It is evident that Congress intended to give the local boards the widest possible latitude for the purpose of informing themselves concerning the truth or falsity of the statements made under oath by registrants, and that the boards are not to be in any way restricted to what would be competent legal evidence in any judicial proceeding. *Brown v. Spelman*, (E. D. N. Y. 1918) 254 Fed. 215.

**Jurisdiction of district boards.**—Under the Selective Service regulations local and district boards have jurisdiction of a registrant, and retain their power to hear and determine matters relating to him, up to the time fixed in the notice of the local board requiring him to report for service. Accordingly where the decision of a local board inducting a registrant into military service, is reversed by the district board before the time when he is required by the local board's notice to report, he cannot thereafter be arrested by order of the local board for failure to report. *Ex p.* McDonald, (E. D. Wis. 1918) 253 Fed. 99. Regarding the jurisdiction of district boards, the court said: "That brings us to the question as to whether the district board did have jurisdiction in this matter. I am ready to hold that it did, upon two grounds, one of which is easy: First, the practical concession of all parties here that there is nothing in law which forbade the district board originally to hear and determine this application for deferred classification at the time it in fact heard and determined it; secondly, jurisdiction appears entirely clear under the regulations issued by the Provost Marshal General and by the President. Under such regulations induction into service contemplated by the law is the point whereat the jurisdiction of these two boards ends, and, as such, is the time and hour fixed in the notice given by the local board. That regulation, of course, is supportive of the very idea to which I have adverted, namely, order, harmony, and effectiveness. It may be an interesting question, not relevant here, whether from and after that time, and prior to taking the oath as a soldier, the registrant is in fact a full-fledged soldier. But it is entirely clear that at no time, prior to the actual induction defined in the regulations, is the power of these boards within their respective jurisdictions to hear and determine matters pertaining to the case of a registrant wholly cut off. There is no statutory or other bar. Indeed, the regulations, wisely and in the interest of justice, seek to preserve and retain that power until the last moment. So I am ready to determine, both upon the concession and upon the record returned here, that there is nothing whatever in the law or the regulations which cuts off the power of the district board to exercise its original jurisdiction at any time prior to the induction which is defined in the regulation, namely, the hour specified in the notice of the local board. Notwithstanding some little contention respecting the exercise of jurisdiction informally, thereby ignoring regulations prescribing time within which a thing shall be done as a matter of practice or procedure, I consider it of no moment here. Such regulations are directory. The mere fact that the district board entertained this application prior to the time specified in the notice and made its determination prior to that time operated, in my judgment;

under the very express terms of the regulations wholly to supersede the determination of the local board."

**Review by courts—Generally.**—Courts are bound to respect the determination made by the functionaries created under the Selective Service Law on all matters within their jurisdiction and this rule limits the courts at the outset to determine and ascertain whether there has been action under the law, and secondly what is the quality and effect of that action in so far as it affects rights appertaining to the individual. *Ex p. McDonald*, (E. D. Wis. 1918) 253 Fed. 99. See also *Brown v. Spellman*, (E. D. N. Y. 1918) 254 Fed. 215.

Where inquiry is made of the court on behalf of a citizen who seeks to prosecute a remedy which, if granted, will lead to his liberty, the court is limited to asking the question: "Have these boards acted; and if so, how? To what effect has the law been applied to the individual?" *Ex p. McDonald*, (E. D. Wis. 1918) 253 Fed. 99.

The determination of a local board, in any case where it has authority to act, is final, except by appeal to the District Board or to the President. *Ex p. Platt*, (E. D. N. Y. 1918) 253 Fed. 413.

The action of the local board becomes final as against the registrant under the regulations, unless appealed from within five days, but does not become final as against the government at any time. If the local board has made an error in a registrant's favor, and awarded him a deferred classification to which his questionnaire shows he was not entitled, there is nothing in the law or the regulations which would prevent the board from correcting that error, if and when it is called to its attention. The result of such procedure would only be that for the period of time during which the error remained uncorrected the registrant would enjoy a deferred classification and an exemption from duty to which he was not entitled, a situation about which he could not be heard to complain. *Ex p. Short*, (N. D. Cal. 1918) 253 Fed. 839.

It is only on a showing of denial of a fair hearing or gross abuse of discretion in the local or district board that resort may be had to the courts. *Napore v. Rowe*, (C. C. A. 9th Cir. 1919) 256 Fed. 832.

Where the members of the local board acted strictly in accordance with the law in holding a registrant for military service, their determination will not be interfered with by the courts. *Brown v. Spellman*, (D. C. E. D. N. Y. 1918) 254 Fed. 215.

If the local board has made an error in a registrant's favor, and awarded him a deferred classification, to which his questionnaire shows he was not entitled, there is said to be nothing in the law or the regulations which would prevent the board from correcting the error when it is called to its attention. *Ex p. Short*, (N. D. Cal. 1918) 253 Fed. 839.

In *U. S. v. Rauch*, (S. D. N. Y. 1918) 253 Fed. 814, on the question of the right to review by certiorari the action of the local board as to classification, the court said: "In conclusion, it is held that no opinion is expressed as to the general right of the District Court to issue independent writs of certiorari for any purpose other than to test jurisdiction; second, that there is no jurisdiction to issue such a writ against a local board created by the selective draft statute, because it is an executive body; third, there is nothing in this record to show any error on the part of the board for division No. 157, except one of fact, and there is no power in this court to substitute its own opinion upon a question of fact for that of said local board; and, fourth, because under the circumstances shown the writ should be denied as a matter of discretion." See also *In re Ritzerow*, (E. D. Wis. 1918) 252 Fed. 865.

"The decision of the district board is made final by the act itself, and the courts can interfere with their action, if at all, only when the registrant has been denied a fair hearing, when he has not been given an opportunity to be heard at all, or when the action of the board is so manifestly unfair and unjust as to make it apparent that the rights of the registrant have been disregarded, and that he has been clearly wronged." *Bottano v. District Board*, (N. D. Cal. 1918) 250 Fed. 812.

Failure of a person to exercise his right to appeal to the district board is of itself a bar to relief by habeas corpus. *Ex p. Timkoff*, (N. D. Ill. 1918) 254 Fed. 222, *affirmed* (C. C. A. 7th Cir. 1918) 254 Fed. 225, 165 C. C. A. 513.

**Failure to comply with regulations promulgated by President.**—Section 61 of the regulations promulgated by the President November 8, 1917, under authority of the Act of Congress approved May 18, 1917, known as the Selective Service Law, provided as follows:

"Section 61. *Cancellation of Registration of Persons Not Subject to Registration.*—Whenever a claim shall be made to a local board that, through error or fraud, a person is registered who is not subject to registration the board shall require the person to submit his claim in writing, together with such proof as he may care to offer. The local board shall forward the claim and the proof with its finding of fact and recommendation to the adjutant general of the state, who shall examine the proof, and, if he is of the opinion that the person was not subject to registration, shall direct the local board to cancel the registration and amend its records accordingly."

In this case application was made for a writ of certiorari or mandamus, directing the defendants, and each of them, to strike the name of the plaintiff from the registration lists of one of the local boards and asking that a writ of prohibition be issued prohibiting the defendants from certifying the plain-



tiff to military service. The defendants were the members of local board for division 35 of the city of New York. There was nothing to indicate that the plaintiff had complied with section 61 of the regulations just referred to, and the court refused the application. *Brown v. Spelman*, (E. D. N. Y. 1918) 255 Fed. 863.

*Certiorari and habeas corpus.*—The courts have uniformly held that all persons, save enemy aliens, within the draft age are subject to the draft, unless exempted or excused therefrom by the local or district board, and that the action of these boards, where there has been a fair hearing, is final, and not subject to review by the courts, either on habeas corpus or certiorari. *Ex p. Beales*, (S. D. Cal. 1918) 252 Fed. 177.

The determination of the local board will not be interfered with on habeas corpus where it appears that it was based on a hearing on evidence, and the petition does not show that the board disregarded all the evidence before it or that it held an unfair hearing or that it acted on anything except its conclusion on the testimony and the witnesses before it. *Ex p. Flatt*, (E. D. N. Y. 1918) 253 Fed. 413.

*Claim of alienage.*—To same effect as original annotation, see *U. S. v. Kinkead*, (C. C. A. 3d Cir. 1918) 250 Fed. 692, 162 C. C. A. 654, *affirming* (D. C. N. J. 1918) 248 Fed. 141 in original annotation; *Ex p. Beales*, (S. D. Cal. 1918) 252 Fed. 177; *Ellen v. Johnson*, (E. D. N. Y. 1918) 254 Fed. 909; *Napoleon v. Rowe*, (C. C. A. 9th Cir. 1919) 256 Fed. 832.

In *Lehto v. Scott*, (E. D. N. Y. 1918) 251 Fed. 767, the facts were as follows: The applicant was drafted into the army in Massachusetts and transferred to Camp Upton, where he had applied for a writ of habeas corpus. It appears that he registered at Prescott, Mass., but left for Maine in order to engage in work in that state, leaving no new address, and therefore failed to receive the notices to appear for examination. Subsequently he returned and endeavored with diligence to submit himself for examination. In order to claim exemption, he sought to prove that he had not intentionally evaded his call under the Selective Draft Law. He was a nondeclarant alien, and claimed that his default in demanding exemption or discharge from the original call should not be enforced against him, even though admitted, inasmuch as he did not intend to default, and inasmuch as his mistake might be attributed to his lack of understanding of English. The court said: "A person who wished to avoid the draft might thus disappear. He might succeed in obtaining an acquittal, if indicted, unless it could be shown that he had knowledge of the law which he evaded. This would not be the usual case, where ignorance of the law could not be urged as an excuse. But the selective portion of the Draft Law is not worded like a statute defining a crime. The Draft Law

in effect gives the military authorities the right to take for service every registered person in the United States who does not claim exemption or secure discharge according to the machinery of the Draft Law itself. It does in fact disavow, in section 2, the general purpose of impressing nondeclarant aliens into service; but in the succeeding sections Congress has plainly intimated that it will use nondeclarant aliens who are willing, and also those who do not comply with the statute in obtaining discharge. Under these circumstances the courts have nothing to do with the release of a person who has failed to comply with the Draft Law and hence is in the army, whether his desire to be released is the result of change of opinion, or the result of unintentional failure on his part to present his application for release in proper form."

Where the evidence showed that the petitioner was a Russian subject who had made no declaration of his intention to become a citizen of the United States, which facts were undisputed, and he made due claim for exemption and filed proper affidavit in support thereof, it was held that the petitioner should be discharged as the local board acted beyond its authority in denying him a hearing, and that, inasmuch as the district board, with which the local board took up the matter, approved of its action an appeal to the district board would have been useless. *Ex p. Cohen*, (E. D. Va. 1918) 254 Fed. 711.

*Waiver of claim of alienage.*—Where an alien waived his claim for exemption before the only tribunal empowered to act upon it, and such tribunal having accorded him a fair hearing, and classified him strictly in accordance with the terms of the Act and the regulations made by the President by virtue of the authority conferred upon him, it was held that the court would not interfere on a petition for habeas corpus. *Ex p. Beales*, (S. D. Cal. 1918) 252 Fed. 177.

A nondeclarant alien who fails to claim exemption before the local board or on appeal to the district board is not entitled to assert it on habeas corpus. *U. S. v. Bell*, (E. D. N. Y. 1917) 248 Fed. 995.

An alien who has not presented to his local board a claim of exemption in accordance with the regulations and who has not availed himself of the privilege accorded by the regulations of applying to the local board to reopen his case is not entitled to habeas corpus, where his only excuse is ignorance of the law and facts and there is no showing of a denial of a fair hearing or abuse of discretion in the local or district board. *Ex p. Tinkoff*, (N. D. Ill. 1918) 254 Fed. 222, *affirmed* (C. C. A. 7th Cir. 1918) 254 Fed. 225, 165 C. C. A. 513; *Napoleon v. Rowe*, (C. C. A. 9th Cir. 1919) 250 Fed. 832.

In *Ex p. Romano*, (D. C. Mass. 1918) 251 Fed. 762, it appeared that an Italian who had not declared his intention to become a citizen, and who, therefore, was not liable to draft, and who had almost from the begin-

ning endeavored, though in an unskilled and inaccurate way, on account of his ignorance of our language and law, to obtain the exemption to which he was entitled, found himself held for military service and charged with desertion for not responding. The court said: "The obligation upon administrative boards, which exercise great powers, subject to but slight restrictions as to procedure and to only a limited review, is very great to deal fairly with the individual concerned, as well as with the public. The strict enforcement of this obligation is the only protection which the individual has against an abuse of such powers. The petitioner was plainly not subject to military service; and he was, without his fault, under great difficulties in understanding and obtaining his rights. Upon the case as a whole it does not seem to me that he has been fairly dealt with by the local board. He would, if not under arrest, be entitled either to a hearing in this court on his right to exemption (*Chin Yow v. U. S.*, 208 U. S. 8, 13, 28 Sup. Ct. 201, 52 L. Ed. 369; *Antrim's Case*, Fed. Cas. No. 495), or to have these proceedings suspended, and to be discharged, unless accorded a fair hearing by the draft tribunals (*U. S. v. Petkos*, 214 Fed. 978, 131 C. C. A. 274 [C. C. A. 1st Cir.]). The ultimate question in the case is, therefore, whether the military authorities have the right to hold him for desertion. He was indisputably within the class of persons reached by the act and within the jurisdiction of the tribunals established thereunder. Their notification to report for service related to a matter also within their jurisdiction. Although based on irregular proceedings, it was not void. Until vacated, it was binding on the petitioner. It brought him under the jurisdiction of the military authorities, and rendered him liable to punishment by them for breach of military duty."

Where a person fails to claim exemption as an alien the draft board is without authority to exempt him. *Ex p. Tinkoff* (N. D. Ill. 1918) 254 Fed. 222, affirmed (C. C. A. 1918) 254 Fed. 225, 165 C. C. A. 513.

**Correction of questionnaires.**—"The enforcement of the Selective Service Act has not been intrusted to the Judicial Department of our government, or to the courts, but to the War Department. The correction of the questionnaires of registrants, in the absence of fraud, is not for the courts, but for that department of the government having charge of registrations, questionnaires, and exemptions, viz., the War Department." *Ex p. Kusweski*, (N. D. N. Y. 1918) 251 Fed. 977.

**Effect of pardon to one convicted of felony.**—Whatever may be the legal effect of a particular pardon, if there is evidence on which the board's conclusions can be supported, namely, proof of a full pardon, the court will not disturb their judgment respecting his liability to conscription and his classification. *U. S. v. Commanding Officer*

of the 78th Div., (D. C. N. J. 1918) 252 Fed. 314.

**Injunction.**—A district board is a public body exercising quasi judicial functions in passing upon the right of exemption within the provisions of the rules and regulations prescribed by the President and this Act, and therefore a court of chancery has no jurisdiction, by means of injunction, to interfere with the duties of the board. *Boniface v. Thompson*, (W. D. Wash. 1917) 252 Fed. 878.

The word "liability" is used in section 2 of this Act in its ordinary sense of obligation or responsibility. *Ex p. Lamachia*, (D. C. N. J. 1918) 250 Fed. 814.

**Power of local boards.**—The Selective Service Act confers upon the local board merely jurisdiction to determine the questions of exemption and the like of persons within the registrable age who have been duly registered. It confers upon it no authority whatever over persons not within the registrable age, and none to investigate, of its own motion, the question of age of a person who has not registered and to place him upon the draft lists in the event it determines that he is in fact of registrable age.

#### 5. Offenses Against Conscription Law

**Failure to register.**—Pending a prosecution for failure to register under section 5 of this Act, the defendant is still subject to registration and military service, and his failure to respond to a call after registration renders him a deserter under military law. He was an offender both under the criminal and under the military law of the United States. Which department of the government should first proceed against him was a matter to be settled between them. He had no right to have the criminal case go forward first, if the prosecuting authorities saw fit to allow the military accusations to take precedence. *Ex p. Dunn* (D. C. Mass. 1918) 250 Fed. 871.

**Persons absent from country.**—In *U. S. v. Scott*, (E. D. Wash. 1918) 253 Fed. 281, it was contended that a person subject to registration but who was absent from the United States on registration day and failed to register within five days after his return to this country, as required by section 5 of this Act and the regulations promulgated thereunder, could avoid registering by leaving the country again before the expiration of the five days. The court said: "The sole contention now made in his behalf is that, under the regulations promulgated by the War Department, he was allowed the full period of five days to register after entering the United States, and was guilty of no offense until after the expiration of that period; that during the period thus allowed he was at liberty to again leave the United States and return to the Dominion of Canada, or to any other foreign country, without violating the laws of the United States or

the regulations made pursuant thereto, and, having been denied the right to thus leave the country because of his imprisonment and forcible detention, he should be acquitted. With this contention I am unable to agree. The court cannot inquire into the lawfulness of his deportation from the Dominion of Canada. He came into the United States on the 6th day of December, and the duty to register within five days thereafter was absolute and unqualified. That duty he could not shirk or avoid by leaving the country before the expiration of five days, any more than any other citizen could avoid the like duty by leaving the country immediately prior to the 5th day of June, 1917."

A person who fails to register at his place of domicile on the day set for registration, or if absent, fails to register by mail as provided for by the Act, is guilty of a violation thereof, and is not excused from liability by registering in another state. In such a case if his failure to register in the place of domicile was willful he may be convicted, but it is for the jury to say under all the circumstances whether he willfully attempted to evade the registration law. *Pass v. U. S.*, (C. C. A. 9th Cir. 1919) 256 Fed. 735.

An indictment under this section which contains a statement with reference to the proclamation of the President provided for in section 5 of the Act sufficient to give the defendant all the information and notice required for every purpose is not open to objection on the ground that the proclamation is not set out in full. *U. S. v. Olson*, (W. D. Wash. 1917) 253 Fed. 233.

**Conspiracy—Common design.**—In a prosecution for a conspiracy to violate the Selective Service Act "the common design is the essence of the charge, and while it is not necessary, to establish a conspiracy, to prove that two or more persons met together and entered into a formal and explicit agreement or understanding, or that they should directly or by words or in writing state what the unlawful scheme was to be, or the general understanding or detail of the plan or means by which an unlawful combination was to be made effective, if they knowingly work together for a common purpose, and that purpose is the illegal act charged as their object, and if the acts of the parties so dovetail and fit together that the conclusion is inevitable that there was an understanding between them as to the thing to be done, as charged, it would establish a conspiracy." *U. S. v. McHugh*, (W. D. Wash. 1917) 253 Fed. 224.

**Moral turpitude.**—The offense of aiding another to avoid registration involves moral turpitude, so that conviction thereof is ground for disbarment. *In re Hofstede*, (1918) 31 Idaho 448, 173 Pac. 1087.

**Alcoholic liquors, prohibition of sale.**—"The contention that this statute conflicted with the Conscription Act is without merit. The act of Congress, conferring upon the

President authority to prohibit the sale of intoxicating liquor within 5 miles from the training camp, did not interfere with the state's police power to establish a 25-mile dry zone around the camp. The state legislature had in mind the civilian as well as the soldier, in abolishing the danger of the blights of intoxicating liquor. Thousands of the state's young citizens had been taken from their homes to the camp. The General Assembly thought the law would have to supply the want, in some measure, of the deterring influence of the home and family; that 25 miles would not be at all too far to remove the temptation, nor too far for the arm of the law to reach, to lay the hand upon the blind tiger. Nothing in the act of Congress interfered with the exercise of the General Assembly's judgment in that respect." *State v. Lahiff*, (1919) 144 La. 362, 80 So. 590.

**Indictment—Negating exceptions.**—All exceptions contained in this Act which qualify the general provisions are sufficiently stated in an indictment which charges that the accused was a male person between the ages of 21 and 30 years, that he was a resident of the district wherein the board sat for registration and that he willfully failed and refused to present himself for registration at the time and place indicated, and further that he was not at that time "an officer or enlisted man of the regular army, or the navy, or of the Marine Corps of the United States, and not being then and there an officer or an enlisted man of the National Guard or Naval Militia in the service of the United States, or of the Officers' Reserve Corps in the service of the United States, and not being then and there in any manner exempted or excused from registering under the terms of the aforesaid act of Congress." Furthermore, there is no necessity of averring in the indictment that the accused was in good health, inasmuch as there is no exception of that character named in the statute, though at the trial under such an indictment evidence of bad health and consequent inability to get to the place of registration might have been offered to show that the failure to attend and register was not "willful" within the meaning of the statute. Nor need the exact age of the accused be alleged. *Sugar v. U. S.*, (C. C. A. 6th Cir. 1918) 252 Fed. 74, 164 C. C. A. 186, *affirming* (E. D. Mich. 1917) 243 Fed. 423.

**Effect of overt act.**—An indictment which charges that defendant conspired with members of a draft board to violate the provisions of section 6 of the Selective Service Act charges the commission of an offense against the United States, and where an overt act is alleged in pursuance of and to effect the object of the conspiracy it is not necessary to allege in what manner the overt act would tend to affect the object of the conspiracy. *Gruber v. U. S.*, (C. C. A. 2d Cir. 1918) 255 Fed. 474, 166 C. C. A. 550.

**Prosecution on information.**—In denying the contention of the accused that under the fifth amendment to the Constitution a prosecution under section 12 could only be by indictment the court in *U. S. v. Nelson*, (E. D. N. Y. 1918) 254 Fed. 889, said: "The constitutional amendment relied upon by the defendant, by its very language does not require an indictment, even for a capital or otherwise infamous crime, in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger. This gives the government the right, in time of war, to prosecute by information a violation of section 12 of the Selective Service Law, even if such a violation be held to be an infamous crime, for such a crime is a case arising in the land or naval forces in actual service in time of war. The Fifth Amendment does not provide that the cases must be against the land or naval forces. It is clearly much broader and refers to such crimes as involve the land or naval forces in their origin. Section 12 of the Selective Service Law forbids the sale of intoxicating liquor to a man in uniform in the military service of the United States, and therefore a violation of its provisions is now a crime arising in the land forces in actual service in time of war."

**Evidence.**—In a prosecution for the violation of section 12 of this Act the testimony of the soldiers alleged to have bought the liquor that they were in uniform at the time, together with the testimony of additional witnesses that they were spoken of as soldiers by others present when the sale was made and that the defendant addressed one of them as "sergeant" justified the jury in finding that the soldiers were in uniform when they bought the liquor. *Goldstein v. U. S.*, (C. C. A. 7th Cir. 1919) 256 Fed. 813.

In a prosecution for failure and refusal to present himself for registration at the place of his permanent residence, admissions made by the defendant are admissible where there is no evidence of any substantial character to show force or threats against him, or as inducements offered to him by the agents of the government; the mere fact that he was in custody when he made the statements and that they were in answer to questions put by the agents do not make such admissions involuntary. Nor is it error to admit a circular opposing the selective draft where there is evidence tending to show that the defendant was responsible for its publication, and he had testified that he had acted in good faith in registering at a place other than that of his permanent residence. *U. S. v. Pass*, (C. C. A. 9th Cir. 1919) 266 Fed. 731.

In a prosecution for conspiracy to obstruct the draft, the minutes of meetings of the executive committee of a political party kept by one of the defendants and containing resolutions adopted by the committee in furtherance of a plan for obstructing the draft and in pursuance of which circulars were issued

and distributed by another one of the defendants, are admissible to show conspiracy on the part of both defendants. *U. S. v. Schenck*, (E. D. Pa. 1918) 253 Fed. 212.

In a prosecution for conspiracy to aid and abet others to evade the provisions of section 6 of this Act the government is not confined to that which is charged in the indictment as the overt act, but may show other acts tending to prove the conspiracy charged, as there can be no legal complaint of testimony tending to show the object of the conspiracy, which evidence may be called an overt act. *Fraina v. U. S.*, (C. C. A. 2d Cir. 1918) 255 Fed. 28, 166 C. C. A. 356.

Where in a prosecution for conspiracy to commit an offense against the United States by aiding and abetting unknown persons unlawfully to evade the requirements of this Act, it is shown that a mass meeting was called by advertisement and that one of the defendants called the meeting to order and that certain others distributed pamphlets concerning the object of the meeting, a conspiracy or combination in thought will be inferred among the platform occupiers and their helpers. *Fraina v. U. S.*, (C. C. A. 2d Cir. 1918) 255 Fed. 28, 166 C. C. A. 356.

**Question for jury.**—In a prosecution for failure to register at his place of residence and permanent home, the question as to whether the accused acted in good faith in registering in another state is properly submitted to the jury. *Pass v. U. S.*, (C. C. A. 9th Cir. 1919) 256 Fed. 731.

**Review.**—In a prosecution for conspiracy to evade the provisions of section 6 of this Act, it is not necessary that the act of combining should be first made to appear before proving the acts and declarations of the co-conspirators, though ordinarily this is the proper practice. It is only a question of the order of proof and as such within the discretion of the trial judge which is only reviewable when abuse of discretion is shown. *Fraina v. U. S.*, (C. C. A. 2d Cir. 1918) 255 Fed. 28, 166 C. C. A. 356.

#### Vol. IX, p. 1157, sec. 4. [First ed., 1918 Supp., p. 1016.]

**Membership not inconsistent with city office.**—A member of a local draft board is not disqualified from holding the position of city police commissioner under a charter provision disqualifying any person holding "an office or position of trust or emolument or regular employment under appointment by the President of the United States or any department of the federal government." *Johnston v. Chambers*, (1919) 148 Ga. 768, 98 S. E. 263.

**Membership not inconsistent with office of clerk of court.**—A clerk of court does not vacate his position by accepting appointment to a local draft board, though the state constitution prohibits any state officer from holding "any office of trust or profit under the

United States." *State v. Joseph*, (1918) 143 La. 428, 78 So. 663, L. R. A. 1918E 1062.

For cases construing the Selective Service Regulations promulgated by the President under the provisions of section 4 of this Act, see *U. S. v. Local Exemption Board No. 157*, (S. D. N. Y. 1918) 252 Fed. 245; *U. S. v. Commanding Officer of 78th Div.*, (D. C. N. J. 1918) 252 Fed. 314.

**Vol. IX, p. 1159, sec. 5.** [First ed., 1918 Supp., p. 1018.]

**Arrest without warrant.**—A sheriff has no power to arrest without a warrant for failure to register, on the verbal request of the chairman of a local exemption board. *Ex p. Jones*, (Tex. 1919) 208 S. W. 525.

For cases construing presidential regulations promulgated pursuant to section 5 of this Act, see *Ex p. Dunn*, (D. C. Mass. 1918) 250 Fed. 871; *Boitano v. District Board, etc.*, (N. D. Cal. 1918) 250 Fed. 812.

**Vol. IX, p. 1159, sec. 6.** [First ed., 1918 Supp., p. 1019.]

**False notarial certificate.**—A person is guilty of violating this section who adds a notarial certificate to a statement relating to the physical condition of a draftee, made by three doctors, when in fact the doctors never appeared before him and never acknowledged the statement as true. *U. S. v. Blakeman*, (N. D. N. Y. 1918) 251 Fed. 306, wherein the court said: "The defendant on the argument of this demurrer urges that the falsity of these statements, respectively in this respect, is immaterial, and does not bring the case within the meaning, or letter, or spirit of the section of the Selective Service Law above quoted. The contention of the defendant is that, while it may be and probably is true that the making of such a false certificate by the notary added to and written on the statement of the doctors, respectively, constitutes a crime under the law of the state of New York, such act does not constitute a crime under the federal laws or statutes, and that such false statements and certificate of the notary public added to the doctor's statement forms no part of the statement itself referred to in section 6 of the Selective Service Law, as that relates to the falsity of the statements made by the doctors themselves contained in the statement or certificate, and not to the falsity of the notarial certificate as to the execution of such statement; that the falsity must actually relate to and concern the fitness or liability for service, and these false certificates of the notary added by him relate only to the execution of the paper and its authenticity, and not to the fitness or liability to service.

"I cannot yield to or concur in this narrow construction of the statute quoted. I think the statement or certificate must be taken and read as a whole, or as a completed

document in so far as material. Clearly the certificate of the notary that these doctors appeared before him and acknowledged the execution of or signature to a statement or to the statements is material, and a material part of the statement as to physical fitness presented and filed. It is a certificate of authenticity, and one which gives the statement credence with the draft board. This is its purpose. These notarial certificates added to the statements induce the draft board to accept such statements as authentic and genuine, and to act thereon in determining the fitness for military service of the persons or person in whose behalf or interest they are made and presented, and in exempting or declining to exempt such person from service. These false statements or certificates, false when taken and read in their entirety and as a completed statement and certificate, were 'as to the fitness or liability' of Mandes for service under the Selective Draft Act."

**Indictment.**—An indictment charging the defendant with making false statement or certificate as to the unfitness or liability of another person for service under the Selective Service Act is insufficient. *U. S. v. Blakeman*, (N. D. N. Y. 1918) 251 Fed. 306, wherein the court said: "The indictment charges a false statement or certificate as to the unfitness or liability, while the statute makes it an offense to make a false statement or certificate 'as to the fitness or liability,' etc. The offense charged in the indictment is not the one specified in the statute, and the error in using the word 'unfitness,' instead of 'fitness,' is not cured by other allegations, as the contents of these statements are not set out in the indictment. The defects can be remedied by a presentation of the case to another grand jury and a new indictment. I do not think it can be held that the words 'fitness' and 'unfitness' mean the same thing, or that a certificate or statement as to the 'unfitness' would include a certificate or statement as to 'fitness.' The doctors in their statement or certificate might include a statement of every fact as to 'unfitness,' and exclude, or not include, all information as to 'fitness,' in a statement of or as to 'unfitness.' The draft board is entitled to their statement of all facts as to 'fitness,' which might include the facts as to 'unfitness'; but a statement as to 'unfitness' clearly does not include the facts as to 'fitness.'"

**Vol. IX, p. 1162, sec. 12.** [First ed., 1918 Supp., p. 1022.]

See notes to section 1 of this Act, *supra*, p. 822.

**Vol. IX, p. 1163, sec. 13.** [First ed., 1918 Supp., p. 1022.]

**Constitutionality.**—Congress under its constitutional power to raise and support armies had the power to enact this section. More-

over it had power to leave details to the regulation of the Secretary of War, and provide for the punishment of those who violated the restrictions. *McKinley v. U. S.*, (1919) 249 U. S. 397, 39 S. Ct. 324, 63 U. S. (L. ed.) —.

In *Pappens v. U. S.*, (C. C. A. 9th Cir. 1918) 252 Fed. 55, 164 C. C. A. 167, it was contended that a rule promulgated by the Secretary of War pursuant to this section was an invasion of the police power reserved to the states. Answering this contention, the court said: "We cannot sustain the contention. Congress, having acted under its constitutional power in declaring that the state of war between Germany and the United States exists, found it necessary and proper that there should be the exercise of the additional constitutional powers 'to raise and to support armies,' and also 'to make rules for the government and regulation of the land and naval forces.'"

"The execution of these powers assigned to the national government came within the obligation or duties of Congress, and its control over the subject is plenary. *Tarble's Case*, 80 U. S. (13 Wall.) 397, 20 L. Ed. 597. Power to raise an army to carry on the war was recognized by the pledge of Congress (by joint resolution approved April 6, 1917 [40 Stat. 1]) of all the resources of the country 'to bring the conflict to a successful termination,' and has been executed by the several acts of legislation providing for the organization and support of the Army and Navy and to promote the efficiency thereof. It is obvious that, to avoid calamity to the nation, the powers referred to in their greatest strength must be upheld as indispensably incidental to the power to declare war."

**Offenses after termination of war.**—This section applies only to offenses committed "during the present war" and consequently a person cannot be convicted for a violation thereof for an offense committed after the war has come to an end, which for the purposes of this section was fixed as of the time when the President declared to Congress that the war was "at an end." However, as facts may develop to show that the statement of the President was not accurate, the defendant in such a case will be granted a new trial and a motion in arrest of judgment will be overruled. *U. S. v. Hicks*, (W. D. Ky. 1919) 256 Fed. 707.

**Indictment.**—An indictment charging the keeping of a house of ill fame within five miles of a military post in violation of the order of the Secretary of War issued pursuant to this section, forbidding the maintenance of such houses within the prescribed limits, charges a misdemeanor, as the statute makes the violation of such an order a misdemeanor. This is true although the indictment contains no averment of the receiving of any persons into a house used for the purpose of prostitution. *Pappens v. U. S.*, (C.

C. A. 9th Cir. 1918) 252 Fed. 55, 164 C. C. A. 167.

**Vol. IX, p. 1184, sec. 24.** [First ed., 1918 Supp., p. 943.]

**Longevity pay.**—Congress by the Act gave to retired officers of the army detailed on active duty the longevity pay which would accrue to them by reason of their added active service after retirement, which pay they could not theretofore receive by reason of the Act of March 2, 1903, 32 Stat. 932. *Jonas v. U. S.*, (1918) 53 Ct. Cl. 254.

**Vol. IX, p. 1254, art. 2.** [First ed., 1918 Supp., p. 977.]

**Construction by Secretary of War.**—In *Ex p. Mikell*, (E. D. S. C. 1918) 253 Fed. 817, the court, in holding that a construction of this section by the Secretary of War was not conclusive, said: "The position of the counsel for the respondents is that William E. Mikell is a person serving with the armies of the United States 'in the field,' and as such is subject to military law. For this respondents cite the construction claimed to have been put upon this clause by the Secretary of War, and maintain that such construction is conclusive. Such a contention could not be admitted by this court for a moment. The construction of the meaning of a statute of Congress is for the courts of the land, especially in so far as it affects the relation of the armies of the United States, with the rest of the people of the United States. The construction of the Secretary of War may be held as applicable in all matters among persons controlled by the Articles of War, or regulations thereunder, within the scope of the authority given him; perhaps it may be said, also, in matters where third persons are concerned, where the matter is limited to the question of what is the rule under the Articles of War among persons admittedly subject to the Articles of War. In all matters, however, pertaining to the people at large and to the effect of the language contained in the statute with relation to people who are not admittedly subject to military law, any construction put by the Secretary of War on the statute has no more effect than the opinion or the construction given by an individual. It may be persuasive in argument to the court as the construction given by a person acquainted with the subject, but it has no controlling effect whatsoever."

**Transport service.**—A cook in the United States Army Transport Service is a person "serving with the armies of the United States in the field," and is subject to military law. *Ex p. Falls*, (D. C. N. J. 1918) 251 Fed. 415, wherein the court said: "Carrying supplies to equip and sustain the army is a very important military operation

in time of war. The petitioner by a reasonable and natural interpretation of the second Article of War is a person 'serving with the armies of the United States in the field,' and as such is in the same position with reference to trial by court-martial as any person belonging to one of the other classes enumerated in said article. Any other interpretation of the statute under all the facts would be unreasonable, illogical, and disastrous 'in time of war.' It is unthinkable that Congress did not mean to include persons in the United States Army Transport Service, engaged in transporting our armies and sustaining them with equipment and supplies, in the class, in time of war, of those 'persons accompanying or serving with the armies of the United States in the field.'

**Civilian employees.**—A camp or cantonment located within the boundaries of the United States at a time when there are no actual hostilities in the United States is not a place where armies can be said to be "in the field" within the meaning of this section. Consequently a civilian employee at such a camp charged with rendering false claims against the United States is not subject to military law but must be tried by the civil courts. *Ex p. Mikell*, (E. D. S. C. 1918) 253 Fed. 817.

**"Retainer to camp."**—A chauffeur employed by a construction company doing work at a training camp in this country is not a retainer to the camp or a person accompanying or serving with the armies of the United States in the field within the meaning of this section and is therefore not subject to military law. *Ex p. Weitz*, (D. C. Mass. 1919) 256 Fed. 58, wherein it was said: "The expression 'retainers to the camp' means 'officers' servants and the like, as well as camp followers generally.' Davis, Military Law, p. 478. It would not, in my opinion, include firms engaged in construction work, nor their employes. Persons 'accompanying or serving with . . . armies in the field' are those who, though not enlisted, do work required in maintenance, supply, or transportation of an army. The work which Weitz was doing was not of that character. He was no more serving with or accompanying the army than was a carpenter building barracks, or a laborer working on a road in the camp, or a machinist hired by the day to do work in the machine shop. There is, I think, a clear distinction between work done in the erection or maintenance of a camp of semipermanent character, and work having a direct relation to the transport, maintenance, or supply of an army in the field. Both sorts of work are necessary to the army, but only persons engaged in the latter sort are amenable to military law and punishment. To hold otherwise would be to subject to military law a very large body of civilian employes, never directly coming in contact with military authority, and not heretofore generally supposed to be subject thereto."

**Vol. IX, p. 1261, art. 15.** [First ed., 1918 Supp., p. 980.]

**Jurisdiction of civil courts.**—This provision was manifestly designed to make it clear that even as to other military tribunals the jurisdiction of courts-martial was not to be considered exclusive with relation to offenders or offenses that by the law of war might lawfully be tried by such other tribunals. It had no relation whatever to the matter of jurisdiction of the civil courts. *People v. Denman*, (Cal. 1918) 177 Pac. 461.

**Accused cannot object to civil jurisdiction.**—"Conceding the paramount right of the military authorities in time of war to the custody of any person in the military service of the United States, notwithstanding criminal charges against him in the courts of a state, the right is solely that of the military authorities, to be enforced as the best interests of the military service may seem to them to require. In the absence of some showing of a claim by such authorities, no question of want of jurisdiction can arise." *People v. Denman*, (Cal. 1918) 177 Pac. 461.

**Vol. IX, p. 1276, art. 58.** [First ed., 1918 Supp., p. 989.]

**Constitutionality.**—This section is not violative of the Fifth Amendment to the Federal Constitution as depriving the accused of a trial by jury on a presentment or indictment by a grand jury. *Ex p. Falls*, (D. C. N. J. 1918) 251 Fed. 415, wherein the court said: "This amendment in excepting 'cases arising in the land or naval forces' in effect says that in cases arising in those forces a person may be held to answer to a capital or otherwise infamous crime without a presentment or indictment by a grand jury; in other words, such cases may be dealt with according to military law. *Runkle v. United States*, 19 Ct. Cl. 396; *Kurtz v. Moffitt*, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458. It is provided in the Constitution (article 1, § 8), that Congress has power 'to make rules for the government and regulation of the land and naval forces.' This power Congress has exercised in the second Article of War, by defining the various classes of persons who are subject to military law, and in the fifty-eighth Article of War by declaring the punishment which may be imposed by a court-martial upon any one of those classes who deserts or attempts to desert the service of the United States."

**Vol. IV, p. 1281, art. 74.** [First ed., 1918 Supp., p. 991.]

**Jurisdiction of civil courts.**—The concurrent jurisdiction of civil courts and courts-martial, heretofore existing, to try persons subject to military law, who commit offenses

against federal or state laws, is not affected by the Articles of War as amended by the Act of August 29, 1916. *U. S. v. Hirsch*, (E. D. N. Y. 1918) 254 Fed. 109.

**Vol. IX, p. 1286, art. 92.** [First ed., 1918 Supp., p. 994.]

**State jurisdiction.**—The superior jurisdiction of the military courts cannot be urged by the accused soldier as an objection to a prosecution in a state court. *Funk v. State*, (Tex. 1919) 208 S. W. 509.

**Vol. IX, p. 1286, art. 93.** [First ed., 1918 Supp., p. 994.]

**Jurisdiction of state court.**—The military authorities may waive their priority of right and permit a trial in a state court. *Stewart v. Com.*, (1919) 185 Ky. 34, 213 S. W. 185.

**Vol. IX, p. 1295, art. 117.** [First ed., 1918 Supp., p. 1001.]

**Act not in military capacity.**—In this prosecution the appellant is accused of murdering a citizen of the state, while the deceased was pursuing his civil avocation and the appellant was engaged in an enterprise in no wise connected with or incident to his duty as a soldier. His connection with the homicide is denied by him, and there is no contention that the prosecution was commenced "on account of any act done under color of his office or status;" nor was it an act "in respect to which he claims any right, title or authority under any law of the United States respecting the military forces thereof, or under the law of war." If he committed the act charged, it is not justified by any law. We are therefore of opinion that the trial court committed no error in refusing to grant his petition for removal. *Funk v. State*, (Tex. 1919) 208 S. W. 509.

## WATERS

**Vol. IX, p. 1349, sec. 2339.** [First ed., vol. VII, p. 1090.]

**II. APPROPRIATION OF WATERS (p. 1351)**

**What waters may be appropriated.**—Percolating water, unconfined to a definite channel, is not the subject of appropriation, but belongs to the realty. *McKenzie v. Moore*, (Ariz. 1918) 176 Pac. 568.

**Vol. IX, p. 1360, sec. 2340.** [First ed., vol. VII, p. 1096.]

**Rights of subsequent entryman.**—The statute "in effect declares" that where ditches are constructed over public lands a subsequent entryman takes them burdened with the easement. *Lowry v. Carrier*, (1918) 55 Mont. 392, 177 Pac. 756.

**Vol. IX, p. 1367, sec. 4.** [First ed., vol. VII, p. 1099.]

**Authority of secretary.**—The secretary is not authorized to amend, modify, or change the Act of May 14, 1880 (see vol. 8, p. 598) under which a defendant claims a preferential right. *Edwards v. Bodkin*, (C. C. A. 9th Cir. 1918) 249 Fed. 562, 161 C. C. A. 488.

**Vol. IX, p. 1368, sec. 6.** [First ed., vol. VII, p. 1100.]

**Transfer of completed reclamation projects to water users.**—The Secretary of the Interior is not authorized by this section to turn over the operation and maintenance of

completed reclamation projects, in whole or in part, or to any extent to water users' associations before the payment by such water users for water rights are made for the major portion of the lands irrigated by such works. (1913) 30 Op. Atty.-Gen. 208.

**Vol. IX, p. 1369, sec. 10.** [First ed., vol. VII, p. 1101.]

**Authority of secretary.**—See note under section 4, supra, on this page.

**Construction of regulations of Secretary of Interior,** see *Edwards v. Bodkin*, (C. C. A. 9th Cir. 1918) 249 Fed. 562, 161 C. C. A. 488.

**Vol. IX, p. 1372, sec. 5.** [First ed., 1912 Supp., p. 418.]

**Validity of contract to furnish power exclusively to electric company.**—A contract between a gas and electric company and the United States whereby the company surrenders and conveys all its rights within the physical limits of the Salt River reclamation project and in lieu thereof the United States agrees to furnish to the company in the city of Phoenix, Ariz., a specified amount of electrical energy generated at its works at the Roosevelt Reservoir at a stipulated sum of money and for a term not exceeding ten years, and further agrees that while serving power to the company under the terms of the contract it will refrain from entering into a general retailing of power to customers in such city, and from furnishing power to any one in said city to be again sold or retailed,



does not violate the provisions of the Sherman Anti-trust Act of July 2, 1890, ch. 647 (see vol. 9, p. 644) nor of this section. (1913) 30 Op. Atty.-Gen. 197.

**Vol. IX, p. 1374, sec. 5.** [First ed., 1909 Supp., p. 544.]

**Failure to reside on withdrawn lands.**—Under this section a charge of abandonment of an entry cannot be successfully maintained against an entryman whose failure to make improvements and reclaim the land entered by him was during a time when he was hindered, delayed, or prevented from making such improvements and from reclaiming the land by reason of the withdrawal of the land

from public entry for irrigation contemplated by the Reclamation Act of June 17, 1902. *Edwards v. Bodkin*, (C. C. A. 9th Cir. 1918) 249 Fed. 562, 161 C. C. A. 488.

**Vol. IX, p. 1381, sec. 1.** [First ed., 1912 Supp., p. 417.]

**Taking timber from national forest.**—An irrigation and canal company may be permitted under this Act to take timber from the Teton National Forest free of charge for use in raising the dam at Jackson Lake, Wyo., which is a project authorized under the Reclamation Act of June 17, 1902, ch. 1093 (see vol. 9, p. 1363). (1915) 30 Op. Atty.-Gen. 398.

## WEIGHTS AND MEASURES

**Vol. IX, p. 1400, sec. 1.** [*Apprentices—promotion.*] [First ed., 1916 Supp., p. 31.]

**Application of section.**—This section applies to "laboratory," "shop," and "office" apprentices. (1915) 30 Op. Atty.-Gen. 430.

## WHITE SLAVE TRAFFIC

**Vol. IX, p. 1409, sec. 2.** [First ed., 1912 Supp., p. 419.]

III. Elements of offense.

1. Debauchery.

IV. Indictment.

1. In general.

V. Evidence.

2. Sufficiency.

3. Variance.

VII. Transportation of wife by husband.

### III. ELEMENTS OF OFFENSE

#### 1. Debauchery (p. 1410)

In *Beyer v. U. S.*, (C. C. A. 9th Cir. 1918) 251 Fed. 39, 163 C. C. A. 289, the indictment charged that the defendant conspired with certain others to transport women and girls from the United States to Mexico for the purpose of debauchery. The evidence was that the defendants were conducting a bar, a gambling hall, a dance hall, and a house of prostitution in a building in Mexicali, Mexico, and that they hired several women and girls at Los Angeles to go to their establishment in Mexicali to act as entertainers, and furnished transportation for some of them. The duties of the entertainers were to sing and dance, and to dance with the male habitués

of the place, and although there was no evidence that the entertainers were to sell liquor, there was evidence that they did in fact invite men to dance, and that the men knew that "if they danced they had to buy a drink." The girls were to derive a profit of from 40 to 50 per cent. of the selling price of the liquors sold. Back of the dance floor was a hall. The first door leading from the hall was a dressing room for the entertainers. Beyond, on both sides of the hall, were rooms occupied by prostitutes. The prostitutes were permitted upon the dance floor and in the café and at the bar. The entertainers were bound by contracts not to engage in prostitution, and they were instructed that, if men should approach them and make improper suggestions to them, they were to say that they were not there for that purpose, but that there were others there. It was held that the purpose of the accused was within the prohibition of the statute. The court said: "They intended to and did place the girls in a house of prostitution. They subjected them to all the evil influences of such surroundings. They required them to dance on the same floor with prostitutes. There was evidence that they were instructed, in case they were solicited to engage in sexual intercourse, to refuse, and to say in

substance that there were others there for that purpose, and thus to advertise the prostitutes. They were to be in the dance hall for the purpose of luring men to dance with them, and to induce men to purchase intoxicating liquors, and thereby to aid in maintaining the business of prostitution in which the plaintiff was engaged. They placed the girls in an environment in which they were likely to be solicited to engage in prostitution, and their contracts with the girls indicate that they expected that such solicitations would be made. In *Simpson v. United States*, 245 Fed. 278, 157 C. C. A. 470 (certiorari denied 245 U. S. 664, 38 Sup. Ct. 133, 62 L. ed. 537), we held that one who induced a woman to travel from California to Mexico to manage a house of prostitution was punishable under the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825). There is no difference in principle between that case and this. While the girls who were transported to Mexicali were not engaged in managing the house of prostitution, they were engaged in luring men to it, and probably were as essential to its success as a manager would have been."

#### IV. INDICTMENT

##### 1. In General (p. 1411)

An allegation, in an indictment under this Act, that the transportation was from a place in the southwestern division of the southern district of a certain state, fixes jurisdiction therein. *Yeates v. U. S.*, (C. C. A. 5th Cir. 1918) 254 Fed. 60, 165 C. C. A. 470.

**Objections to indictment.**—Where no demurrer or motion to quash was interposed, no motion made for a directed verdict on the ground of a defect in the indictment, and no attention called specifically to the alleged defect at any time in the lower court, and it is clear from the record that there was no misunderstanding on the part of the defendant or his counsel as to the nature of the offense charged, that the evidence was ample as to every element of the offense to sustain conviction, and that there is no possibility that the judgment of conviction could not be successfully pleaded to any other prosecution under an indictment containing the omitted words but covering the same transactions, it has been declared that under these circumstances the defendant's contention as to the insufficiency of a count of the indictment is not entitled to receive so favorable consideration as if it had been raised by

demurrer. *Hamilton v. U. S.*, (C. C. A. 8th Cir. 1919) 255 Fed. 511.

#### V. EVIDENCE

##### 2. Sufficiency (p. 1412)

For evidence held to be sufficient to show a violation of this Act, see *Hamilton v. U. S.*, (C. C. A. 8th Cir. 1919) 255 Fed. 511.

##### 3. Variance (p. 1413)

**Evidence showing additional offense.**—The fact that the offense proved may contain the elements of a graver crime, cognizable by the state laws, does not affect the prosecution. *Yeates v. U. S.*, (C. C. A. 5th Cir. 1918) 254 Fed. 60.

#### VII. TRANSPORTATION OF WIFE BY HUSBAND (p. 1414)

The wife of the accused is a competent witness against him. *Denning v. U. S.*, (C. C. A. 5th Cir. 1918) 247 Fed. 463, 159 C. C. A. 517, L. R. A. 1918E 487, wherein it was said: "It must be held that it is within the reason of the common-law exception to the rule of incompetency to permit the wife to testify against the husband when the commission of the offense charged against the latter is an act directed against the person of the former. It cannot be that the common law would protect the wife against a single act of violence, and not against a system of assaults; against an act that brought mortification and shame, and not against a series of acts which brought degradation and destruction of body and soul; against a single essay at crime, and not against a continuing effort at pre-eminence in infamy. The offense cannot be classed with those which merely offend the marital relation. It operates immediately and directly upon the wife. It is an offense against the wife. A primary purpose of the Mann Act was to protect women who were weak from men who were bad. Its protection was not confined to unmarried women. Its punishment was not intended to be limited to unmarried men. Men led by cupidity to the base crime have utilized marriage in the accomplishment of their ends. They should not be permitted to use marriage to prevent their punishment. They should not be permitted to invoke a sacred institution, and the rules established for its protection, to secure immunity from punishment for the most infamous crime that could be devised for its degradation."

## WITNESSES

Vol. IX, p. 1421, sec. 858. [First ed., 1909 Supp., p. 708.]

III. Criminal cases.

VI. State statutes affecting competency.

### III. CRIMINAL CASES (p. 1422)

In *Louie Ding v. U. S.*, (C. C. A. 9th Cir. 1918) 247 Fed. 12, 159 C. C. A. 230, it was held that the competency of a witness in a criminal case in a federal court is to be determined by the law of the state in which the court sits as it existed at the time of the admission of that state into the Union. Applying the rule so announced it was held that a witness who did not believe in the existence of a Supreme Being was competent to testify on the trial of a criminal prosecution in a federal court sitting in the state of Washington, the constitution of that state at the time of its admission providing that no person shall be incompetent as a witness on account of his opinions in matters of religion. Discussing the decisions in *U. S. v. Reid*, (1851) 12 How. 361, 13 U. S. (L. ed.) 1023, and *Logan v. U. S.*, (1892) 144 U. S. 263, 12 S. Ct. 617, 36 U. S. (L. ed.) 429, the court said: "But we do not understand that in the general statement, to the effect that the rules of evidence in criminal cases are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed, the Supreme Court ever intended to establish a guide which would prevent the application of the rule as we have before indicated; the test is what local law obtained at the time of the creation of the state, rather than that which obtained at the time of the enactment of the Judiciary Act of 1789. Wigmore on Evidence, § 6 (see notes 9 and 10). In *Maxey v. United States*, 207 Fed. 327, 125 C. C. A. 77, the Circuit Court of Appeals for the Eighth Circuit considered the question of competency of a witness who had been convicted of a felony, and who was offered as a witness in the trial in the federal court in the district of Arkansas, and it was held that the competency of the witness was to be determined by the common law of the state where the trial was had, as it was when the United States courts were established, except where Congress provided otherwise. While the decisions upon the question discussed are not as clear as they might be, yet, when we accept the doctrine of *Reid v. United States*, supra, to be that neither the common law as it existed at the time of the emigration of the colonists nor the rule which at that time prevailed in England is controlling upon the subject, but that the known rules which were in force in the respective states at the time of their creation are,

unless Congress has specially otherwise provided, it leads to the view that the court should have followed the rule which the local courts adopted in their usual daily practice when the state of Washington was admitted into the Union."

The competency of a witness in a criminal case in a federal court is to be determined by the law of the state where the court sits as it existed when the state was admitted to the Union, and accordingly where the original state constitution continues the territorial laws in force those laws govern. *McCoy v. U. S.*, (C. C. A. 5th Cir. 1918) 247 Fed. 861, 160 C. C. A. 83, holding that in a federal court sitting in Florida a person who had been convicted of a felony in another state was competent.

### VI. STATE STATUTES AFFECTING COMPETENCY (p. 1423)

**State decision construing statute.**—We are under obligation to follow, as to the matter of competency of witnesses in civil cases, the law of the state; and the statements by the highest courts of the state as to what that law is will, of course, be followed. *Central Iron, etc., Co. v. Hamacher*, (C. C. A. 5th Cir. 1918) 248 Fed. 50, 160 C. C. A. 190.

**Transaction with a decedent.**—Under the Delaware statute a transaction with a deceased officer of a corporate party is not excluded. *Wright v. Barnard*, (D. C. Del. 1917) 248 Fed. 756.

Vol. IX, p. 1424, sec. 876. [First ed., vol. VII, p. 1121.]

**Subpoenas duces tecum.**—The authorization of subpoenas for witnesses in criminal cases to run into any other district includes subpoenas duces tecum as well as the ordinary subpoenas ad testificandum. *In re Subpoenas Duces Tecum*, (E. D. Tenn. 1916) 248 Fed. 137.

**No order necessary.**—In a criminal case subpoena duces tecum may be issued by the clerk without an order of court. *In re Subpoenas Duces Tecum*, (E. D. Tenn. 1916) 248 Fed. 137.

Vol. IX, p. 1434. [*Defendants in criminal cases may be witnesses.*] [First ed., vol. VII, p. 1120.]

**Reference to "uncontradicted testimony."**—In *Shea v. U. S.*, (C. C. A. 6th Cir. 1915) 251 Fed. 440, 182 C. C. A. 458, it appeared that neither defendant testified on the trial.

In discussing the testimony, in the course of the charge, the court several times referred to certain testimony on the part of the government and certain identifications of the defendants as "uncontradicted," "not directly contradicted," or "without any contradiction." The appellate court held that this was not error, saying: "If these comments were manifestly designed to direct the attention of the jury to defendants' failure to testify (or, perhaps, if they had such necessary effect), they would constitute reversible error. *Wilson v. United States*, 149 U. S. 60, 65, 13 Sup. Ct. 765, 37 L. Ed. 650, and following: *McKnight v. United States*, (C. C. A. 6) 115 Fed. 972, 981-983, 54 C. C. A. 358. But unless they were in-

tended as such comment, or would naturally be so understood, no error was committed. *Jackson v. United States*, (C. C. A. 9) 103 Fed. 473, 487, 42 C. C. A. 452; *Carlisle v. United States*, (C. C. A. 4) 194 Fed. 827, 114 C. C. A. 531; *Rose v. United States*, (C. C. A. 8) 227 Fed. 357, 363, 142 C. C. A. 53. To say the least, it is not so plain that, as to any of the subjects commented upon by the District Judge, no one but plaintiffs in error could, in the nature of things, have disputed them, if untrue, as to make it clear that the court's remarks were intended to be, or that they would naturally be understood as, an unfavorable comment on the failure of plaintiffs in error to testify. They thus did not constitute error."

**CONSTITUTION OF THE UNITED STATES**

**EIGHTEENTH AMENDMENT**

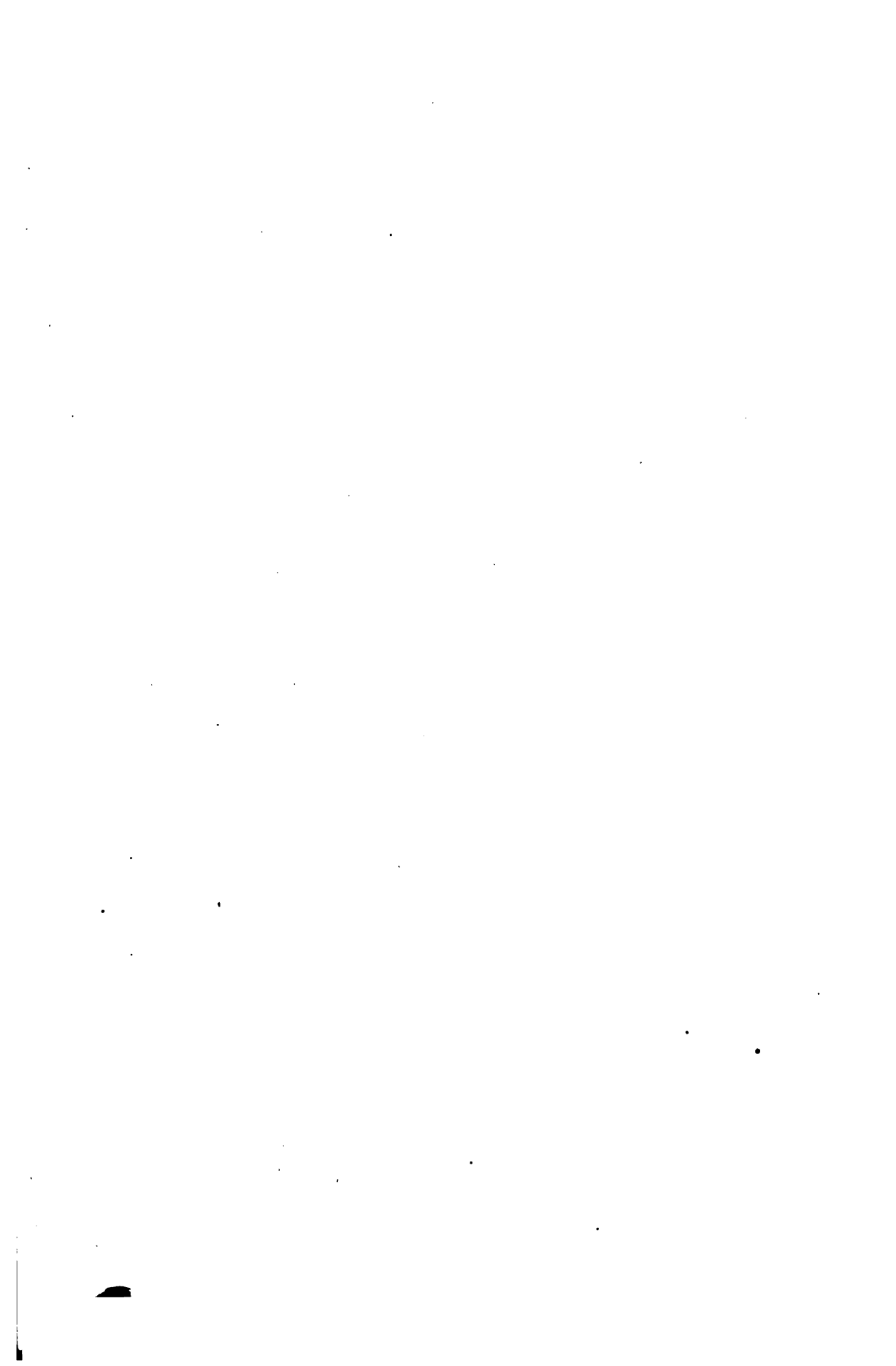
**(PROHIBITION OF INTOXICATING LIQUORS)**

**AND**

**PROPOSED NINETEENTH AMENDMENT**

**(WOMAN SUFFRAGE)**

**[837]**



# EIGHTEENTH AMENDMENT TO THE CONSTITUTION

(PROHIBITION OF INTOXICATING LIQUORS)

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FRANK L. POLK,

Acting Secretary of State of the United States of America.

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

KNOW YE, That the Congress of the United States at the second session, sixty-fifth Congress begun at Washington on the third day of December in the year one thousand nine hundred and seventeen, passed a Resolution in the words and figures following: to wit —

## JOINT RESOLUTION

Proposing an amendment to the  
Constitution of the United States.

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED (TWO-THIRDS OF EACH HOUSE CONCURRING THEREIN), That the following amendment to the Constitution be, and hereby is, proposed to the States, to become valid as a part of the Constitution when ratified by the legislatures of the several States as provided by the Constitution:

“ Article —.

“ Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

“ Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

“ Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.”

And, further, that it appears from official documents on file in this Department that the Amendment to the Constitution of the United States proposed as aforesaid has been ratified by the Legislatures of the States of Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

And, further, that the States whose Legislatures have so ratified the said proposed Amendment, constitute three-fourths of the whole number of States in the United States.

Now, therefore, be it known that I, Frank L. Polk, Acting Secretary of State of the United States, by virtue and in pursuance of Section 205 of the Revised Statutes of the United States, do hereby certify that the Amendment aforesaid has become valid to all intents and purposes as a part of the Constitution of the United States.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Department of State to be affixed.

Done at the City of Washington this 29th day of January in the year of our Lord one thousand nine hundred and nineteen.

[Seal]

FRANK L. POLK  
Acting Secretary of State.

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## Proposed Nineteenth Amendment to the Constitution

(WOMAN SUFFRAGE)

### JOINT RESOLUTION

Proposing an amendment to the Constitution extending the right of suffrage to women.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States.

#### “ Article —.

“ The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

“ Congress shall have power to enforce this article by appropriate legislation.”

F. H. GILLET,   
Speaker of the House of Representatives.

THOS. R. MARSHALL,   
Vice-President of the United States and   
President of the Senate.

Deposited in the Department of State, June 5, 1919.



# SUPPLEMENTAL NOTES

ON THE

## CONSTITUTION OF THE UNITED STATES

Vol. X, p. 376, art. 1, sec. 7.

### III. "Two thirds of That House" (p. 379)

**Two-thirds of quorum.**—The two-thirds vote of each house required to pass a bill over a veto is the two-thirds vote of a quorum of each body, not a two-thirds vote of all the members of the body. *Missouri Pac. R. Co. v. Kansas*, (1919) 248 U. S. 276, 39 S. Ct. 93, 63 U. S. (L. ed.) —, *affirming* (1915) 96 Kan. 609, 152 Pac. 777, Ann. Cas. 1917A 612.

Vol. X, p. 410, art. 1, sec. 8.

#### 3. a (1) In General (p. 435)

**Transportation of child-made goods.**—Congress exceeded its power under the commerce clause of the Federal Constitution in enacting the provisions of the Act of September 1, 1916, 39 Stat. at L. 675, ch. 432, 1918 Supp. Fed. Stat. Ann. 426, which prohibit the transportation in interstate commerce of manufactured goods the product of a factory in which, within thirty days prior to the removal of the goods, children under fourteen have been employed, or children between fourteen and sixteen have been employed more than eight hours in a day, or more than six days in a week, or between seven in the evening and six in the morning. *Hammer v. Dagenhart*, (1918) 247 U. S. 251.

#### b (1) In General (p. 439)

**Transmission of stock quotations.**—The telegraphic transmission of the quotations of the New York Stock Exchange to the Boston offices of the telegraph companies, whence they are transmitted by an operator to tickers in the offices of brokers within the state who have subscribed for such service and have been approved by the Exchange, conformably to a contract between the telegraph companies and the Exchange, does not lose its character as interstate commerce until it is completed in the brokers' offices, and the state of Massachusetts may not interfere with such commerce by ordering the removal of an alleged discrimination resulting from the refusal of the telegraph companies to furnish one broker the service supplied to others. *Western Union Tel. Co. v. Foster*, (1918) 247 U. S. 105, *reversing* (1916) 224 Mass. 365.

#### (2) (a) In General (p. 443)

**Sale of artificial ice plant.**—A provision in a contract of sale of an artificial ice plant

by which the foreign corporate seller agreed to furnish an engineer who should assemble and erect the machinery at the point of destination, and should make a practical efficiency test before complete delivery, is relevant and appropriate to the interstate sale of the machinery, and, therefore, does not justify the courts of the state to which the machinery was shipped in refusing to enforce payment of the purchase price, on the theory that the corporation was doing local business in the state without having first secured the permit made by a state statute a condition precedent to the right to sue in the local courts. *York Mfg. Co. v. Colley*, (1918) 247 U. S. 21, 62 U. S. (L. ed.) 963, *reversing* (Tex. 1915) 172 S. W. 206.

#### b. National Subjects Requiring Uniform Regulations (p. 448)

To same effect as original annotation, see *American Distributing Co. v. Hayes Wheel Co.*, (E. D. Mich. 1918) 250 Fed. 109.

#### (5) Indirect or Incidental Interference with Commerce (p. 455)

**Removal of street railway tracks.**—No unconstitutional interference with interstate commerce results from a municipal ordinance which directs a railway company to remove its tracks from a busy street intersection, thereby necessitating resort to other accessible and fairly convenient means of getting cars to and from tracks beyond such crossing, where the ordinance makes no discrimination against interstate commerce, will not impede its movement in regular course, and will affect it only incidentally and indirectly. *Denver, etc., R. Co. v. Denver*, (1919) 250 U. S. 241, 39 S. Ct. 450, 63 U. S. (L. ed.) —.

**Licensing transportation of lobsters beyond limits of state.**—A state statute relating to the necessity of obtaining a license to transport lobsters beyond the limits of the state is a valid and reasonable provision even if interstate commerce is indirectly involved in the absence of legislation by Congress on the subject. *State v. Dodge*, (1918) 117 Me. 269, 104 Atl. 5.

#### (2) Local Subjects May be Regulated by State Action (p. 460)

**Location of railroad shops, etc.**—A state cannot be said, as a matter of law, to have imposed an unconstitutional burden upon interstate commerce by forbidding any change in location of the machine shops, round-houses, and general offices of a railway company which has agreed to maintain them in a designated county in consideration of re-

ceiving county aid. *International, etc., R. Co. v. Anderson County*, (1918) 246 U. S. 424, 38 S. Ct. 370, 62 U. S. (L. ed.) 807, *affirming* (Tex. Civ. App. 1915) 174 S. W. 305.

**m. Intoxicating Liquors (p. 497)**

The Reed amendment prohibiting the transportation of liquor into any state or territory the laws of which prohibit the manufacture or sale of the same for beverage purposes, is constitutional, though construed to include the transportation of the same on the person for personal use, and though transported into a state which permits the introduction of liquor for personal use in limited quantities. *U. S. v. Hill*, (1919) 248 U. S. 420, 39 S. Ct. 143, 63 U. S. (L. ed.) —.

**(8) Act of March 1, 1913—Webb-Kenyon Act (p. 500)**

State statute requiring records kept by carriers of liquors.—The enactment of the Webb-Kenyon Act, divesting intoxicating liquors of their interstate character in certain cases, removed any restrictions in the Federal Constitution or laws upon the power of a state to adopt such a law as *N. C. Pub. Laws 1913, ch. 44, § 5*, requiring railway companies to keep a separate record of the name of every person to whom intoxicating liquor is shipped, together with the amount, kind, date of receipt and delivery, followed by the consignee's signature acknowledging delivery, and to permit inspection of such record by any officer or citizen, and making noncompliance with such statute a misdemeanor. *Seaboard Air Line Ry. v. North Carolina*, (1917) 245 U. S. 296, 38 S. Ct. 96, 62 U. S. (L. ed.) 299, *affirming* (1915) 169 N. C. 295, 84 S. E. 283.

**1. What Constitutes an Original Package (p. 514)**

Natural gas.—Natural gas transported through pipe lines is an original package so long as it is in the main line, but it ceases to become a part of the interstate commerce when it leaves the main line, being separated from the bulk of gas in such line and forced into intermediate lines and the pipes of individual consumers, where it cannot return to the main line, and where it remains until used. It is then subject to state legislation. *West Virginia, etc., Gas Co. v. Towers*, (Md. 1919) 106 Atl. 265.

**b. Cannot Authorize Restraints of Commerce (p. 521)**

Excessive charge by state for approving issue of bonds of interstate railroad.—*In Union Pac. R. Co. v. Public Service Commission*, (1918) 248 U. S. 67, 39 S. Ct. 24, 63 U. S. (L. ed.) —, *reversing* (1916) 268 Mo. 641, 187 S. W. 827, the facts and conclusion reached thereon were stated by the court as follows: "This case concerned the validity of a charge made by the Public Service Commission of Missouri for a cer-

tificate authorizing the issue of bonds secured by a mortgage of the whole line of the Union Pacific road. The statutes of Missouri have general prohibitions against the issue of such bonds without the authority of the commission, impose severe penalties for such issue and purport to invalidate the bonds if it takes place. Moreover the bonds would be unmarketable if the certificate were refused. Upon these considerations the plaintiff in error applied, in all the states through which its line passed, for a certificate authorizing the issue of bonds to the amount of \$31,848,900. The Missouri commission granted the authority and charged a fee of \$10,962.25. The railroad company accepted the grant as required by its terms, but protested in writing against the charge as an unconstitutional interference with interstate commerce, and gave notice that it paid under duress to escape the statutory penalties and to prevent the revocation of the certificate. It moved for a rehearing on the ground that the statutes of Missouri, if they gave the commission jurisdiction, did not purport to authorize the charge, or, if they did purport to do so and to invalidate an issue without the Commission's assent, were in conflict with the Constitution of the United States. The rehearing was denied and thereupon the railroad, pursuant to state law, applied to a local court for a certiorari to set the commission's judgment aside as an interference with interstate commerce and as bad under the Fourteenth Amendment. The court decided that the charge was unreasonable and that the minimum statutory fee of \$250 should have been charged. On appeal by the commission the Supreme Court held the railroad estopped by its application, reversed the court below and upheld the charge. 268 Missouri 641.

"The railroad company is a Utah corporation having a line over thirty-five hundred miles long, extending through several states, from Kansas City, Missouri, and elsewhere, to Ogden, Utah. It has only about six-tenths of one mile of main track in Missouri, and its total property there is valued at a little more than three million dollars, out of a total valuation of over two hundred and eighty-one millions. The bonds were to reimburse the company for expenditures of which again less than one hundred and twenty-five thousand dollars had been made in Missouri. The business done by the railroad in Missouri is wholly interstate. On these facts it is plain, on principles now established, that the charge, which in accordance with the letter of the Missouri statutes was fixed by a percentage on the total issue contemplated, was an unlawful interference with commerce among the states."

**(3) Inspection Fees (p. 530)**

Oil and gasoline.—"Specifically, state laws providing for the inspection of oils and gasoline have several times been recognized as valid by this court. *Fatterson v. Kentucky*, 97 U. S. 501; *Red "C" Oil Mfg. Co.*

*v. Board of Agriculture of North Carolina*, 222 U. S. 380, and *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159. But if such inspection charge should be obviously and largely in excess of the cost of inspection, the act will be declared void because constituting, in its operation, an obstruction to and burden upon that commerce among the states the exclusive regulation of which is committed to Congress by the Constitution. *Postal Telegraph-Cable Co. v. Taylor*, 192 U. S. 64; *Footo & Co. v. Maryland*, 232 U. S. 494, 504, 508. Plainly the application of the principles thus stated leaves open for consideration only the question as to whether the inspection charge is so excessive as to render the act a revenue measure, as the plaintiff in error claims that it is, and not an inspection law enacted in good faith to promote the public safety and prevent fraud and imposition upon the users of oil and gasoline. In the consideration of this question the discretion of the legislature in determining the amount of the inspection fee will not lightly be disturbed. Its determination is *prima facie* reasonable and the courts will not 'enter into any nice calculation as to the difference between cost and collection; nor will they declare the fees to be excessive unless it is made clearly to appear that they are obviously and largely beyond what is needed to pay for the inspection services rendered.' *Footo & Co. v. Maryland*, 232 U. S. 494, 504, and *Western Union Telegraph Co. v. New Hope*, 187 U. S. 419." *Pure Oil Co. v. Minnesota*, (1918) 248 U. S. 158, 39 S. Ct. 35, 63 U. S. (L. ed.) —, *affirming* (1916) 134 Minn. 101, 158 N. W. 723.

#### In Excess of Expenses of Inspection (p. 532)

**Oil inspection fees.**—A state oil inspection law under which fees grossly in excess of the cost of inspection (the total receipts for ten years being \$335,000, more than four times the expense of administration) must be paid by importers after inspection before the oils may be lawfully sold, even in the original receptacles or containers in which they were brought into the state, is unconstitutional as a direct burden on interstate commerce. *Standard Oil Co. v. Graves*, (1919) 249 U. S. 389, 39 S. Ct. 320, 63 U. S. (L. ed.) —, *reversing* (1917) 94 Wash. 291, 162 Pac. 558.

#### (b) aa. At County Seats (p. 554)

**Regulating stoppage of trains at county seats.**—A state may require that four passenger trains each way, if so many are run daily, Sundays excepted, shall stop at all county-seat stations, although this may necessitate the stopping of two interstate mail trains, one each way, at a place having a population of but 1,500, where this is the only county seat at which those trains do not stop, and they do stop at some smaller places, as well as make a detour to go through an important city, and where but little time will be consumed in making these

additional stops. *Gulf, etc., R. Co. v. Texas*, (1918) 246 U. S. 58, 38 S. Ct. 236, 62 U. S. (L. ed.) 574, *affirming* (Tex. Civ. App. 1914) 169 S. W. 385.

#### f. Requiring Notice of Time of Trains' Arrival to Be Posted (p. 558)

**Requiring trains to keep to schedule time.**—As applied to through interstate trains originating outside the state on the lines of other carriers, an order of a state railway commission under which a railway company must start its passenger trains in the state at the point of origin and at local stations on schedule time, with an allowance of not more than thirty minutes for connections, is an unconstitutional regulation of interstate commerce, especially where there is sufficient accommodation for local traffic independent of the through trains. *Missouri, etc., R. Co. v. Texas*, (1918) 245 U. S. 484, 38 S. Ct. 178, 62 U. S. (L. ed.) 419, L. R. A. 1918C 535, *reversing* (Tex. Civ. App. 1914) 167 S. W. 822, wherein the court said: "On its face the order as applied was an interference with such commerce. It undertook to fix the time allowed for stops in the course of interstate transit. It was a serious interference, for it made the defendant liable for an interstate train not starting on schedule time, when the train did not come into the defendant's hands, from another company in another state, until too late. This, as we understand the facts, was the train to which the advertised schedule applied, and, if so, the mere statement of the result is enough to show that the burden imposed not only was serious, but was unwarranted as well as unjust. The suggestion that compliance with the order could have been secured by having an extra train ready to run if the regular one was not on time hardly is practical, and is not an adequate answer, even in form. For the defendant advertised, or at least had the right to advertise, the interstate train, and, if it did so, would not free itself from liability for a delay on the part of that train by offering another. We think it plain that this order was applied in a way that was beyond the power of the Commission and courts of the state."

#### (c) Charges on Poles and Wires (p. 562)

To the same effect as the original annotation, see *Mackay Tel., etc., Co., v. Little Rock*, (1919) 250 U. S. 94, 39 S. Ct. 428, 63 U. S. (L. ed.) —, *affirming* (1917) 131 Ark. 306, 199 S. W. 90.

#### i. Warehouses and Elevators (p. 617)

**Weighing.**—A state statute is constitutional prohibiting "any person, corporation or association other than a duly authorized and bonded state weigher to issue any weight certificate . . . [for any] grain weighed at any warehouse or elevator in this state where duly appointed and qualified state weighers

are stationed . . . or to make any charge for such weighing, . . . or weight certificates." *Merchants' Exch. v. Missouri*, (1919) 248 U. S. 385, 39 S. Ct. 114, 63 U. S. (L. ed.) —, *affirming* (1916) 269 Mo. 346, 190 S. W. 903, *Ann. Cas.* 1917E 871, wherein the court said: "Section 63 does not violate the commerce clause of the Constitution. The contention that it does was rested below solely on the ground that the prohibition, as applied to grain received from or shipped to points without the state, burdens interstate commerce. It clearly does not. *Pittsburg & Southern Coal Co. v. Louisiana*, 156 U. S. 590; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452."

#### c 1 (1) In General (p. 639)

**Licensing vessels engaged in lobster fisheries.**—The imposition of a license fee for smacks or vessels engaged in the lobster fisheries on waters within the jurisdiction of the state, and moving in interstate commerce, if reasonable, is not a burden on interstate commerce. *State v. Dodge*, (1918) 117 Me. 269, 104 Atl. 5.

#### g 1 (1) Prohibiting Transportation of Natural Gas (p. 645)

**State regulation of local rates.**—The sale and delivery of gas to customers at burner tips by local distributing companies operating under special franchises, and the payment of two-thirds of their receipts to the natural gas company furnishing the gas through interstate pipe lines, do not constitute any part of interstate commerce so as to exclude state regulation of local rates as confiscatory and unduly burdening such commerce. *Public Utilities Commission v. Landon*, (1919) 249 U. S. 236, 39 S. Ct. 268, 63 U. S. (L. ed.) — (*reversing*) (D. C. Kan. 1916) 234 Fed. 152 (D. C. Kan. 1917) 242 Fed. 658, (D. C. Kan. 1917) 245 Fed. 950, wherein the court said: "That the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted. Also, it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the state. *American Express Co. v. Iowa*, (1905) 196 U. S. 133, 143, 25 S. Ct. 182; *West v. Kansas Natural Gas Co.*, (1911) 221 U. S. 229 [31 S. Ct. 564, 55 U. S. (L. ed.) 716, 35 L. R. A. (N. S.) 193]; *Haskell v. Kansas Natural Gas Co.*, (1912) 224 U. S. 217 [32 S. Ct. 442, 56 U. S. (L. ed.) 738]. But in no proper sense can it be said, under the facts here disclosed, that sale and delivery of gas to their customers at burner-tips by the local companies operating under special franchises constituted any part of interstate commerce. The companies received supplies which had moved in such commerce and then disposed thereof at retail in due course of their own local business. Payment to the receivers of sums amounting to two-thirds of the

product of these sales did not make them integral parts of their interstate business. In fact, they lacked authority to engage by agent or otherwise in the retail transactions carried on by the local companies. Interstate commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods. *Rearick v. Pennsylvania*, (1906) 203 U. S. 507, 512 [27 S. Ct. 159, 51 U. S. (L. ed.) 295, 296]; *Pipe Line Cases*, (1914) 234 U. S. 548, 560 [34 S. Ct. 956, 58 U. S. (L. ed.) 1459, 1470]. The thing which the receivers actually did was to deliver supplies to local companies. Exercising franchise rights, the latter distributed and sold the commodity so obtained upon their own account and paid the receivers what amounted to two-thirds of their receipts from customers. Interstate movement ended when the gas passed into local mains. The court below erroneously adopted the contrary view and upon it rested the conclusion that the public commissions were interfering with establishment of compensatory rates by the receivers in violation of their rights under the Fourteenth Amendment."

#### w 1 (1) Right of States to Exclude Foreign Corporations or Impose Conditions (p. 652)

**Reasonableness of fee.**—The exaction from a foreign manufacturing corporation having a capital stock of \$5,000,000 of the \$1,000 fee, fixed by Va. Acts 1910, chap. 53, § 38a, as a condition of permitting foreign corporations with a capital stock of more than \$1,000,000 and not exceeding \$10,000,000, to do local business in the state, does not unlawfully burden interstate commerce, the fees prescribed by the statute not varying in direct proportion to capital stock, and there being a fixed maximum. *General Ry. Signal Co. v. Virginia*, (1918) 246 U. S. 50, 38 S. Ct. 360, 62 U. S. (L. ed.) 854, *affirming* (1916) 118 Va. 301, 87 S. E. 598.

#### XI (1 In General (p. 657)

**Excise tax on foreign corporation.**—The imposition of a state excise tax as a condition of admitting a foreign manufacturing and trading corporation engaged in both local and interstate commerce to do business within the state, based upon the amount of its authorized capital stock, without limitation of the amount of the tax, constitutes an unlawful burden on interstate commerce. *International Paper Co. v. Massachusetts*, (1918) 246 U. S. 135, 38 S. Ct. 292, 62 U. S. (L. ed.) 624, *reversing* (1917) 228 Mass. 101, 117 N. E. 246; *Locomotive Co. v. Massachusetts*, (1918) 246 U. S. 146, 38 S. Ct. 298, 62 U. S. (L. ed.) —, *reversing* (1917) 228 Mass. 117, 117 N. E. 5.

The imposition of a state tax as a condition of admitting a foreign corporation engaged in interstate commerce to do business

within the state, based upon the amount of its authorized capital stock, and of a franchise tax based upon capital, surplus and undivided profits, constitutes an unlawful burden on interstate commerce. *Looney v. Crane*, (1917) 245 U. S. 178, 38 S. Ct. 85, 62 U. S. (L. ed.) 230, *affirming* (N. D. Tex. 1914) 218 Fed. 260.

**Privilege tax on manufacturing business.**—A municipal license tax upon the conduct of a manufacturing business in the city is not an unconstitutional regulation of interstate commerce merely because the amount of the tax is measured by the amount of sales of goods manufactured in the local factory, whether sold within or without the state, either in domestic or interstate commerce. *American Mfg. Co. v. St. Louis*, (1919) 250 U. S. 450, 39 S. Ct. 522, 63 U. S. (L. ed.) —, (*affirming* (Mo. 1917) 198 S. W. 1183) wherein the court said: "There is no doubt of the power of the state, or of the city acting under its authority, to impose a license tax in the nature of an excise upon the conduct of a manufacturing business in the city. Unless some particular interference with federal right be shown, the states are free to lay privilege and occupation taxes. *Clark v. Titusville*, (1902) 184 U. S. 329; [22 S. Ct. 382, 46 U. S. (L. ed.) 569]; *St. Louis v. United R. Co.*, (1908) 210 U. S. 266, 276, [28 S. Ct. 630, 52 U. S. (L. ed.) 1054, 1059.] The city might have measured such tax by a percentage upon the value of all goods manufactured, whether they ever should come to be sold or not, and have required payment as soon as, or even before, the goods left the factory. In order to mitigate the burden, and also, perhaps, to bring merchants and manufacturers upon an equal footing in this regard, it has postponed ascertainment and payment of the tax until the manufacturer can bring the goods into market. A somewhat similar method of postponing payment has been pursued for many years by the Federal Government with respect to the internal revenue tax upon distilled spirits."

(g) Separation of Interstate from Intrastate Commerce (p. 657)

**Material part of business intrastate.**—Where a material part of the business of a foreign corporation conducted in a state is intrastate that state may impose a license tax. *Adding Mach. Co. v. St. Louis*, (1918) 246 U. S. 498, 38 S. Ct. 361, 62 U. S. (L. ed.) 851, *affirming* (1916) 118 Va. 563, 88 S. E. 167.

(b) Tax on Instrumentalities of Commerce as Property (p. 667)

**Tax on privilege of engaging in interstate commerce.**—Consistently with the commerce clause a state cannot tax the privilege or act of engaging in interstate commerce, but may tax the company's property within the state although chiefly employed in such com-

merce. *Wells v. Nevada*, (1918) 248 U. S. 165, 39 S. Ct. 62, 63 U. S. (L. ed.) —, *affirming* (1915) 38 Nev. 505, 150 Pac. 836.

bb. Rolling Stock (p. 668)

**Double taxation.**—The cars of a foreign freight line company are not twice taxed nor excessively valued merely because the state, in addition to imposing a tax upon the company property employed within the state, measured by gross earnings from the property so employed, which are derived largely from interstate commerce, makes the rents of the railroads from shipments in the freight line company's cars, less the rental paid to that company, a factor in valuing for taxation the property on which the railroads are taxed. *Cudahy Packing Co. v. Minnesota*, (1918) 246 U. S. 450, 38 S. Ct. 373, 62 U. S. (L. ed.) 827, *affirming* (1915) 129 Minn. 30, 151 N. W. 410.

**Leased refrigerator cars.**—A foreign corporation leasing refrigerator cars to railway companies for freight transportation may be taxed by a state upon the basis of a fixed percentage of its corporate earnings from the operation of its car line within the state, although such earnings are derived largely from interstate commerce, where the tax is locally viewed as imposed in respect of the property employed within the state rather than upon the earnings, is expressly declared to be in lieu of other taxes on such property, is part of a general taxation system which the state applies to railroads, telephones, and the like, and is not in excess of what would be legitimate as an ordinary tax upon the property, viewed with reference to the use in which it is employed. *Cudahy Packing Co. v. Minnesota*, (1918) 246 U. S. 450, 38 S. Ct. 373, 62 U. S. (L. ed.) 827, *affirming* (1915) 129 Minn. 30, 151 N. W. 410.

dd. According to Unit Rule (p. 677)

**Mileage basis.**—See *infra*, p. 870 of this supplement for a consideration of this question.

(ff) Effect of Act of Congress of July 24, 1866 (p. 688)

An annual license tax of \$300 for the privilege of doing business within the city limits, excluding interstate and government service, may be imposed by a municipality under state authority upon a telegraph company which has accepted the provisions of the Act of July 24, 1866 (see vol. 9, p. 505), where such tax does not burden or discriminate against interstate business, and where the local business purporting to be taxed is so substantial in amount that it does not clearly appear that the tax is a disguised attempt to tax interstate commerce. Such a tax is not an inspection measure, limited in amount to the cost of issuing a license or supervising the business, but is an exercise of the police power of the state for revenue

purposes restricted to internal commerce, and therefore within the taxing power of the state. *Postal Tel.-Cable Co. v. Richmond*, (1919) 249 U. S. 252, 39 S. Ct. 265, 63 U. S. (L. ed.) —.

An annual fee of \$3 for each telegraph pole that a telegraph company which has accepted the Act of July 24, 1866 (see vol. 9, p. 505), and is engaged in interstate commerce, maintains or uses in the streets of the city, will not be deemed to be beyond the power of the city to impose by ordinance,—even if the net returns from the intrastate business are less than the tax thus imposed,—where such tax does not seem excessive, having regard to the necessary burdens which the poles and wires in the streets must impose upon the city. *Postal Tel.-Cable Co. v. Richmond*, (1919) 249 U. S. 252, 39 S. Ct. 265, 63 U. S. (L. ed.) —.

### (27) Taxation of Exports (p. 720)

**Tax on business of selling goods in foreign commerce.**—A state tax imposed upon the business of selling goods in foreign commerce, the amount of which is measured by the gross receipts, is unconstitutional as a regulation of foreign commerce and also as an impost upon exports, levied without the consent of Congress. *Crew Levick Co. v. Pennsylvania*, (1917) 245 U. S. 292, 38 S. Ct. 126, 62 U. S. (L. ed.) 295, *reversing* (1917) 256 Pa. St. 508, 100 Atl. 952.

### 33 (a) Tax on Gross Income (p. 722)

*Northwestern Mut. L. Ins. Co. v. State*, (1916) 163 Wis. 484, cited as authority for the original annotation, is affirmed in (1918) 247 U. S. 132.

### (39) Tax on Income from Interstate Business (p. 726)

A state, in levying a general income tax on the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce, without contravening the commerce clause of the Federal Constitution, where there is no discrimination against interstate commerce either in the admeasurement of the tax or in the means adopted for enforcing it. *United States Glue Co. v. Oak Creek*, (1918) 247 U. S. 321, *affirming* (1915) 161 Wis. 211, which was cited in the original annotation.

## Vol. X, p. 743, art. 1, sec. 8.

### 3. Different Operation in Different States (p. 748)

The Bankruptcy Acts of Congress may recognize the laws of the several states in certain particulars although such recognition may lead to different results in different states. *Stellwagen v. Clum*, (1918) 245 U. S. 605, 38 S. Ct. 215, 62 U. S. (L. ed.) 507, on certificate from Circuit Court of Appeals for

Sixth Circuit, case below being reported in (C. C. A. 6th Cir. 1914) 218 Fed. 730, 134 C. C. A. 408.

### d. Non-conflicting Provisions of State Laws (p. 756)

**Fraudulent transfers.**—The federal bankruptcy laws did not suspend the provisions of Ohio Rev. Stat. §§ 6343, 6344, under which transfers made to an insolvent which are actually or constructively fraudulent may be declared void at the suit of any creditor, in which suit a receiver may be appointed to take charge of all the assets of the debtor, including the property conveyed, and administer the same for the equal benefit of creditors, as in cases of assignments to trustees for the benefit of creditors, there being no attempt by the Ohio statutes to provide for the discharge of the debtor from his existing debts. *Stellwagen v. Clum*, (1918) 245 U. S. 605, 38 S. Ct. 215, 62 U. S. (L. ed.) 507, on certificate from Circuit Court of Appeals for Sixth Circuit, case below being reported in (C. C. A. 6th Cir. 1914) 218 Fed. 730, 134 C. C. A. 408.

## Vol. X, p. 888, art. 1, sec. 9.

### XI. Tax on Income from Goods Exported (p. 891)

To same effect as original annotation see *Peck v. Lowe*, (1918) 247 U. S. 165, 38 S. Ct. 432, 62 U. S. (L. ed.) 1049, *affirming* (S. D. N. Y. 1916) 234 Fed. 125, cited in the original annotation.

## Vol. X, p. 944, art. 1, sec. 10.

### 1. Limitation on the Power of the States (p. 948)

**Legislative, not judicial, action is what is forbidden by the prohibition against impairing contract obligations.** *McCoy v. Union El. R. Co.*, (1918) 247 U. S. 354, 38 S. Ct. 504, 62 U. S. (L. ed.) 1156.

#### 1. In General (p. 950)

**Care of highway crossings.**—Railway companies may be required by the states, in the exercise of the police power, to make streets and highways crossed by the tracks of such companies reasonably safe and convenient for public use, and to do this at their own expense. *Great Northern R. Co. v. Minnesota*, (1918) 246 U. S. 434, 38 S. Ct. 346, 62 U. S. (L. ed.) 817, *affirming* (1916) 132 Minn. 474, 157 N. W. 1069.

**Regulation of railroad rates.**—When parties enter into a contract with a public service corporation relating to rates, they are presumed to have done so with the knowledge that the right of the state to exercise this police power in the future is expressly reserved, and that where the common weal and the interests of the public demand that the

provisions of the contract thus entered into shall be modified, it can be done without any violation of the provision of the Constitution of the United States with reference to the impairment of the obligation of contracts. *Leiper v. Baltimore, etc., R. Co.*, (1918) 262 Pa. St. 328, 105 Atl. 551.

## 2. State Cannot Divest Itself of Police Power (p. 956)

### Police power as attribute of sovereignty.—

"The police power of a state is an attribute of sovereignty, and exists without any reservation in the constitution, being founded on the duty of the state to protect its citizens and provide for the safety and good order of society." *People v. Johnson*, (1919) 288 Ill. 442, 123 N. E. 543.

### Exempting railroad from taxation.—

Where a railroad charter contains tax exemptions such exemptions cannot be revoked by subsequent provisions in the state constitution. *Central of Georgia R. Co. v. Wright*, (1919) 248 U. S. 525, 39 S. Ct. 181, 63 U. S. (L. ed.) —, *reversing* (1917) 146 Ga. 406, 91 S. E. 471.

## 1. In General (p. 957)

**Sale of tax-sale certificates.**—Where a state statute is amended so as to permit a county to sell tax-sale certificates at a less sum than the total amount of taxes, interest and costs due, a person purchasing such certificates after the amendment for the total amount due the company must trace his title and rights through it, and there is no impairment of his contract if the county exercises its option to sell certificates at less than the total amount due. *Glen Invest. Co. v. Romero*, (C. C. A. 8th Cir. 1918) 254 Fed. 239, 165 C. C. A. 527.

## IV. Power of Eminent Domain (p. 959)

**Contracts of state affecting its governmental authority.**—The state cannot, by virtue of the contract clause of the Federal Constitution, divest itself by contract of the right to exert its governmental authority in matters which, from their very nature, so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society, or to secure the performance of essential governmental duties. *Pennsylvania Hospital v. Philadelphia*, (1917) 245 U. S. 20, 38 S. Ct. 35, 62 U. S. (L. ed.) 124, *affirming* (1916) 254 Pa. St. 392, 98 Atl. 1077.

**Taking property of hospital.**—The state is not prevented by the provisions of the Federal Constitution against impairing the obligation of contracts, from acquiring, under the right of eminent domain, land for the opening of a street through hospital grounds, and also the rights acquired by the hospital under a contract with the state, created by a law forbidding the opening of any street through such grounds without the consent of the hospital authorities, as the power of eminent domain is so inherently governmental and so essential to the public wel-

fare that it cannot be abridged by agreement. *Pennsylvania Hospital v. Philadelphia*, (1917) 245 U. S. 20, 38 S. Ct. 35, 62 U. S. (L. ed.) 124, *affirming* (1916) 254 Pa. St. 392, 98 Atl. 1077.

## 11 a. In General (p. 966)

**Convict labor contracts.**—Regulations providing for the release of convicts from confinement in the prisons, and their employment in the open air outside of the penitentiary, under conditions that enable them to earn for their own benefit something beyond the cost of their maintenance, have a direct relation to the public welfare and public safety, the preservation of their health, and the preservation of public morals. The state cannot, therefore, by contract or otherwise, barter away its duty and right to adopt such measures as it may, from time to time, deem advisable for the promotion of those ends, and if it attempts to do so such attempt is futile. Such a regulation does not for example impair the obligation of a contract hiring out convicts to contractors for profit. *Jones Hollow Ware Co. v. Crane*, (Md. 1919) 106 Atl. 274, 3 A. L. R. 1658.

## 12. Contracts of Municipal Corporations (p. 979)

**Municipal bonds.**—An amendment of a state statute so as to authorize the appointment of special collectors, each charged with the duty of collecting only some designated part of assessed county taxes, instead of requiring the appointment of a sheriff or single collector to collect all money due the state, county or taxing district, as previously required, impairs the obligation of the contract of the holder of a bond issued by a county previous to the amendment, as a collector appointed to collect taxes for the payment of such a bond may fail to qualify as collector, or to discharge the duties of his office. *Hendrickson v. Apperson*, (1918) 245 U. S. 105, 38 S. Ct. 44, 62 U. S. (L. ed.) 178, *affirming* (C. C. A. 6th Cir. 1916) 238 Fed. 473, 151 C. C. A. 409.

## 17 a. Exclusive Privileges (p. 1039)

**Interurban electric railway.**—The grant by a county board of a right to locate, construct, maintain and operate an interurban electric railway along a state highway, without specifying any limit of time, must be held—unless there are controlling provisions in the state constitution or statutes, or a prior adjudication by its courts to the contrary—to constitute, when accepted, a perpetual franchise, protected by U. S. Const. art. 1, § 10, against revocation by subsequent resolution of such board. *Northern Ohio Traction, etc., Co. v. Ohio*, (1918) 245 U. S. 574, 38 S. Ct. 196, 62 U. S. (L. ed.) 481, L. R. A. 1918E 865, *reversing* (1915) 93 Ohio St. 466, 114 N. E. 53.

**Municipal railway paralleling existing privately owned line.**—The establishment of a

municipal street railway paralleling an existing privately owned line was not precluded by Cal. Civ. Code, sec. 499, which, as it stood when the private franchise was granted, provided that "two corporations may be permitted to use the same streets, each paying an equal portion for the construction of the track, but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks," or by the provision of the franchise ordinance that the city may grant to one other corporation and no more the right to use either of the streets embraced in such franchise for five blocks and no more, after the forms and conditions specified in such code section, the city having thereafter, by the amendment of April 24, 1911, to such section, and by Cal. Const., art. 11, sec. 19, been given the right to establish and operate transportation service. *United Railroads of San Francisco v. San Francisco*, (1919) 249 U. S. 517, 39 S. Ct. 361, 63 U. S. (L. ed.) —, *affirming* (N. D. Cal. 1917) 239 Fed. 987.

The injury to an existing privately owned street railway system from the establishment of a parallel municipal street railway, in so far as such injury is an inevitable consequence of the doing by the city of what the street railway company's franchise did not make unlawful, is not a taking of the company's property that requires resort to eminent domain. *United Railroads of San Francisco v. San Francisco*, (1919) 249 U. S. 517, 39 S. Ct. 361, 63 U. S. (L. ed.) —, *affirming* (N. D. Cal. 1917) 239 Fed. 987.

The federal Supreme Court, upon affirming a decree which dismissed the bill in a suit to enjoin the municipal construction of a street railway paralleling and crossing an existing privately owned line, will not direct that the bill be retained for a claim of damages growing out of the construction of the road, but will order that the affirmance be without prejudice to further proceedings to recover any damages to which the street railway company may be entitled. *United Railroads of San Francisco v. San Francisco*, (1919) 249 U. S. 517, 39 S. Ct. 361, 63 U. S. (L. ed.) —, *affirming* (N. D. Cal. 1917) 239 Fed. 987.

Protection against municipal competition without compensation is not accorded an existing privately owned street railway system by a provision of the municipal charter requiring the city to consider offers for the sale of existing public utilities before constructing new ones. *United Railroad of San Francisco v. San Francisco*, (1919) 249 U. S. 517, 39 S. Ct. 361, 63 U. S. (L. ed.) —, *affirming* (N. D. Cal. 1917) 239 Fed. 987.

#### c. Municipal Control (p. 1042)

**Requiring removal of tracks.**—A municipal ordinance directing a railway company to remove its tracks from a busy street intersection does not offend against the contract and due process of law clauses, even though the company may have a vested right to

maintain the track there, where the attendant disadvantages and expense are small, there being other accessible and fairly convenient means of getting cars to and from its tracks beyond such crossing. *Denver, etc., R. Co. v. Denver*, (1919) 250 U. S. 241, 39 S. Ct. 450, 63 U. S. (L. ed.) —.

#### (2) When Subject to Legislative or Municipal Control (p. 1047)

**Requiring street railway to give longer ride for same fare.**—When a continuous trip begins on a nonfranchise line and is over a franchise line and a nonfranchise line, the former having the right to charge five cents for a trip over it, an ordinance compelling the carrying of passengers over both for five cents impairs the obligation of the franchise contract. *Detroit United R. Co. v. Detroit*, (1919) 248 U. S. 429, 39 S. Ct. 151, 63 U. S. (L. ed.) —, *following* *Detroit United R. Co. v. Michigan*, (1916) 242 U. S. 238, 37 S. Ct. 87, 61 U. S. (L. ed.) 268.

#### c. Regulation of Lighting Rates (p. 1062)

**Changing rate in private contract.**—Where a lighting company enters into a contract with a private corporation to supply it with power and light at a certain rate for a definite time, the lighting company may, notwithstanding such contract, increase the rate before its expiration if authorized by an order of a public service commission having power from the legislature to regulate rates. *Union Dry Goods Co. v. Georgia Pub. Service Corp.*, (1919) 248 U. S. 372, 39 S. Ct. 117, 63 U. S. (L. ed.) —, *affirming* (1916) 145 Ga. 658, 89 S. E. 779.

#### 37. Interest (p. 1091)

**Interest on judgments.**—The application to a subsisting judgment on noninterest-bearing county warrants which awards interest at a definite specified rate of the provisions of an Arkansas statute, subsequently enacted, that "no judgment rendered or to be rendered against any county in the state on county warrants or other evidence of county indebtedness shall bear any interest after the passage of this act," does not violate the contract or due process of law clauses of the Federal Constitution. *Missouri, etc., Min. Co. v. Greenwood Dist.*, (1919) 249 U. S. 170, 39 S. Ct. 202, 63 U. S. (L. ed.) —, wherein the court said: "Plaintiff in error maintains that the challenged act conflicts with § 10, Art. I, of the Constitution and also the Fourteenth Amendment forbidding a state from depriving any person of property without due process of law; but we think the contrary is settled by our opinion in *Morley v. Lake Shore, etc., R. Co.*, (1892) 146 U. S. 162, 168, 171 [13 S. Ct. 54, 36 U. S. (L. ed.) 925, 929, 930]. There the judgment directed that interest should accrue from its entry without mentioning any rate, the statutory one then being seven per centum; later another act fixed six per centum



for the future and the debtor claimed benefit of it while the creditor maintained that to permit this would violate both the contract clause and Fourteenth Amendment. . . . It is insisted that as the judgment now under consideration specified a definite interest rate while the one in *Morley v. Lake Shore, etc., R. Co.*, supra, did not, the doctrine there approved is inapplicable. To this we cannot assent; mere recital of a particular rate does not change the nature of the charge as a penalty or liquidated damages. It should be noted that the county warrants, upon which plaintiff in error sued, bore no interest; if the parties had lawfully stipulated therefor, a different question would have been presented."

#### 1. In General (p. 1118)

In order that a state statute may impair the obligation of a contract, the statute must affect the validity, construction, discharge, or enforcement of the contract. *Virginia, etc., Coal Co. v. Charles*, (W. D. Va. 1917) 251 Fed. 83.

**Street railroad franchise.**—Increased street railway operating costs and decreased net revenues due to war conditions and to an increased wage scale fixed by the National War Labor Board, though rendering unremunerative the street railway fares fixed by municipal franchise ordinances which, by acceptance, became valid contracts, mutually binding for the twenty-five-year term named therein, do not absolve the street railway company from the obligations of its contract so as to justify it in surrendering its franchises and excuse it from giving service at the rates so fixed—especially where it cannot be said that, taking all the years of the term together, the contract will prove unremunerative. *Columbus R., etc., Co. v. Columbus*, (1919) 249 U. S. 399, 39 S. Ct. 349, 63 U. S. (L. ed.) — (affirming *S. D. Ohio* 1918) 253 Fed. 499), wherein the court said: "There is no showing that the contracts have become impossible of performance. Nor is there any allegation establishing the fact that taking the whole term together the contracts will be necessarily unprofitable. This case is not like the *Denver v. Denver Union Water Co.*, (1918) 246 U. S. 178, [38 S. Ct. 278, 62 U. S. (L. ed.) 649], and the *Detroit United R. Co. v. Detroit*, (1919) 248 U. S. 429, [39 S. Ct. 151, 63 U. S. (L. ed.) —], in both of which the franchise to use the streets of the city had expired by limitation, and it was sought to require continued operation of a waterworks system in the one case and in the other of a street railway system, under rates which would afford no adequate return to the companies. In this case the company seeks the aid of a court of equity to avoid contracts duly made and entered into while the same are yet in force. . . . It is undoubtedly true that the breaking out of the World War was not contemplated, nor was the subsequent action of the War Labor

Board within the purview of the parties when the contract was made. That there might be a rise in the cost of labor, and that the contract might at some part of the period covered become unprofitable by reason of strikes or the necessity for higher wages might reasonably have been within their contemplation when the contract was made and provisions made accordingly. There is no showing in the bill that the war or the award of the War Labor Board necessarily prevented the performance of the contract. Indeed, as we have said, there is no showing, as in the nature of things there cannot be, that the performance of the contract, taking all the years of the term together, will prove unremunerative. We are unable to find here the intervention of that superior force which ends the obligation of a valid contract by preventing its performance. It may be, and taking the allegations of the bill to be true, it undoubtedly is, a case of a hard bargain. But equity does not relieve from hard bargains simply because they are such. It may be that the efficiency of the service and fairness in dealing with the company which performs such important and necessary service ought to require an advance in rates; such was the strongly announced opinion of the War Labor Board. But these and kindred considerations address themselves to the duly constituted authorities having the control of the subject-matter." See to the same effect *Burr v. Columbus*, (1919) 249 U. S. 415, 39 S. Ct. 354, 63 U. S. (L. ed.) —, decided on authority of the above case.

#### 4. Statutes of Limitations (p. 1116)

**Repeal of statute of limitations.**—To the same effect as the original annotation see *Gilbert v. Selleck*, (1919) 93 Conn. 412, 106 Atl. 439, where in the court said: "This remedial legislation is assailed as in violation of the Fourteenth Amendment to the Constitution of the United States, which declares that no state shall 'deprive any person of life, liberty, or property without due process of law.' The action it seeks to affect is based upon a contract of indemnity to recover for the violation of an implied promise to pay money. 'The statute of limitations does not destroy the debt; it merely takes away the remedy.' After its bar has operated, the debtor may waive it. He may make a new promise to pay, and the existing debt is a sufficient consideration. A vested right in a remedy which the debtor may disregard would be an anomaly. The debt, and hence the obligation to pay, never ceases. Hence it is that the repeal of the statute under which the bar has fallen lifts the bar and permits recovery of the debt theretofore barred. The statute was the creation of the legislative will, and its repeal did not affect the debt; it merely again permitted the enforcement of an existing obligation. The question has been authoritatively settled in *Campbell v. Holt*, 115 U. S.

620, on page 629, 6 Sup. Ct. 209, on page 214 (29 L. Ed. 483), in which opinion Mr. Justice Miller said: 'We are unable to see how a man can be said to have property in the bar of the statute as a defense to his promise to pay. In the most liberal extension of the use of the word "property" to choses in actions, to incorporeal rights, it is new to call the defense of lapse of time to the obligation to pay money property. It is no natural right. It is the creation of conventional law. . . . We can see no right which the promisor has in the law which permits him to plead lapse of time instead of payment, which shall prevent the legislature from repealing that law, because its effect is to make him fulfill his honest obligations.'

#### b. Changing Rules of Evidence (p. 1134)

**Presumptions.**—'As there is no vested right in rules of evidence, the general principle is that the obligation of a contract is not impaired, nor due process of law nor the equal protection of law denied by a statute making a fact proved presumptive evidence of another. This statement of the rule and its limitation has been adopted by the Supreme Court:

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.' *Mobile, etc., R. Co. v. Turnipseed*, (1910) 219 U. S. 35, 31 S. Ct. 136, 55 U. S. (L. ed.) 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A 463." *Virginia, etc., Coal Co. v. Charles*, (C. C. A. 4th Cir. 1918) 254 Fed. 379, 165 C. C. A. 599.

#### 14. Impairment Vel Non in Sundry Instances (p. 1137)

**Redemption of lands from foreclosure.**—The obligations of the contract of the state of California with a purchaser of public land, which gave to the state the right to foreclose for default in payment of the purchase price, and to the purchaser the privilege of redemption within twenty days from the entry of the foreclosure decree upon payment of the amount due the state and the costs of suit, were not impaired by the enactment of subsequent legislation under which, in case principal and interest were in arrears for five years, and the state had issued to a subsequent purchaser another certificate for the same land, the first purchaser's right to the land and to complete the contract of pur-

chase was cut off unless he should pay all unpaid interest within six months from the passage of the act. *Aikins v. Kingsbury*, (1918) 247 U. S. 484, 38 S. Ct. 558, 62 U. S. (L. ed.) 1226, *affirming* (1915) 170 Cal. 674, 151 Pac. 145.

### Vol. X, p. 1146, art. 1, sec. 10.

#### II. When Goods Lose Character as Imports or Domestic Character (p. 1148)

**Original package.**—Where cans of milk preparation are shipped from one state to another in fibre cases containing forty-eight one-pound cans the case is the original package and not each individual can. *Hebe Co. v. Shaw*, (1919) 248 U. S. 297, 39 S. Ct. 125, 63 U. S. (L. ed.) —.

### Vol. X, p. 1158, art. 1, sec. 10.

#### 1. When Consent to Be Given (p. 1158)

**Assistance to federal government in time of war.**—States may enact legislation beneficial to the federal government while it is at war with a foreign country, such for example as legislation compelling male residents of a state between eighteen and fifty-five to be employed during the period of the war and six months thereafter. *State v. McClure*, (Del. 1919) 105 Atl. 712.

### Vol. XI, p. 72, art. 3, sec. 1.

#### c. Validity of State Statutes Under State Constitutions (p. 79)

**Interpretation of municipal ordinance.**—The federal courts may interpret for themselves a municipal ordinance which is asserted to constitute a contract protected by the contract clause of the Federal Constitution against subsequent impairment. *Mitchell v. Dakota Cent. Telephone Co.*, (1918) 246 U. S. 396, 38 S. Ct. 362, 62 U. S. (L. ed.) 793.

#### 5. Interference by Political Department with Judicial Power (p. 81)

**Who is sovereign of another country as judicial question.**—Who is the sovereign *de jure* or *de facto* of a territory is not a judicial question, but is a political one, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens and subjects of that government. *Oetjen v. Central Leather Co.*, (1918) 246 U. S. 297, 38 S. Ct. 309, 62 U. S. (L. ed.) 726, *affirming* (1915) 87 N. J. L. 552, 704, 94 Atl. 789, L. R. A. 1917A 276; *Ricaud v. American Metal Co.*, (1918) 246 U. S. 304, 38 S. Ct. 312, 62 U. S. (L. ed.) 733.

**Vol. XI, p. 95, art. 3, sec. 2.****5 a (1) In General (p. 118)**

**Contract to serve as master of vessel.**—A contract made in California to proceed to Alaska and after arrival there to serve for a year as master of a vessel and perform certain duties in connection therewith for an agreed compensation is not governed by the laws of California, being of a maritime character and therefore governed by the maritime law. *Union Fish Co. v. Erickson*, (1919) 248 U. S. 308, 39 S. Ct. 112, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 9th Cir. 1916) 235 Fed. 385, 148 C. C. A. 647.

**7. Power of State to Legislate over Maritime Law (p. 122)**

**A state statute as to death by wrongful act confers no jurisdiction on a court of admiralty as to death by collision on the high seas.** *The Sagamore*, (C. C. A. 1st Cir. 1917) 247 Fed. 743, 169 C. C. A. 601.

**Vol. XI, p. 153, art. 3, sec. 2.****f (1) Between Two States (p. 156)**

**Questions of boundary between two states.**—The Supreme Court has jurisdiction of questions of boundary between two states. *Arkansas v. Tennessee*, (1918) 246 U. S. 158, 38 S. Ct. 301, 62 U. S. (L. ed.) 638.

**h. Settlement of Public Debt as Between Old and New State (p. 157)**

**To the same effect as the original annotation see** *Virginia v. West Virginia*, (1918) 246 U. S. 565, 38 S. Ct. 400, 62 U. S. (L. ed.) 883, which was another phase of the same case as that cited in the original annotation.

**Vol. XI, p. 175, art. 3, sec. 3.****4. Words Oral, Written, or Printed (p. 180)**

**Combination of intent and act.**—In addition to obviously necessary elements, treason, as thus defined, embraces the existence both of a state of mind and the commission of overt acts, and prescribes how the latter shall be proven. The latter requirement demands a trial ruling and is not a demurrer question or in any proper sense a question of pleadings. Treason, as we are now concerned with it, assumes, as the proper attitude of all who are subject to this law, that of being well disposed toward the United States and of being its well wisher, and brands as traitor one who adheres to its enemies and who also levies war upon the United States, or who, in adhering to its enemies, gives those enemies aid and comfort. It is conceivable that a defendant may have this condemned attitude of mind or be what is termed 'traitor at heart,' and yet not expose himself to the charge of legal treason because he has committed no traitorous act. It is also conceivable that one under the domination of folly or of factional feeling or directed by a perverted view of what

he is doing, or even a wrong-headed conscience, may do what would otherwise be traitorous acts, and yet not expose himself to that charge because the acts, although carrying all the consequences of traitorous acts, were done without traitorous purpose or intent. Such a man plays the part of a traitor, but is not a traitor at heart. *U. S. v. Werner*, (E. D. Pa. 1918) 247 Fed. 708.

**Vol. XI, p. 185, art. 4, sec. 1.****2. Effect of Proceedings of United States Courts (p. 190)**

**Decree by Circuit Court.**—A United States Circuit Court has jurisdiction to issue a decree quieting title to land of the complainant, alleged to be situated in the state where the court sits, and cancelling grants of the land to the defendant by another state, and such decree is entitled to be given full faith and credit by all other United States courts. *Ferguson v. Babcock Lumber, etc., Co.*, (C. C. A. 4th Cir. 1918) 252 Fed. 705, 164 C. C. A. 545.

**9. Effect of Foreign Judgment (p. 192)**

**Presumption as to validity of foreign judgment.**—There is a general presumption in favor of the regularity and validity of judgments of the courts of sister states and this presumption is strong enough to warrant the court in inferring that a judgment was rendered upon a count upon which it lawfully could have been entered. *Tucker v. Columbian Nat. Life Ins. Co.*, (Mass. 1919) 122 N. E. 285.

**c. Probate of Will (p. 211)**

**Soundness of mind of legatee.**—The refusal of a federal court sitting in Louisiana to require an executor to pay over a share of the decedent's estate to a legatee who had been adjudged incapable of taking care of his person and administering his estate by a judgment of interdiction of the Louisiana courts cannot be said to deny full faith and credit to a decree of a Tennessee court adjudicating such person to be of sound mind and entitled to settlement from all persons having control of any part of his estate, and removing any disability by reason of such interdiction, where, under the Louisiana law, no accounting or settlement may be had until either a curator has been appointed or the interdiction has been removed, since, whatever may be the conclusiveness of the Tennessee decree, it cannot operate upon the interdiction directly, but at most can only furnish ground for a conclusive right to have the interdiction removed. *Gasquet v. Fenner*, (1918) 247 U. S. 16, 38 S. Ct. 416, 62 U. S. (L. ed.) 956, *affirming* (E. D. La. 1916) 235 Fed. 997.

**(4) Decree of Alimony (p. 214)**

**Divorce with alimony.**—The refusal of a state court to treat a decree of a court of another state, granting a divorce with ali-

mony, as a bar to an independent suit by the wife in the former state to recover alimony out of the real property of the husband, situated in that state, denies to such decree the full faith and credit required by the Federal Constitution, where in the divorce proceedings there were charges of cruelty and counter charges, a display of property, prayers for divorce, and a prayer by the wife in her cross bill that the husband be required to restore a sum borrowed from her, "and that the court award her such alimony as the facts and law warrant, and all other proper and necessary relief," and where the decree, responding to the issues thus made and the relief thus prayed, adjudged the husband to be guilty of cruelty, granted the wife a divorce, and awarded her a lump sum "in full of alimony and all other demands set forth in the cross bill," and recited that it was rendered "by the consent" of the husband, on condition that no appeal be taken, and where the evidence in the second suit confirms the face of the decree, and that it was rendered by consent of the parties. *Bates v. Bodie*, (1918) 245 U. S. 520, 38 S. Ct. 182, 62 U. S. (L. ed.) 444, L. R. A. 1918C 355, reversing (1916) 99 Neb. 253, 156 N. W. 8.

#### j. Stockholders' Liability (p. 216)

**Stockholders' liability.**—A judgment of a North Dakota court by which the receiver of an insolvent Minnesota corporation was denied the right to enforce against one of its stockholders an order of a Minnesota court levying an assessment on the stockholders generally, made in a sequestration suit brought against the corporation conformably to Minn. Gen. Stat. 1905, secs. 3173, 3184-3187, denies the constitutional full faith and credit due the Minnesota laws and proceedings, although the Minnesota court may have been mistaken in its assumption that the corporation was of the class whose stock is assessable for corporate debts and was not one of the excepted class, where, in Minnesota, such an order is conclusive against all the stockholders, as to all matters relating to the amount, propriety and necessity of the assessment, including the questions of the character and insolvency of the corporation, leaving open the questions whether a particular person is a stockholder or holds the number of shares attributed to him, whether he has discharged his liability, or has a claim which may be set off against the assessment, and whether he has any other defense which is personal to himself. *Marin v. Augedahl*, (1918) 247 U. S. 142, 38 S. Ct. 452, 62 U. S. (L. ed.) 1038, reversing (1916) 32 N. D. 536, 156 N. W. 101.

#### n. Assessment on Members of Mutual Insurance Company (p. 217)

**Decree affecting assessment of members of mutual insurance company.**—A decree of the home state of a life insurance company issuing benefit certificates on the assessment plan, by which it was adjudged that it was

proper and reasonable for the company to hold a fund collected in advance in order to enable it to pay losses promptly, and that any excess in the fund above the average of the four preceding quarterly assessments should be distributed to certificate holders in diminution of assessments by crediting the excess on account of the next succeeding assessment, is denied the full faith and credit to which it is entitled, where the court of another state holds that a benefit certificate issued by such company was not forfeited by nonpayment of an assessment because such assessment, together with the fund on hand, exceeded the quarterly average. *Hartford Life Ins. Co. v. Barber*, (1917) 245 U. S. 146, 38 S. Ct. 54, 62 U. S. (L. ed.) 208, reversing (1916) 269 Mo. 21, 187 S. W. 867.

### Vol. XI, p. 220, art. 4, sec. 2.

**There Is No Doubt of the Power of the State to Prohibit Foreign Insurance Companies, Etc. (p. 229)**

**Statutory regulations affecting foreign insurance companies.**—A Pennsylvania fire insurance company which, in the exercise of its right, under the Pennsylvania laws, to write insurance on property outside the state, issued policies on property in Florida, dealing through local insurance brokers for a series of years, permitting them to receive and receipt for premiums and transfer them to it, and consult with them about the subject-matter and with what companies the risk was divided, and accepting the benefit of their action while receiving premiums and issuing new policies, cannot successfully claim that by construing Fla. Gen. Laws, secs. 2765, 2777, as making such brokers the agents of the insurance company with the right to waive a warranty in the policies as to the existence of concurrent insurance with an approved and designated company doing business in Florida, there was denied full faith and credit to the Pennsylvania laws, or that the privileges and immunities, due process of law, or equal protection of the laws clauses of the Federal Constitution were violated. *American F. Ins. Co. v. King Lumber, etc., Co.*, (1919) 250 U. S. 2, 39 S. Ct. 431, 63 U. S. (L. ed.) —.

#### 2. State Taxation (p. 232)

**Regulating railway construction work.**—An unconstitutional discrimination in favor of citizens of Tennessee as against those of other states, results from the provision of Tennessee Acts 1909, ch. 479, under which an annual license tax of \$100 in each county is imposed upon a person engaged in railway construction work in Tennessee who has his chief office outside the state, while a person engaged in the same business, but having his chief office within the state, pays an annual tax of but \$25 in each county. *Chaiker v. Birmingham, etc., R. Co.*, (1919) 249 U. S. 522, 39 S. Ct. 366, 63 U. S. (L. ed.) —.

reversing *Wright v. Jackson Constr. Co.*, (1917) 138 Tenn. 145, 190 S. W. 488, wherein the court said: "Replying to the claim that the statute in effect discriminates against citizens of other states, the Supreme Court of Tennessee, 138 Tennessee 145, 152, 153, said: 'The determining feature in the legislation quoted is the having of one's chief office in this state. Any citizen of this state, as well as any citizen of a foreign state, who has his chief office out of the state, must pay the \$100 tax; so of any domestic corporation, as well as foreign corporation, having its chief office out of the state. Any foreign corporation or citizen of another state, or firm, as well as domestic corporations, citizens of this state, and firms of this state having its or their chief office in this state, are all alike entitled to carry on a railroad construction business here on the payment of \$25. There is no discrimination at all.'

"With this conclusion we are unable to agree. Accepting the construction placed upon it by the Supreme Court, we think the quoted section does discriminate between citizens of Tennessee and those of other states by imposing a higher charge on the latter than it does on the former, contrary to § 2, Art. IV of the Federal Constitution — 'The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.'

"The power of a state to make reasonable and natural classifications for purposes of taxation is clear and not questioned; but neither under form of classification nor otherwise can any state enforce taxing laws which in their practical operation materially abridge or impair the equality of commercial privileges secured by the Federal Constitution to citizens of the several states. . . .

"It is insisted that no tender of any sum for license tax was made in time, and therefore plaintiff in error cannot question the validity of the enactment because of discrimination. But the Supreme Court expressly declared that the statute is liability of *Wright* at one hundred dollars. A tender of less would have availed nothing and it was therefore unnecessary."

#### c. Prohibiting Nonresidents Grazing Cattle (p. 242)

**Grazing on public lands.**—Privileges and immunities of citizens of the United States are not denied by the provisions of Idaho Rev. Codes 1908, § 6872, prohibiting the grazing of sheep on the federal public domain upon a range previously occupied by cattle. *Amaechevarria v. Idaho*, (1918) 246 U. S. 343, 38 S. Ct. 323, 62 U. S. (L. ed.) 763, affirming (1915) 27 Idaho 797, 152 Pac. 280.

#### II. Statute of Limitations (p. 247)

**Prohibiting certain actions except by citizens of state.**—A state statute which pro-

vides that "when a cause of action has arisen outside of this state, and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in this state unless plaintiff be a citizen of the state who has owned the cause of action ever since it accrued," is unconstitutional as being violative of this article and section of the Constitution. *Eggen v. Canadian Northern R. Co.*, (C. C. A. 8th Cir. 1918) 255 Fed. 937, 167 C. C. A. 229, wherein it was said: "It has been wisely seen that this provision of the Constitution is of comprehensive scope (*Ward v. Maryland*, 12 Wall. 418, 430, 20 L. Ed. 449; *Conner v. Elliot*, 18 How. 591, 593, 15 L. Ed. 497), and of deep influence in molding the Union into a compact nation (*Blake v. McClung*, 172 U. S. 239, 251, 19 Sup. Ct. 165, 43 L. Ed. 432; *Paul v. Virginia*, 8 Wall. 168, 180, 19 L. Ed. 357; *Lemmon v. People*, 20 N. Y. 607). Therefore the courts have prudently refrained from attempting any hard and fast definition of its terms (*Ward v. Maryland*, 12 Wall. 418, 430, 20 L. Ed. 449; *Conner v. Elliot*, 18 How. 591, 593, 15 L. Ed. 497; *McCready v. Virginia*, 94 U. S. 391, 395, 24 L. Ed. 248; *Blake v. McClung*, 172 U. S. 239, 248, 19 Sup. Ct. 165, 43 L. Ed. 432); but there is no divergence of opinion from the view expressed in *Cole v. Cunningham*, 133 U. S. 107, 113, 10 Sup. Ct. 269, 271, (33 L. Ed. 538) by Mr. Chief Justice Fuller, who said: 'The intention of section 2, art. 4, was to confer on the citizens of the several states a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances; and this includes the right to institute actions.' Which view was emphasized by Mr. Justice Moody in *Chambers v. B. & O. R. R. Co.*, 207 U. S. 142, 148, 149, 28 Sup. Ct. 34, 35 (52 L. Ed. 143) who said: 'The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. . . Equality of treatment in respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution. . . Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land.' *Ward v. Maryland*, 12 Wall. 418, 430 (20 L. Ed. 449); *McCready v. Virginia*, 94 U. S. 391, 395, 24 L. Ed. 248; *Blake v. McClung*, 172 U. S. 239, 249, 19 Sup. Ct. 165, 43 L. Ed. 432; *Harris v. Balk*, 198 U. S. 215, 223, 25 Sup. Ct. 625, 49 L. Ed. 1023, 3 Ann. Cas. 1084; *Corfield v. Coryell*, 4 Wash. C. C. 371, 380, Fed. Cas. No. 3,230.

We regard section 7709 as opposed to this constitutional requirement, as it has been expounded in the above decisions, and therefore void."

**17. Discriminating Against Individuals Transacting Insurance (p. 249)**

**Discrimination in favor of residents.**—A state statute is constitutional under this clause of the Constitution which is entitled "An act to provide for the licensing of insurance brokers," defines in its first section an insurance broker "to be such person as shall be licensed by the insurance commissioner to represent citizens" of the state "for the placing of insurance in insurers" in the "state or in any other state or country," and provides in the second section, among other conditions, that only such persons may be licensed as are residents of the state and have been licensed insurance agents of the state for at least two years. *La Tourette v. McMaster*, (1919) 248 U. S. 465, 39 S. Ct. 160, 63 U. S. (L. ed.) —, *affirming* (1916) 104 S. C. 501, 89 S. E. 398, set out in the original annotation.

**Vol. XI, p. 284, art. 4, sec. 3.**

**b. Power to Dispose of Public Lands (p. 286)**

**Exemption from debts of lands conveyed.**—R. S. sec. 2296 (see vol. 8, p. 575) provides as follows: "No lands acquired under the provisions of this [homestead] act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent thereof." This statute has been held to be constitutional as against the contention that Congress had no power to restrict alienation of homestead lands after conveyance by the United States in fee simple. *Ruddy v. Rossi*, (1918) 248 U. S. 104, 39 S. Ct. 46, 63 U. S. (L. ed.) —, *reversing* on other grounds (1916) 28 Idaho 376, 154 Pac. 977.

**Vol. XI, p. 345, amend. 1.**

**Scope of amendment affecting free speech.**—"The First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language." *Frohwerk v. U. S.*, (1919) 249 U. S. 204, 39 S. Ct. 249, 63 U. S. (L. ed.) —.

**The Espionage Act of June 15, 1917** (see 1918 Supp. p. 118) does not fall within the language of this amendment. *Schenck v. U. S.*, (1919) 249 U. S. 47, 39 S. Ct. 247, 63 U. S. (L. ed.) —; *Frohwerk v. U. S.*, (1919) 249 U. S. 204, 39 S. Ct. 249, 63 U. S. (L. ed.) —; *Debs v. U. S.*, (1919) 249 U. S. 211, 39 S. Ct. 252, 63 U. S. (L. ed.) —.

**Contempt (p. 346)**

**Newspaper publications having reference to pending judicial action which tended and**

were intended to provoke public resistance to an injunction order, should one be made, and amounted to an attempt unduly to influence the judge with reference to his decision in the matter pending before him, were not safeguarded by the constitutional guaranty of the freedom of the press from being made the basis of the summary contempt proceedings which the Judicial Code, § 268, recognizes and sanctions. *Toledo Newspaper Co. v. U. S.*, (1918) 247 U. S. 402, 38 S. Ct. 560, 62 U. S. (L. ed.) 1186, *affirming* (C. C. A. 6th Cir. 1916) 237 Fed. 986, 150 C. C. A. 636.

**Vol. XI, p. 351, amend. 4.**

**II. Affirmation of Common-law Principles (p. 352)**

**Waiver of objection to search and seizure.**—In *U. S. v. Gouled*, (S. D. N. Y. 1918) 253 Fed. 242, regarding the waiver of objections to searches and seizures, it was said: "The purpose of the constitutional provision invoked was to protect the citizen against arbitrary and tyrannical power, and not to furnish him a shield with which to shift according to the different aspect in which his case presented itself to his mind as time went on. And so it is recognized clearly that, while the law protects against unlawful seizures and searches, the defendant may waive, if he thinks it to his advantage, or for any reason, the manner and method of the acquisition of his papers, and thereupon the constitutional objection is removed."

**III. Applicable to Criminal Cases Only (p. 353)**

**Persons protected.**—This Amendment embraces all persons, even those accused of crime, although its scope is limited by allowing the search of persons accused of crime when legally arrested, etc. *In re Tri-State Coal, etc., Co.*, (W. D. Pa. 1918) 253 Fed. 605.

**VI. "Unreasonable Searches and Seizures" (p. 354)**

**Consent of an agent of persons, whose property has been seized under an illegal search warrant, to the execution of the warrant does not have the effect of depriving the principals of their rights under this amendment.** *In re Tri-State Coal, etc., Co.*, (W. D. Pa. 1918) 253 Fed. 605.

**5. Compulsory Production of Books and Papers (p. 355)**

**Impounding of exhibits in possession of court.**—Exhibits voluntarily offered in an infringement suit by the plaintiff may be subsequently impounded by the court for use before the grand jury as the basis for an indictment against him. Such action does not constitute an unreasonable seizure and make the plaintiff a compulsory witness against himself. *Perlman v. U. S.*, 247 U. S. 7.

wherein the court said: "Perlman contends that the proposed use by the United States before the grand jury of the exhibits as a basis for an indictment against him constitutes an unreasonable seizure and makes of him a compulsory witness against himself, in violation of the Fourth and Fifth Amendments. In other words, he claims the same sanctuary for the exhibits in the hands of the court as though they were in his hands and had never been published or delivered to the world. For this he invokes certain principles and cases. The principles are well established. They are paraphrases of the Constitution, giving it in cases a more precise specialization. They preclude, of course, compulsion, either upon the individual or, under some circumstances, his property; nor is it a condition or part of compulsion that there be an actual entry upon premises, an actual search and seizure. The principles preclude as well the extortion of testimony or detrimental inferences from silence or refusals to testify. The incidences of the cases in which the principles were declared do not help Perlman. In all of them there was force or threats or trespass upon property, some invasion of privacy or governmental extortion. In *Boyd v. United States*, 116 U. S. 616, there was an order of the court requiring the production of private books, invoices and papers, the alternative of refusal being that their character as asserted by counsel should be taken as confessed. In *Counselman v. Hitchcock*, 142 U. S. 547, there was an effort to compel a witness to disclose circumstances which might be evidence against him of the commission of an offense or might connect him with it. *Hale v. Henkel*, 201 U. S. 43, is of like illustration. In *United States v. Wong Quong Wong*, 94 Fed. Rep. 832, private letters were opened. In *United States v. Mills*, 185 Fed. Rep. 318, there was a general seizure of all of the defendant's business records by the United States marshal when executing a warrant of arrest. In *United States v. Abrams*, 230 Fed. Rep. 313, business papers were delivered to an officer under threats or promises of benefit. In *Weeks v. United States*, 232 U. S. 383, there was an invasion of premises without a search warrant and the carrying away of certain letters and envelopes. The latter case is especially relied on by counsel, and it is definite as to principles and as to seizures the Constitution forbids and those it permits. The distinctions are made clear and the discussion leaves nothing to be added of either principles or their illustration. But it is not like the case at bar. In it there was an invasion of the defendant's privacy, a taking from his immediate and personal possession. In the case at bar there was a voluntary exposition of the articles, for use as evidence in the District Court and in the Circuit Court of Appeals (231 Fed. Rep. 453 and 734), that judicial action should be based upon them, action prayed for by him

against another. And they served his purpose; they prevailed as proof and secured a judgment for him."

A letter taken from a seaman on his landing by a private detective acting temporarily as a substitute for a custom house guard at the latter's request, is admissible on a trial of the seaman for unlawfully bringing the letter into the United States. *U. S. v. Welsh*, (S. D. N. Y. 1917) 247 Fed. 239, wherein the court said: "His counsel argues that under the cases of *Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and *Flagg v. United States*, 233 Fed. 481, 147 C. C. A. 367, the evidence thus procured could not be used against the defendant. I do not think the government can rest upon the proposition that it was not liable for the acts of McGinnis, because he was a private detective. Martin, the custom house guard, appears to have asked him to act for him while he was temporarily absent, and in the search he must be regarded as a government official pro hac vice. But, assuming this to be the fact, the cases quoted do not apply to the present situation. They only go so far as to hold that private books and papers cannot be seized and used as incriminating evidence. The corpus delicti itself has not, I think, been held incapable of detention and production to establish the crime. If the defendant is right, testimony of a witness of a murder, though furnishing the only evidence, would be excluded, and the corpse could not be presented before the coroner's jury, if the witness discovered the murder by rushing into a house without a search warrant, where he heard cries of distress. Here the letter is in no real sense the property of the defendant, but is the very unlawful thing imported contrary to the statute.

"I think the District Attorney is right in urging that any one could arrest the person carrying it, who was thus committing a felony in his presence. To be sure, the man making the arrest did not know that a felony was being committed. He took the risk of civil and perhaps criminal actions for assault and battery if his suspicions turned out to be without foundation; but in this case it appears on the face of the indictment, and from the evidence adduced, that the suspicions were well founded, and the defendant was engaged in the commission of a felony. The constitutional safeguards against self-incrimination do not prevent the arrest of men engaged in the commission of crimes, or the seizure of property whereby the crime is being effected."

A person's home and place of business are not to be invaded forcibly and searched by the curious and suspicious, or even by a disinterested officer of the law, unless he is armed with a search warrant. *Veeder v. U. S.*, (C. C. A. 7th Cir. 1918) 252 Fed. 414, 164 C. C. A. 338.

**6. Compelling an Officer of Corporation to Produce Corporate Books and Papers (p. 357)**

A corporation is not privileged from the production of its books and papers, even though they tend to incriminate an officer thereof. *Linn v. U. S.*, (C. C. A. 2d Cir. 1918) 251 Fed. 476, 163 C. C. A. 470.

**11. Use of Papers or Property Illegally Obtained as Evidence (p. 359)**

Where incriminating documents were obtained upon a valid search warrant issuing against socialist headquarters, they were held admissible in evidence in a prosecution of the general secretary who had charge of the headquarters and sent such documents through the mails in violation of the Espionage Act. *Schenck v. U. S.*, (1919) 249 U. S. 47, 39 S. Ct. 247, 63 U. S. (L. ed.) —.

The denial of a motion to return a letter addressed to one of the defendants in a criminal prosecution under section 37 of Penal Laws [7 Fed. Stat. Ann. 534], and seized under a search warrant issued on a sufficient affidavit, is proper and not in violation of the defendant's constitutional rights under this amendment, where the letter contains evidence against the writer, who is a co-defendant. *U. S. v. Gouled*, (S. D. N. Y. 1918) 253 Fed. 770.

**1. Necessity of Showing Probable Cause (p. 360)**

No search warrant should be issued unless the judge has first been furnished with facts under oath which tend to establish probable cause for its issuance. *Veeder v. U. S.*, (C. C. A. 7th Cir. 1918) 252 Fed. 414, 164 C. C. A. 338.

**Vol. XI, p. 363, amend. 5.**

**I. Not a Limitation on the States (p. 363)**

That this amendment is not a limitation, etc.—To the same effect as the original annotation, see *Palmer v. Ohio*, (1918) 248 U. S. 32, 39 S. Ct. 16, 63 U. S. (L. ed.) —, dismissing writ of error to review (1917) 96 Ohio St. 513, 118 N. E. 102.

What constitutes "indictment." — In *Cooper v. U. S.*, (C. C. A. 4th Cir. 1917) 247 Fed. 45, 159 C. C. A. 263, the court in passing on an attack in an indictment for want of evidence to warrant the finding thereof said: "The Constitution (Const. Amend. 5) provides that one charged with certain offenses shall not be placed upon trial until the grand jury shall have investigated the subject-matter of the offense alleged in the indictment, and returned a true bill thereon. To this end certain formalities must be complied with in the preparation and presentation of the bill to the grand jury. Technically speaking, such paper cannot be called a bill of indictment until it is found 'a true bill' by a properly constituted grand jury.

An indictment can only be found upon the testimony of a competent and material witness or witnesses, who must be sworn and examined before the grand jury."

**Vol. XI, p. 374, amend. 5.**

**1. Not a Limitation on the States (p. 375)**

Amendment as limitation on states.—This amendment was not intended to limit the powers of the state governments in respect to their own people, but merely operates as a restraint upon federal action. *State v. Felch*, (Vt. 1918) 105 Atl. 23.

**Vol. XI, p. 390, amend. 5.**

**2. Corporations (p. 392)**

An officer of a corporation.—To the same effect as the original annotation, see *Linn v. U. S.*, (C. C. A. 2d Cir. 1918) 251 Fed. 476, 163 C. C. A. 470.

**VI. "In Any Criminal Case" (p. 393)**

In general.—"Long before the separation of the American Colonies from the mother country, compulsion of witnesses to appear and testify had become established in England. By Act of 5 Eliz., c. 9, § 12 (1562), provision was made for the service of process out of any court of record requiring the person served to testify concerning any cause or matter pending in the court, under a penalty of ten pounds besides damages to be recovered by the party aggrieved. See *Havithbury v. Harvy*, Cro. Eliz. 131; 1 Leon. 122; *Goodwin v. West*, Cro. Car. 522, 540; March, 18. When it was that grand juries first resorted to compulsory process for witnesses is not clear. But as early as 1612, in the Countess of Shrewsbury's case, Lord Bacon is reported to have declared that 'all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery.' 2 How. St. Tr. 769, 778. And by Act of 7 & 8 Wm. III, c. 3, § 7 (1695), parties indicted for treason or misprision of treason were given the like process to compel their witnesses to appear as was usually granted to compel witnesses to appear against them; clearly evincing that process for crown witnesses was already in familiar use. At the foundation of our Federal Government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States. By the Fifth Amendment a presentment or indictment by grand jury was made essential to hold one to answer for a capital or otherwise infamous crime, and it was declared that no person should be compelled in a criminal case to be a witness against himself; while, by the Sixth Amendment, in all



criminal prosecutions the accused was given the right to a speedy and public trial, with compulsory process for obtaining witnesses in his favor. By the first Judiciary Act (September 24, 1789, c. 20, § 30, 1 Stat. 73, 88), the mode of proof by examination of witnesses in the courts of the United States was regulated, and their duty to appear and testify was recognized. These provisions, as modified by subsequent legislation, are found in §§ 861-865, Rev. Stats. By Act of March 2, 1793, c. 22, § 6, 1 Stat. 333, 335, it was enacted that subpoenas for witnesses required to attend a court of the United States in any district might run into any other district, with a proviso limiting the effect of this in civil causes so that witnesses living outside of the district in which the court was held need not attend beyond a limited distance from the place of their residence. See § 876, Rev. Stats. By § 877, originating in Act of February 26, 1853, c. 80, § 3, 10 Stat. 161, 169, witnesses required to attend any term of the district court on the part of the United States may be subpoenaed to attend or testify generally; and under such process they shall appear before the grand or petit jury, or both, as required by the court or the district attorney. By the same Act of 1853 (10 Stat. 167, 168), fees for the attendance and mileage of witnesses were regulated; and it was provided that where the United States was a party the marshal on the order of the court should pay such fees. Rev. Stats., §§ 848, 855. And §§ 879 and 881, Rev. Stats., contain provisions for requiring witnesses in criminal proceedings to give recognizance for their appearance to testify, and for detaining them in prison in default of such recognizance. In all of these provisions, as in the general law upon the subject, it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide." *Blair v. U. S.*, (1919) 250 U. S. 273, 39 S. Ct. 468, 63 U. S. (L. ed.) —.

#### VIII. Before Grand Jury (p. 396)

**Right of witness to challenge constitutionality of statute.**—Witnesses summoned to testify before a federal grand jury are not concerned with the possible invalidity of the statutes under which the grand jury's investigation is conducted, and the consequent want of jurisdiction of court or jury over the subject matter, and they may not urge that objection to justify their contumacy in refusing to testify. *Blair v. U. S.*, (1919) 250 U. S. 273, 39 S. Ct. 468, 63 U. S. (L. ed.) —, *affirming* (S. D. N. Y. 1918) 253 Fed. 800.

#### 3. Requiring Production of Private Books and Papers (p. 402)

**Papers obtained under search warrant.**—Papers obtained by use of a search warrant, if otherwise competent evidence, cannot be excluded as in violation of the defendant's constitutional rights against unlawful search and seizure. *Rice v. U. S.*, (C. C. A. 1st Cir. 1918) 251 Fed. 778, 164 C. C. A. 12.

#### Vol. XI, p. 408, amend. 5.

#### VIII. Application to Indians (p. 414)

**Approval by Secretary of Interior of conveyances of Indians.**—A statute requiring approval by the Secretary of the Interior of conveyances made by a tribal Indian is not unconstitutional, even as applied to land upon the conveyance of which no such restriction existed at the time of its enactment, and notwithstanding the admission of its owner to citizenship. *Brader v. James*, (1918) 246 U. S. 88, 38 S. Ct. 285, 62 U. S. (L. ed.) 591, *affirming* (1916) 49 Okla. 734, 154 Pac. 560.

#### 4 a (1) In General (p. 437)

**Substitution of joint rate for through rate.**—The substitution of a through route and joint rate for the transportation of logs and lumber to a designated city not higher than the rate to another city, equally distant from the place from which the transportation commences, in place of a through rate made by adding the rate to the second city, which was a rate-breaking point, and the local rate therefrom to the former city, is not a violation of the Fifth Amendment of the Federal Constitution, where the carriers are given the right to elect between establishing a new and shorter route or continuing the existing route, and the joint rate is reasonable, while the old rate is unreasonable. *St. Louis Southwestern R. Co. v. U. S.*, (1917) 245 U. S. 136, 38 S. Ct. 40, 62 U. S. (L. ed.) 199, *affirming* (W. D. Ky. 1916) 234 Fed. 868.

#### 25. Deprivation of Rights under Foreign Contracts (p. 446) [New]

The Act of March 4, 1915, ch. 153, § 4 (9 Fed. Stat. Ann. 158), which authorizes seamen to demand one-half of their earned wages on the arrival of their ships at American ports, is not unconstitutional on the ground that it deprives ship owners of rights under wage contracts made in foreign jurisdiction. *The Strathearn*, (C. C. A. 5th Cir. 1919) 256 Fed. 631, *reversing* (N. D. Fla. 1917) 239 Fed. 583, in original annotation.

#### Vol. XI, p. 447, amend. 5.

#### 1. No Distinction Between Real and Personal Property (p. 451)

**Placer mining claim as property.**—A placer mining claim which has been perfected in

accordance with law is property. When so perfected it has the effect of a grant by the United States of the right of present and exclusive possession, and if taken by the United States just compensation must be made therefor under the Constitution. *North American, etc., Co. v. U. S.*, (1918) 53 Ct. Cl. 424.

## 2. Property of a State (p. 451)

**Public highway.**—While the property rights in a public highway held by a county in Kentucky are an easement held in trust for the benefit of the public, and are within most of the definitions of public and not private property, yet for purposes of compensation, as for a taking under the Constitution, they are to be regarded as private property. *Wayne County v. U. S.*, (1918) 53 Ct. Cl. 417.

### 1. In General (p. 452)

The noise, vibration, or concussion caused by the firing of guns does not constitute a taking of the premises, but is merely a nuisance for which the government is not liable. *Portsmouth Harbor Land, etc., Co. v. U. S.*, (1918) 53 Ct. Cl. 210.

### (3) Intermittent Overflows (p. 456)

**Erection of dams.**—The erection of certain government dams in aid of navigation in the Monongahela river caused increased and more prolonged flood heights and more frequent overflows than theretofore of certain county roads. It was held, on a review of the authorities, that this is not a taking of private property within the purview of the Fifth Amendment to the Constitution, and that to the extent that the roads in question were injured or destroyed the damages were consequential. *County Ct. v. U. S.*, (1918) 53 Ct. Cl. 120.

## 17. Firing Over Island in Naval Target Practice (p. 458)

**Firing over land in target practice.**—Land cannot be said to have been appropriated by the federal government so as to raise an implied agreement on its part for compensation merely because of some occasional acts of gun fire from an adjacent coast defense battery, and the passing of the projectiles over and across such land. *Portsmouth Harbor Land, etc., Co. v. U. S.*, (1919) 250 U. S. 1, 39 S. Ct. 399, 63 U. S. (L. ed.) —, wherein the court said: "Recovery was sought in the court below from the United States for property taken by it as the result of the alleged firing of guns in a fortification on the coast of Maine and the passing of the projectiles over and across a portion of the land alleged to have been taken. The court finding that a former case by it decided against the owners and here affirmed (*Peabody v. U. S.*, (1913) 231 U. S. 530 [34 S. Ct. 159, 58 U. S. (L. ed.) 351]), for taking of the same land resulting from instances of

gun fire resulting from the same fort and guns, was identical with this, except for some occasional subsequent acts of gun fire, held that case to be conclusive of this and rejected the claim on the merits.

"Coming to consider this action of the court in the light of the findings by it made, we are constrained to the conclusion that it was right and that no possible difference exists between this and the *Peabody Case*."

## 1. What Constitutes Just Compensation (p. 466)

**Consequential damages.**—Where the government appropriates a portion of an entire tract of private land for public purposes, it is also liable, in ascertaining the just compensation prescribed by the Fifth Amendment, for the damage to the remainder resulting from such taking, embracing injury due to the use to which the part appropriated is to be devoted. *Archer v. U. S.*, (1918) 53 Ct. Cl. 405.

### b. Special Benefits to Owner (p. 472)

**Benefits resulting to owner of property abutting on elevated railroad.**—The equal protection of the laws is not denied the owner of property abutting on a street in which an elevated railroad has been constructed, merely because, in judicially determining the actionable damage to the premises, if any, consequent upon the construction, operation, and maintenance of such railroad, the increase in value of the premises from the resulting increased travel is considered and treated as a deductible special benefit, although enjoyed by other property in the vicinity. *McCoy v. Union El. R. Co.*, (1918) 247 U. S. 354, 38 S. Ct. 504, 62 U. S. (L. ed.) 1156, affirming (1916) 271 Ill. 490, 111 N. E. 517.

## Vol. XI, p. 474, amend. 6.

### II. 1. In General (p. 475)

**Public trial.**—In *Davis v. U. S.*, (C. C. A. 8th Cir. 1917) 247 Fed. 394, 159 C. C. A. 448, L. R. A. 1918C 1164, it was held to be error from which prejudice to the accused would be implied, and a violation of the 6th Amendment to the Constitution, for the exclusion of the public from a room at one session of a criminal trial all persons except two relatives of the accused, a few newspaper men and about ten members of the bar. The circumstances were stated by the court as follows: "The crime of which defendants were charged had connection with a train robbery, and the trial, which was held at Muskogee, Okl., excited more than ordinary interest. At previous sessions the courtroom was crowded with spectators, so much so that in one instance the court directed the bailiffs to clear the aisles, so that witnesses would not be impeded when called. Considerable ill feeling had developed between the defendants, their

relatives and friends, and some of the witnesses for the prosecution, and the court had placed the latter in the custody and care of an officer. Precautions had also been taken that defendants should come unarmed into the courtroom. On the evening of the night session an encounter occurred in a restaurant, in which a relative of one of the defendants hit a witness for the prosecution across the face with a newspaper. This was reported to the court; also that one or more of the witnesses in the courtroom were intoxicated. It does not appear that the courtroom was crowded beyond its seating capacity when the order to clear it was made, or that any person was making a disturbance or threatening to do so, or that there was any well-founded apprehension that a disturbance would occur."

### 3 a. In General (p. 486)

**Failure to negative statutory exception.**—The fact that section 8 of the Harrison Narcotic Law (4 Fed. Stat. Ann. 187) provides that it shall be unnecessary for an indictment under that Act to negative the statutory exceptions and exemptions, does not render it unconstitutional as violating this amendment. *Fyke v. U. S.*, (C. C. A. 5th Cir. 1918) 254 Fed. 225, 165 C. C. A. 513.

## Vol. XI, p. 494, amend. 7.

### 2. Contradistinction to Equity and Admiralty Jurisprudence (p. 498)

**Transfer of case to law side of court.**—The error of a federal District Court, sitting in New York, in ordering transferred to the equity side of the court that one of two counts in an action at law which claims damages for breach of a contract to bequeath a specified sum, may be corrected by granting mandamus to require the District Court to proceed and to give plaintiff her right to a trial at common law. *Ex p. Simons*, (1918) 247 U. S. 231, 38 S. Ct. 497, 62 U. S. (L. ed.) 1094.

## Vol. XI, p. 518, amend. 8.

### 1. When Within the Statute (p. 519)

**Fine held not excessive.**—A fine of \$22,400, being \$100 for each failure of a carrier to comply with an order of the State Railroad Commission which, conformably to a statutory mandate, required such carrier to stop two interstate passenger trains, one each way, at a designated county seat, is not excessive, where the local statute provides for a suit to test the validity of the order in a court either of the state or of the United States, and the carrier saw fit to await proceedings against it. *Gulf, etc., R. Co. v. Texas*, (1918) 246 U. S. 58, 38 S. Ct. 236, 62 U. S. (L. ed.) 574, *affirming* (Tex. Civ. App. 1914) 169 S. W. 385.

## Vol. XI, p. 523, amend. 10.

### VI. As to Rights of Property (p. 528)

**Transportation of child-made goods in interstate commerce.**—Powers over local matters reserved to the states by U. S. Const. 10th Amend., are invaded by the enactment by Congress of the Act of September 1, 1916 (39 Stat. at L. 675, ch. 432, 1918 Supp. Fed. Stat. Ann. 426), which prohibits the transportation in interstate commerce of manufactured goods, the produce of a factory in which, within thirty days prior to the removal of the goods, children under fourteen have been employed, or children between fourteen and sixteen have been employed more than eight hours in a day, or more than six days in a week, or between seven in the evening and six in the morning. *Hammer v. Dagenhart*, 247 U. S. 251.

## Vol. XI, p. 530, amend. 11.

### 1. In General (p. 537)

**Action against state bank examiner for damages for negligent acts.**—The immunity of a state from suit does not extend to an action against the bank commissioner of the state and his surety, brought by a depositor in an insolvent bank to recover the damage he claims to have sustained through the bank commissioner's wilful and negligent disregard of the state laws, whereby the bank's officers were enabled so to conduct its affairs as to bring it to insolvency, making it necessary for him to take possession of it with its assets depleted, and through his conduct after taking possession in subordinating plaintiff's claim to other claims of like character, in violation of the equal protection and due process of law clauses of the Federal Constitution, where the petition, considered as a whole, negatives state action or liability, since the references to the Federal Constitution may well be regarded as emphasizing the bank commissioner's wrongdoing, and not as setting up an independent ground of recovery. *Johnson v. Lankford*, (1918) 245 U. S. 541, 38 S. Ct. 203, 62 U. S. (L. ed.) 460.

A state's immunity from suit is not infringed by an action against the bank commissioner of the state and his surety, brought by a depositor and stockholder in an insolvent bank to recover the damages which he claims to have sustained through the bank commissioner's wilful and negligent disregard of the state laws whereby the bank's officers were enabled so to conduct its affairs as to bring it to insolvency, making it necessary for him to take possession of it with its assets depleted, and through his conduct after taking possession of the bank, whereby plaintiff's claim was subordinated to that of other depositors in the same situation, in violation of the due process and equal protection of the laws clauses of the Federal Constitution, and through the enforcement of the state's lien upon the assets of the bank

so as to give other depositors a preference and abridge plaintiff's privileges and immunities, where the petition, considered as a whole, negatives state action or liability, since the references to the Federal Constitution may well be regarded as emphasizing the bank commissioner's wrongdoing, not as setting up an independent ground of recovery. *Martin v. Lankford*, (1918) 245 U. S. 547, 38 S. Ct. 205, 62 U. S. (L. ed.) 464.

#### 10 a. To Restrain Enforcement of Unconstitutional Statute (p. 542)

To same effect as original annotation, see *Rockaway Fac. Corp. v. Statesbury*, (N. D. N. Y. 1917) 255 Fed. 345.

"It is now settled doctrine 'that individuals, who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a federal court of equity from such action.' *Ex parte Young*, 209 U. S. 123, 155, 156; *Western Union Telegraph Co. v. Andrews*, 216 U. S. 165, 166, 167; *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U. S. 278, 293; *Truax v. Raich*, 239 U. S. 33, 37; *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 506. But no such injunction 'ought to be granted unless in a case reasonably free from doubt,' and when necessary to prevent great and irreparable injury. *Ex parte Young, supra*, 166. The jurisdiction should be exercised only where intervention is essential in order effectually to protect property rights against injuries otherwise irremediable." *Cavanaugh v. Looney*, (1919) 248 U. S. 453, 39 S. Ct. 142, 63 U. S. (L. ed.) —.

#### Vol. XI, p. 554, amend. 13, sec. 1.

##### 1 a. In General (p. 556)

State statute requiring male residents to work during war.—A state statute requiring male residents of the state between the ages of 18 and 55 to be employed during the period of the world war and six months thereafter did not violate the Federal Constitution. *State v. McClure*, (Del. 1919) 105 Atl. 712.

#### Vol. XI, p. 577, amend. 14, sec. 1.

##### 4. Limitations of the First Eight Amendments (p. 588)

Rights specified in first eight amendments as protected by this clause.—"Although it has been vigorously asserted that the rights specified in the first eight amendments are among the privileges and immunities protected by the Fourteenth Amendment, and although this view has been defended by

many distinguished jurists, including several justices of the federal Supreme Court, that court holds otherwise and asserts that it is the character of the right claimed, whether specified as above or not, that is controlling. *Maxwell v. Dow*, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597." *State v. Felch*, (Vt. 1918) 105 Atl. 23.

##### b. Insurance (p. 604)

Suicide not a defense.—A state statute, restricted in its benefits to citizens of the state, providing that suicide of the insured shall be a defense to liability on a life insurance policy unless suicide was contemplated at the time of the application, does not abridge the privileges or immunities of citizens of the United States. *Wheeler v. Business Men's Acc. Ass'n*, (W. D. Mo. 1918) 247 Fed. 677.

##### h. License to Deal in Trading Stamps (p. 615)

License to deal in trading stamps.—A state statute requiring dealers in trading stamps to be licensed is constitutional. *Sperry, etc., Co. v. State*, (Ind. 1919) 122 N. E. 585.

#### Vol. XI, p. 616, amend. 14, sec. 1.

##### I. Prohibition on State Action (p. 634)

Form in which legislative power exerted.—The protection of the Federal Constitution applies, whatever the form in which the legislative power of the state is exerted, whether by a Constitution, an act of the legislature, or an act of any subordinate instrumentality of the state exercising delegated legislative authority, like an ordinance of a municipality, or an order of a commission. But a "specification" in a bulletin of "instruction and information to dealers, and weights and measures officials," issued by a state superintendent of weights and measures, which states that "all combination spring and lever computing scales must be equipped with a device which will automatically compensate for changes of temperature at zero balance and throughout the whole range of weight graduations," cannot be said to be a law or regulation, such as comes within the scope of the several provisions of the Federal Constitution designed to secure the rights of citizens as against action by the states that is arbitrary, unreasonable, discriminatory, or that interferes with interstate commerce, where such official is not clothed with power to prescribe rules of action which city and county sealers are forced to follow, or to prohibit the use in the state of scales not sealed in accordance with his regulations, since the function of such specification must be deemed to be educational, and at most advisory. *Standard Computing Scale Co. v. Farrell*, (1919) 249 U. S. 571, 39 S. Ct. 380, 63 U. S. (L. ed.) —, affirming (S. D. N. Y. 1916) 242 Fed. 87.

**X 1. Exercise of Police Power (p. 647)**

**Extension of police power over public domain.**—The police power of a state extends over the federal public domain, at least where there is no congressional legislation on the subject. *Omaechevarria v. Idaho*, (1918) 246 U. S. 343, 38 S. Ct. 323, 62 U. S. (L. ed.) 763, *affirming* (1915) 27 Idaho, 797, 152 Pac. 280.

**Requiring male residents to work during period of war.**—A state statute compelling male residents of the state between the ages of eighteen and fifty-five to be employed during the period of the world war and six months thereafter is within the reasonable exercise of the police power. *State v. McClure*, (Del. 1919) 105 Atl. 712.

**4. State Court Must Have Jurisdiction (p. 652)**

**Judgment against one not a party or privy.**—The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. And as a state may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privy with a party therein. *Postal Tel. Cable Co. v. Newport*, (1918) 247 U. S. 464, 39 S. Ct. 566, 62 U. S. (L. ed.) 1215.

**7. State Control Over Court Procedure (p. 654)**

**Rule of evidence.**—There is no want of due process of law in the enactment of a reasonable rule of evidence. *Virginia, etc., Coal Co. v. Charles*, (W. D. Va. 1917) 251 Fed. 83.

**t (1) Sufficiency of Indictment (p. 661)**

**Necessity of prosecuting by indictment or information.**—"Due process of law" as that expression is used here does not necessarily require that a state shall prosecute even for felony by presentment or indictment. It is competent for a state legislature to invest municipal and other subordinate courts with jurisdiction to try and punish offenders against the statute. *Le Clair v. White*, (1918) 117 Me. 335, 104 Atl. 516.

**w. Former Jeopardy (p. 667)**

**Exceptions by state in criminal cases.**—A state statute authorizing exceptions by the state in criminal cases does not violate the due process clause. *State v. Felch*, (Vt. 1918) 105 Atl. 23.

**Former jeopardy.**—"It is interesting to note in this connection that the question whether double jeopardy amounts to want of due process under the Federal Constitution was suggested and its importance recognized by Mr. Justice Harlan in *Dreyer v. Illinois*, 187 U. S. 71, 23 Sup. Ct. 28, 47 L. Ed. 79,

but was left undecided. It is also of interest to note that in *Ex parte Ulrich* (D. C.) 42 Fed. 587, it was held by Judge Phillips that, inasmuch as it is a principle of the common law that no one shall be twice placed in jeopardy for the same offense, the trial and commitment of one who has already been partly tried and in legal effect acquitted of the same offense is depriving him of his liberty without due process of law, within the meaning of the Fourteenth Amendment." *State v. Felch*, (Vt. 1918) 105 Atl. 23.

**(5) Opportunity to Present Evidence (p. 669)**

**Error in admission of evidence and entering judgment.**—Error of a trial judge in admitting evidence or entering judgment after full hearing does not constitute a denial of due process of law. *Jones v. Buffalo Creek Coal, etc., Co.*, (1917) 245 U. S. 328, 38 S. Ct. 121, 62 U. S. (L. ed.) 325.

**g1. Allowance of Attorney's Fees (p. 679)**

**Limiting attorney's fees.**—Limiting to 20 per cent the payment to be made to an attorney or agent out of the moneys appropriated for the payment of certain claims against the United States, is not a denial of due process of law or of the liberty to contract to an attorney who has rendered professional services in the prosecution of one of such claims under a contract whereby he was to receive a fee equal to 50 per cent of whatever might be awarded or collected. *Capital Trust Co. v. Calhoun*, (1919) 250 U. S. 208, 39 S. Ct. 486, 63 U. S. (L. ed.) —, *reversing* (1917) 177 Ky. 518, 197 S. W. 944, wherein the court said: "We can only instance some of the points of the argument. The Act of February 26, 1853, c. 80, 10 Stat. 161, now § 823, Rev. Stats., is cited as recognizing the right of attorneys to compensation for their services in claims against the United States, and it is said that contracts for such compensation have been universally sanctioned as legal. And, further, official statements are adduced to the effect that the Court of Claims is so constituted 'that the successful prosecution of a claim' in it 'is something more than a merely perfunctory performance on part of counsel'; it is 'a matter of great business hazard and risk to counsel when done upon purely contingent fees.' And in many cases, it is further urged, no other than contingent fees are possible and to deny them is practically to deny the right to counsel. Mr. Justice Miller is quoted from, in *Taylor v. Bemiss*, (1884) 110 U. S. 42 [3 S. Ct. 441, 28 U. S. (L. ed.) 64], in illustration of such result and its injury. The right to counsel being thus recognized, and recognized antecedently to the contract now involved, it became, counsel contend, a 'pre-existing valid right,' and to take it away is to divest the right—to take it away is to deprive of property of value assured of protection by the Constitu-

tion of the United States. To sustain the contentions a number of state cases are cited. Among them is *Black v. O'Hara*, (1917) 175 Ky. 623, [194 S. W. 811] the case which the Court of Appeals regarded as authority for its ruling in the present case. In a general sense there is force and much appeal in the contentions, but we think they carry us into considerations beyond our cognizance. Liberty in any of its exertions and its protection by the Constitution are of concern. The right to bind by contract and require performance of the contract are examples of that liberty and that protection and they might have resistless force against any interfering or impairing legislation if the contest in the case was simply one between Calhoun and the Arnold estate. But there are other elements to be considered—there is the element of the condition Congress imposed on the subject-matter of the controversy regarded as a condition of its grant. Relief could only be had through legislation. This was petitioned and the Senate of the United States was prompted to refer the claim to the Court of Claims. A defect of remedy remained even after the court had been thus invoked and had reported the amount and facts of the claim. Further legislation was necessary, but it could not have been compelled; it was optional, not compulsory; and it would seem to require no argument to convince that the terms of its enactment must be taken as expressed and the relief it granted accepted with the condition imposed upon it."

#### b. Reasonable Notice (p. 681)

**Parties entitled to notice in eminent domain proceedings.**—A state statute which authorizes condemnation by telegraph companies of easements over railroad rights of way, may not be attacked by a railroad company as unconstitutional because it provides that no notice need be given to any mortgagee, for the constitutionality of a statute may not be questioned by one who is not injured by it. *Louisville, etc., R. Co. v. Western Union Tel. Co.*, (C. C. A. 6th Cir. 1918) 249 Fed. 385, 161 C. C. A. 359.

#### f. Before Final Judgment (p. 683)

**Taxation.**—Valuation of property by a state board of taxation without notice to the owner of the property does not render a tax based upon such valuation invalid where the mode of enforcing the tax under the state law is by a judicial proceeding wherein process issues, an opportunity is afforded for a full hearing and only after there is a judgment sustaining the tax is payment enforced. *Wells v. Nevada*, (1918) 248 U. S. 165, 39 S. Ct. 62, 63 U. S. (L. ed.) —, *affirming* (1915) 38 Nev. 505, 150 Pac. 836.

#### h1. Judgment Against Surety (p. 692)

A state statute whereby a judgment against an executor may be enforced by seizure on an execution against him of the property of

his sureties denies due process of law. *Gillispie v. Riggs*, (N. D. W. Va. 1918) 248 Fed. 843.

#### (8) (a) In General (p. 695)

A judgment against a foreign corporation rendered on service of process on a person who is not an agent of the corporation is void as not constituting due process of law. *Atchison, etc., R. Co. v. Weeks*, (W. D. Tex. 1918) 248 Fed. 970.

#### (11) On Nonresident Partner (p. 699)

A nonresident firm doing business in the state at the time a transaction, the subject of the suit, took place is not brought into court by service of process on a person who was local agent at the time of the transaction, but not at the time of the service; and if a state statute authorizes such a service it is unconstitutional. *Flexner v. Farson*, (1919) 248 U. S. 289, 39 S. Ct. 97, 63 U. S. (L. ed.) —, *affirming* (1915) 268 Ill. 435, 109 N. E. 327, Ann. Cas. 1916D 810.

#### 9 a (1) In General (p. 703)

To same effect as third paragraph of original annotation, see *Queens Land, etc., Co. v. Kings County Trust Co.*, (E. D. N. Y. 1918) 255 Fed. 222.

#### 11 a. Making Intent Unnecessary as an Element of Offense (p. 709)

The possession of a motor vehicle on which the manufacturer's mark has been removed may be made an offense by statute notwithstanding that guilty knowledge or intent is missing. *People v. Fernow*, (1919) 286 Ill. 627, 122 N. E. 155, wherein the court said: "It is agreed that the section was enacted in the exercise of the police power, which may be exercised in the passage of laws for the protection of the public and the general welfare. The purpose of the act is to prevent the defacing, covering, or destruction of the manufacturer's serial number or distinguishing mark, so as to preserve the identity of motor vehicles and thereby protect the public against violations of law. The motor vehicle has become the most common and efficient agency for the commission of crime and the chief instrumentality employed by criminals to avoid detection and escape punishment, and one of the methods employed is to destroy the evidence of identity. Motor vehicles have also become very frequent subjects of larceny, and the removal or change of the serial number is a convenient method for preventing identification and recovery. One committing a crime, even the most serious, and escaping in an automobile would be more difficult of apprehension if the serial number or identification mark should be removed. The section is a legitimate and proper exercise of the police power. The argument that the section conflicts with the Bill of Rights and the Fourteenth Amendment to the Constitution of the United States, which prohibit

deprivation of life, liberty, or property without due process of law, is that the section creates a crime without guilty knowledge or intent, because the manufacturer's serial number or distinguishing mark may have been changed without the knowledge of the person having possession of the motor vehicle, and may have been changed before the law went into effect. At common law a crime consisted of an unlawful act with evil intent, and in crimes created by statute a specific intent may be required so that the intent and act may constitute the crime, and in such cases the intent must be alleged and proved. Where a specific intent is not an element of the crime it is not always necessary that a criminal intent should exist. In the exercise of the police power for the protection of the public the performance of a specific act may constitute the crime regardless of either knowledge or intent, both of which are immaterial on the question of guilt. For the effective protection of the public the burden is placed upon the individual of ascertaining at his peril whether his act is prohibited by criminal statute. The law in that regard has most frequently arisen in police regulations of the liquor traffic, but it has been applied in precisely the same way in other cases coming within the same rule and reason, such as a sale of imitation butter, a sale of milk below a prescribed quality, the obstruction of a public highway by a railroad corporation for longer than a specified time, the admission of a minor to a pool room, driving an unregistered automobile, killing for sale an animal under a designated age, carriage by an express company for transportation beyond the state line of fish or game, and in prosecutions for bigamy."

#### 16. Incidental Injury to Property (p. 715)

**Pollution of oyster beds by discharge of municipal sewage.**—Unless precluded by some right of a neighboring state or by some act of its own or of the United States, a state may authorize a city to discharge its sewage into the sea, so long, at least, as a nuisance is not thereby created that so seriously interferes with private property as to infringe constitutional rights. The mere ownership of a tract of land under water would not be enough to give a right to prevent the pollution of the water by the discharge of municipal sewage into tidal waters, under state authority. *Darling v. Newport News*, (1919) 249 U. S. 540, 39 S. Ct. 371, 63 U. S. (L. ed.) —, (affirming (1918) 123 Va. 14, 96 S. E. 307), wherein the court said: "The fundamental question as to the rights of holders of land under tide waters does not present the conflict of two vitally important interests that exists with regard to fresh water streams. There the needs of water supply and of drainage compete. *Missouri v. Illinois*, (1906) 200 U. S. 496, 521, 522, [26 S. Ct. 268, 50 U. S. (L. ed.) 572, 579]. The ocean hitherto has been treated as open

to the discharge of sewage from the cities upon its shores. Whatever science may accomplish in the future we are not aware that it yet has discovered any generally accepted way of avoiding the practical necessity of so using the great natural purifying basin. Unless precluded by some right of a neighboring state, such as is not in question here, or by some act of its own, or of the United States, clearly a state may authorize a city to empty its drains into the sea. Such at least would be its power unless it should create a nuisance that so seriously interfered with private property as to infringe constitutional rights. And we apprehend that the mere ownership of a tract of land under the salt water would not be enough of itself to give a right to prevent the fouling of the water as supposed. The ownership of such land, as distinguished from the shore, would be subject to the natural uses of the water.

... The constitution of Virginia, like some others, requires compensation for property taken or damaged for public use. Const. 1902, § 58. But this seems to be construed by the dissenting judge as well as by the court below as not including damage like this, which would not have been a wrong even without the act of the legislature. It is a question that has been subject to much debate. See for example, *Caledonian R. Co. v. Walker*, (1882) 7 App. Cas. (Eng.) 250, 293 et seq.; *Taft v. Com.*, (1893) 158 Mass. 526, 548 [33 N. E. 1046]; *Northern Transp. Co. v. Chicago*, (1879) 99 U. S. 635, 642 [25 U. S. (L. ed.) 336, 338]. But upon that point we follow the Supreme Court of the state."

#### 17. Summary Destruction of Property

(p. 716)

**Requiring burning of refuse on timber lands.**—Property is not taken without due process of law by a state statute which provides that any person who owns land or standing timber on land within 400 feet of any watershed held or owned by any city or town for the purpose of furnishing the city or town water supply, upon cutting or removing the timber, or permitting either, within 400 feet of the watershed, shall, within three months after cutting, or earlier upon written notice by the city or town, remove or cause to be burned under proper supervision, all tree tops, boughs, laps and other portions not desired to be taken for commercial or other purposes, within 400 feet of the boundary line of the watershed, so as to leave such space of 400 feet free and clear of the designated parts required to be removed or burned and other inflammable material caused by or left from cutting the standing timber, so as to prevent the spread of fire from such cut-over area and the consequent damage to the watershed. *Perley v. North Carolina*, (1919) 249 U. S. 510, 39 S. Ct. 357, 63 U. S. (L. ed.) —, affirming (1917) 173 N. C. 783, 92 S. E. 504.

**23. Railroad Companies (p. 736)****Cost of construction of grade crossing.—**

A railway company whose road was constructed at a time when the state law imposed the entire cost of the construction of a crossing of two railways at grade, including installing and maintenance of interlocking devices, upon the junior company, is not deprived of its property without due process of law by construing as applicable to it a subsequent statute under which expense of a grade crossing by a junior company is to be divided equally between the two railway companies. *Northern Pac. R. Co. v. Puget Sound, etc., R. Co.*, (1919) 250 U. S. 332, 39 S. Ct. 474, 63 U. S. (L. ed.) —, *affirming* (1916) 94 Wash. 10, 161 Pac. 850, (1917) 97 Wash. 701, 168 Pac. 793.

**c (1) In General (p. 737)**

**Terminal tracks.**—Property is not taken without compensation and without due process of law, by requiring that, for rate-making purposes, two railway companies entering a city shall extend to shippers over terminal or spur delivery tracks, the property of another railway company, which, through joint ownership and control by such railway companies, is merely their agency or instrumentality, equality of treatment with that which they give to shippers over their separately owned tracks when similar service is rendered. *Chicago, etc., R. Co. v. Minneapolis, etc., Assoc.*, 247 U. S. 490, *affirming* 134 Minn. 169.

**(6) (b) Question of Reasonableness Is Judicial (p. 742)**

**Binding effect of judicial inquiry.**—There is nothing to hinder a state from providing that after a judicial inquiry into the validity of an order of a state railroad commission fixing the rate on logs carried within the state it shall be binding upon the parties until changed. *Detroit, etc., R. Co. v. Fletcher Paper Co.*, (1918) 248 U. S. 30, 39 S. Ct. 13, 63 U. S. (L. ed.) —, *affirming* (1917) 198 Mich. 469, 164 N. W. 528.

**s. Requiring Construction of Side Track or Switch (p. 760)**

**Expense of building sidetracks.**—An order of a state public utilities commission, made after notice and hearing, and upheld by the highest court of the state, requiring a railway company to restore a sidetrack which, before its removal, had served a grain elevator and coal yard, does not deny due process of law, either as taking its property for private use or for public use without compensation, where, under the laws of the state, such a sidetrack was open to use by the public and subject to public control like other parts of the company's road, and the statute under which its restoration was ordered contains express provisions whereby it will retain its public character and be open to use by other

shippers as well as by the elevator owner. *Lake Erie, etc., R. Co. v. State Public Utilities Commission*, (1919) 249 U. S. 422, 39 S. Ct. 345, 63 U. S. (L. ed.) —, *affirming* (1917) 277 Ill. 574, 115 N. E. 519.

Empowering a state commission to apportion between plant owner and railway company the cost of the rearrangement and extension of a sidetrack leading to an adjacent manufacturing plant, made necessary by the growth of such plant and its increased shipments, as is done by Minn. Gen. Stat. 1913, §§ 4231, 4284, does not take private property for private use, where under the local law such a sidetrack is not merely a private siding, but is additional trackage for public use, constituting an integral part of the railway system. *Chicago, etc., R. Co. v. Ochs*, (1919) 249 U. S. 416, 39 S. Ct. 343, 63 U. S. (L. ed.) — (*affirming* (1917) 125 Minn. 323, 160 N. W. 866, Ann. Cas. 1918E 337), wherein the court said: "As a common carrier a railroad company assumes and must discharge the obligations which inhere in the nature of its business. Among these obligations is that of providing reasonably adequate facilities for serving the public. *Northern Pacific R. Co. v. North Dakota*, (1915) 236 U. S. 585, 595 [35 S. Ct. 429, 59 U. S. (L. ed.) 735, 741, Ann. Cas. 1916A 1, L. R. A. 1917F 1148]. To do this requires an expenditure of money, of course, but the expenditure is for property which will belong to the company and will be employed in its business. The money is not taken from the company and given to others, nor is the use of the facilities to be uncompensated. Like other property employed by the company in the transportation of persons or property, the facilities have a real bearing on the rates which it is entitled to charge. Therefore an enforced discharge of the duty to provide such a facility does not amount to a taking of property without compensation merely because it is attended with some expense. . . . Of course, the expense is an important element to be considered in determining whether the requirement is within the bounds of reasonable regulation or is essentially arbitrary, but it is not the only one. The nature and volume of the business to be affected, the revenue to be derived from it, the character of the facility required, the need for it and the advantage to be realized by shippers and the public are also to be considered. Tested by these criteria we think the order in question is not arbitrary, but reasonable.

"The case of *Missouri Pac. R. Co. v. Nebraska*, (1910) 217 U. S. 196, [30 S. Ct. 461, 54 U. S. (L. ed.) 727], on which the railroad company relies, is plainly distinguishable. The Nebraska statute there condemned, as applied by the state court, required the company to bear the cost of 'reduplicating already physically adequate accommodations,' on the demand and for the



benefit of certain shippers, and this in the absence of exceptional circumstances, if any there could be, making such an extraordinary requirement reasonable. Besides, the statute made no provision for a preliminary hearing before an administrative body and yet subjected the company to the risk of a fine of at least five hundred dollars if it awaited a hearing in court on the reasonableness of the demand."

#### u. Regulating Crossings (p. 762)

**Sidewalk at railroad crossing.**—Neither due process of law nor the equal protection of the laws is denied by requiring a railway company to construct at its expense a sidewalk upon its right of way at a highway crossing to connect in either direction the planking extending the full length of the ties and between the tracks for the full width of the street with the sidewalks constructed or installed by the municipality or by the owners of abutting property. *Great Northern R. Co. v. Minnesota*, (1918) 246 U. S. 434, 38 S. Ct. 346, 62 U. S. (L. ed.) 817, *affirming* (1916) 132 Minn. 474, 157 N. W. 1069.

#### x1 (1) In General (p. 768)

**Relief from performance of franchise.**—Where a street railroad under its franchise has agreed to operate its cars for a fixed rate of fare, it will not be relieved from performing its franchise by a court on the ground that, owing to a change in conditions, further operation at the old rate would entail loss to the company and deprive it of its property without due process of law. *Columbus R., etc., Co. v. Columbus*, (S. D. Ohio 1918) 253 Fed. 499.

#### (8) Forfeiture of Right to Occupy Streets (p. 770)

The "fair return" to which a public service corporation "is entitled upon the value of its plant is that rate per cent. actually received in the absence of special contract in the community where the service is rendered; . . . and where the corporation performs a service obviously necessary and indispensable to the well-being of the community, the capital of the company upon which the 'fair return' is to be computed should be the fair and reasonable value of the plant of the corporation engaged in such service valued as the equipment of a going concern." *Doherty v. Toledo Rys. etc., Co.*, (N. D. Ohio 1918) 254 Fed. 597.

#### c. Regulating Rates (p. 774)

**Reasonable compensation as dependent on circumstances and locality.**—In determining whether the rates permitted to be charged by a public service corporation afford a fair and reasonable compensation, the question what is a fair and reasonable compensation depends greatly upon circumstances and lo-

cality. *Denver v. Denver Union Water Co.*, (1918) 246 U. S. 178, 38 S. Ct. 278, 62 U. S. (L. ed.) 649.

#### Method of Estimating Value of Property (p. 775)

**Four per cent as reasonable compensation.**—An ordinance fixing the rates permitted to be charged by a water company which will operate to reduce its net return to about 428/100 per cent of the value of its plant, in a locality in which the prevailing rate of interest for secured loans is about 6 per cent, amounts to a taking of the property of the company without due process of law. *Denver v. Denver Union Water Co.*, (1918) 246 U. S. 178, 38 S. Ct. 278, 62 U. S. (L. ed.) 649.

**Value as going concern.**—In ascertaining the value of a water system for the purpose of determining whether the rates fixed by a municipal ordinance are inadequate and confiscatory, its value as a going concern is properly included. *Denver v. Denver Union Water Co.*, (1918) 246 U. S. 178, 38 S. Ct. 278, 62 U. S. (L. ed.) 649.

#### Effect of Expiration of Franchise (p. 776)

In determining whether water rates fixed by a municipal ordinance are confiscatory, it is proper, notwithstanding the water company's franchise has expired, to value the plant as capable of use and actually in use in the public service, rather than at what the property would bring for some other use in case the city should build its own plant, where there are no other means of adequately supplying the city, and the construction of a municipal system would take at least five years, and where the ordinance fixing rates, while assuming to treat the water company as a mere tenant by sufferance in the streets, recognizes that its plant must continue to serve the public needs, since such ordinance amounts to the grant of a new franchise of indefinite duration, terminable either by the city or by the company at such time and under such circumstances as may be consistent with the duty that both owe to the inhabitants of the city. *Denver v. Denver Union Water Co.*, (1918) 246 U. S. 178, 38 S. Ct. 278, 62 U. S. (L. ed.) 649.

#### 27 A. In General (p. 776)

**Extension of gas system.**—An order of a state Public Service Commission requiring a gas company to extend its distributing system to a rapidly growing community 1½ miles beyond the then terminus of the company's mains, but within the area in which it alone had franchises, cannot be said to be arbitrary or capricious so as to justify the federal Supreme Court in substituting its judgment for that of the commission as to what was reasonable under the circumstances of the case, there being every prospect that the return upon the investment involved, though

low at first, will soon become ample, and there being no claim that the comparatively small initial loss will render the business as a whole unprofitable. *New York, etc., Gas Co. v. McCall*, (1917) 245 U. S. 345, 38 S. Ct. 122, 62 U. S. (L. ed.) 337, *affirming* (1916) 171 App. Div. 580, 157 N. Y. 707, (1916) 219 N. Y. 84, 681, 113 N. E. 795, 115 N. E. 1048.

#### b. Regulating Rates (p. 776)

**A return of six per centum.**—A gas rate fixed by municipal ordinance cannot be said necessarily to be free from the objection that it is confiscatory merely because it yields as much as 6 per cent upon the invested capital, where 8 per cent is the lowest rate sought and generally obtained as a return upon capital invested in banking, merchandising, and other business in the vicinity, 7 per cent being the legal rate of interest in the state. *Lincoln Gas., etc., Light Co. v. Lincoln* (1919) 250 U. S. 256, 39 S. Ct. 454, 63 U. S. (L. ed.) —.

**Form of decree dismissing bill to enjoin alleged confiscatory rates.**—A decree dismissing the bill in a suit to enjoin as confiscatory the operation of a municipal ordinance reducing gas rates should be without prejudice to a subsequent application to the courts for relief against the operation of such ordinance thereafter if the gas company can show, as the result of a practical test of the reduced rate, or upon evidence respecting values, costs of operation and the current rates of return upon capital as they stand at the time of bringing suit and are likely to continue thereafter, that the rate ordinance is confiscatory in its effect under the new conditions arising principally out of the World War. *Lincoln Gas., etc., Light Co. v. Lincoln*, (1919) 250 U. S. 256, 39 S. Ct. 454, 63 U. S. (L. ed.) —.

**Changing rate fixed in private contract.**—A lighting and power company may, if authorized by a public service commission having power to fix rates, increase the rate charged a private corporation for light and power under an unexpired contract. *Union Dry Goods Co. v. Georgia Public Service Corp.*, (1919) 248 U. S. 372, 39 S. Ct. 117, 63 U. S. (L. ed.) —, *affirming* (1916) 145 Ga. 658, 89 S. E. 779.

**Rates fixed by franchise contract.**—Where a rate for furnishing light, fixed by a franchise contract between a utility company and a municipality, is reasonable at the time when it is made, the fact that it thereafter becomes confiscatory owing solely to industrial conditions and without any action by the state, is not a violation of this amendment. *Muscatine Lighting Co. v. Muscatine*, (S. D. Ia. 1919) 256 Fed. 929.

#### 31. Regulating Business and Rates of Grain Elevators (p. 782)

**Weighing.**—A state statute is not unconstitutional which prohibits under severe

penalties "any person, corporation or association other than a duly authorized and bonded state weigher to issue any weight certificate . . . [for any] grain weighed at any warehouse or elevator in this state where duly appointed and qualified state weighers are stationed . . . or to make any charge for such weighing, . . . or weight certificates . . ." *Merchants' Exch. v. Missouri*, (1919) 248 U. S. 365, 39 S. Ct. 114, 63 U. S. (L. ed.) *affirming* (1916) 289 Mo. 346, 190 S. W. 903, Ann. Cas. 1917E 871), wherein the court said: "Section 63 of the act does not violate the Fourteenth Amendment. As the state court has pointed out, the statute does not prohibit owners of grain from weighing it before it is sent to a public warehouse or after it is removed therefrom. But the issue of a private weigher's certificate in addition to the certificate of the public weigher might lead to embarrassment or confusion or prove a means of deception. The regulation of weights and measures with a view to preventing fraud and facilitating commercial transactions is an exercise of the police power. To require that goods received in or discharged from public warehouses shall be weighed by public weighers and that no one else shall issue certificates of or make charges for weighing under those circumstances is not an unreasonable or arbitrary exercise of the discretion vested in the legislature. *Compare House v. Mayes*, supra; *Bradnox v. Missouri*, 219 U. S. 285. Nor can we say that to limit the application of the provision to grain and hay is an arbitrary discrimination against dealers in them. The fact that respondent is a corporation does not lessen the scope of the state's police power. We have no occasion to consider whether it is thereby enlarged."

#### i. Extraterritorial Operation of State Rule as to Validity of Loan Agreement (p. 789)

The right of a citizen of a state to conclude with a foreign life insurance company at its home office a policy loan agreement whereby the policy on his life was pledged as collateral security for a cash loan to become due and payable upon default in payment of premiums, in which case the entire policy reserve might be applied to discharge the indebtedness, is within the protection of the 14th Amendment, guaranteeing freedom to contract, and may not be destroyed by state legislation. *New York Life Ins. Co. v. Dodge*, (1918) 246 U. S. 357, 38 S. Ct. 337, 62 U. S. (L. ed.) 772, Ann. Cas. 1918E 593, *reversing* (Mo. App. 1916) 189 S. W. 609.

#### 32. Regulating Manufacture and Sale of Goods (p. 796)

**Judgment against saloon keeper under civil damage act as lien on liquor premises.**—Property is not taken without due process of law, by the provisions of Ill. Rev. Stat. ch. 43, §§ 9 and 10, under which the building or

premises used for the sale of intoxicating liquors is made liable for the payment of a judgment recovered by a wife for injury to her means of support, against the tenant who has sold the husband intoxicating liquors upon the premises sought to be charged (provided the owner has rented the same for the purpose of the sale of intoxicating liquors, or has knowingly permitted such sales), and making the judgment against the tenant, in the absence of fraud or collusion, conclusive in an action to subject the building and premises to its payment, except that the owner may controvert the allegations that he had knowingly rented or knowingly permitted his building to be used for such sales, and that a judgment had been recovered against the occupant for damages arising therefrom. *Eiger v. Garrity*, (1918) 246 U. S. 97, 38 S. Ct. 298, 62 U. S. (L. ed.) 596, *affirming* (1916) 272 Ill. 127, 111 N. E. 735.

### 38 a (1) In General (p. 796)

To same effect as original annotation, see *U. S. v. James*, (E. D. Tex. 1918) 256 Fed. 102.

Liquors acquired after enactment and before taking effect of state prohibition law.—The prohibitions of a state prohibitory law against the possession of intoxicating liquor may be applied to liquors acquired between the date of the passage of such law and the date when it became effective, without infringing the guaranties of the Fourteenth Amendment. *Barbour v. Georgia*, (1919) 249 U. S. 454, 39 S. Ct. 316, 63 U. S. (L. ed.) —, *affirming* (1917) 146 Ga. 667, 92 S. E. 70, 39 L. R. 1095, wherein the court said: "The Georgia prohibitory liquor law was approved Nov. 18, 1915, but by its terms did not become effective until May 1, 1916. Under it Barbour was convicted for having in his possession on June 10, 1916, more than one gallon of vinous liquor. (Georgia Laws, Extraordinary Session, 1915, Part 1, Title 2, No. 4, §§ 16 & 30, pp. 90, 99, 105.) He asserted that the liquor had been acquired by him before May first; and contended that the statute, if construed to apply to liquor so acquired, was void under the Fourteenth Amendment. The Supreme Court of the state overruled this contention and affirmed the sentence. 146 Ga. 667. The case comes here on writ of error under § 237 of the Judicial Code. That a state which has enacted a prohibitory law may forbid the mere possession of liquor within its borders was decided in *Crane v. Campbell*, (1917) 245 U. S. 304, [38 S. Ct. 98, 62 U. S. (L. ed.) 304], but it did not appear there when the liquor had been acquired. Whether the prohibition of sale may be constitutionally applied to liquor acquired before the enactment of the statute was raised in *Bartmeyer v. Iowa*, (1873) 18 Wall. 129, [21 U. S. (L. ed.) 929], and *Boston Beer Co. v. Massachusetts*, (1877) 97 U. S. 25, 32-33, [24 U. S. (L. ed.) 989, 992] but was not decided. The question

presented here however is simpler. For the exact date when Barbour acquired the liquor is not shown; and we must assume, as the Supreme Court of Georgia did, that it was acquired during the period of five months and twelve days between the enactment of the law and the date when it became effective. Does the Fourteenth Amendment, by its guaranty to property, prevent a state from protecting its citizens from liquor so acquired? A state having the power to forbid the manufacture, sale, and possession of liquor within its borders may, if it concludes to exercise the power, obviously postpone the date when the prohibition shall become effective, in order that those engaged in the business and others may adjust themselves to the new conditions. Whoever acquires, after the enactment of the statute, property thus declared noxious, takes it with full notice of its infirmity and that after a day certain its possession will, by mere lapse of time, become a crime. It is well settled that the Federal Constitution does not enable one to stay the exercise of a state's police power by entering into a contract under such circumstances. *Diamond Glue Co. v. U. S. Glue Co.*, (1903) 187 U. S. 611, 615, [23 S. Ct. 206, 47 U. S. (L. ed.) 328, 332]. Compare *Calder v. Michigan* (1910) 218 U. S. 591, 599, [31 S. Ct. 122, 54 U. S. (L. ed.) 1163, 1168]. Nor can he do so by acquiring property."

### b. Food Laws Generally (p. 801)

As to labeling and branding.—A regulation of a state board of health, sanctioned by the state Food and Drugs Law, under which the sales of a table syrup are forbidden unless the principal label discloses the ingredients and their proportions, does not amount to a taking of property without due process of law as applied to a proprietary syrup made under a secret formula and sold under its own distinctive name, and containing no deleterious or injurious ingredients. *Corn Products Refining Co. v. Eddy*, (1919) 249 U. S. 427, 39 S. Ct. 325, 63 U. S. (L. ed.) —, *affirming* (1916) 99 Kan. 63, 163 Pac. 615.

### d. Regulating Food Preservatives (p. 802)

The text proposition is supported by *Weigle v. Curtice Bros. Co.*, (1919) 248 U. S. 285, 39 S. Ct. 124, 63 U. S. (L. ed.) —, fully considered under title FOOD AND DRUGS, *ante*, p. 529.

### f. Of Milk (p. 802)

Condensed milk.—A state statute prohibiting the sale of condensed milk unless made from unadulterated milk from which the cream has not been removed is violated by the sale of a preparation called "Hebe" made from skimmed milk, condensed by evaporation, to which a small percentage of cocoanut oil is added, and such construction does not violate this amendment. *Hebe Co. v. Shaw*, (1919) 248 U. S. 297, 39 S. Ct. 125, 63 U. S. (L. ed.) —.

### 1. Lobster Law (p. 817)

**Licensing lobster vessels.**—The imposition by a state of a license fee for smacks or vessels engaged in the lobster fisheries on waters within the jurisdiction of the state is constitutional. *State v. Dodge*, (1918) 117 Me. 269, 104 Atl. 5.

### k. Question of Necessity (p. 822)

**No opportunity to be heard as to necessity and extent of taking.**—A statute authorizing a municipality to expropriate property for the purpose of a water supply is not void as violating U. S. Const., art 1, sec. 10, or the Fourteenth Amendment, because it affords no opportunity to the owner of the property to be heard as to the necessity and extent of the taking. *Sears v. Akron* (1918) 243 U. S. 242, 38 S. Ct. 245, 62 U. S. (L. ed.) 688.

### p. For Telegraph Line Over Railroad Right of Way (p. 824)

**Power of states.**—Congressional legislation has not deprived the states of power to condemn for the use of a telegraph company a part of the right of way of an interstate road or bridge over navigable waters. *Louisville, etc., R. Co. v. Western Union Tel. Co.*, (1919) 250 U. S. 363, 39 S. Ct. 513, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 5th Cir. 1916) 233 Fed. 827, 147 C. C. A. 152, (1914) 107 Miss. 626, 65 So. 650.

**Sufficiency of judgments.**—Judgments in eminent domain proceedings giving a telegraph company the right to erect its poles along a railway right of way cannot be deemed to infringe the guaranties of the Fourteenth Amendment on the theory that the telegraph company, in contravention of state law, wanted the right not for a new line, but for the purpose of maintaining an existing line that it had maintained theretofore under a contract with the railway company, now terminated, where the highest state court holds that the judgments being right on their face, if the telegraph company attempts to use them to maintain an existing line instead of a new one, its rights can be determined when the attempt is made. *Louisville, etc., R. Co. v. Western Union Tel. Co.*, (1919) 250 U. S. 363, 39 S. Ct. 513, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 5th Cir. 1916) 233 Fed. 82, 147 C. C. A. 152, (1914) 107 Miss. 626, 65 So. 650.

The failure of judgments in eminent domain giving a telegraph company the right to erect a pole line along a railway right of way to fix the exact location of the telegraph poles within the specified right of way does not invalidate the judgments under the Fourteenth Amendment, where they allow only one line of poles to be set up, and require it to be erected in such manner and at such distance from the railroad track as in no way to interfere with the operation of trains or with any proper and legitimate use thereof, or the use by any telegraph or tele-

phone company now existing thereon, and so as not to be dangerous to persons or property, and subject to all stipulations and agreements contained in the petition, and such petition contains a binding agreement that if it shall become necessary for the railway company to change the location of its tracks, or construct new tracks or sidetracks where the same do not now exist, and for such purpose to use or occupy that portion of the right of way on which petitioner's poles are or may be set, cross arms placed thereon and wires strung, the petitioner will, at its own expense, upon reasonable notice, remove said poles, cross arms, and wires to such other points on the right of way as the railway company shall designate, and where the description has been held to satisfy the requirements of the local law. *Louisville, etc., R. Co. v. Western Union Tel. Co.*, (1919) 250 U. S. 363, 39 S. Ct. 513, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 5th Cir. 1916) 233 Fed. 82, (1914) 107 Miss. 626, 65 So. 650.

### q. Providing for Hearing (p. 825)

**Hearing provided for by separate suit.**—A railway company cannot complain of not having a hearing on the right of a telegraph company to condemn an easement along the railway right of way for a pole line merely because it is referred for that hearing to a separate suit in equity, the eminent domain proceedings being limited in their effect to determining the amount of the damages. *Louisville, etc., R. Co. v. Western Union Tel. Co.*, (1919) 250 U. S. 363, 39 S. Ct. 513, 63 U. S. (L. ed.) —, *affirming* (C. C. A. 5th Cir. 1916) 233 Fed. 82, 147 C. C. A. 152, (1914) 107 Miss. 626, 65 So. 650.

### s. Must Be Provision for Compensation (p. 825)

**Provision for compensation.**—To same effect as original annotation, see *Rockaway Pac. Corp. v. Stotesbury*, (N. D. N. Y. 1917) 255 Fed. 345.

### 53. Mechanics' Lien Law (p. 847)

**Garage Keepers' Lien Act.**—A lien act providing that garage keepers and automobile repairmen shall have a lien on any automobile for which they have furnished certain services or accessories, even after the possession of such automobiles has passed from their hands, does not operate to deprive a person of his property without due process of law. *Crucible Steel Co. v. Polack Tyre, etc., Co.*, (1918) 92 N. J. L. 221, 104 Atl. 324.

### 53. Compulsory Vaccination (p. 848)

**Exclusion of unvaccinated pupils from schools.**—Where children are denied admission to school because of their father's refusal to permit them to be vaccinated, and after opportunity to present his defense he is convicted of a violation of a school law requiring parents to send their children to

school, proceedings against him for a subsequent violation of the school law may not be enjoined by a federal court on the ground that the decisions of the state courts in the first prosecution were erroneous and denied him due process of law, for this amendment does not protect a citizen against errors of judicial judgment, if he is given an opportunity to present his defense. *Gillin v. Board of Public Education*, (E. D. Pa. 1918) 250 Fed. 649.

#### 67. Fencing Grazing Lands (p. 850)

**Grazing of sheep on public domain.**—There is no such indefiniteness in the provisions of Idaho Rev. Codes 1908, sec. 6872, making criminal the grazing of sheep on the federal public domain on ranges previously occupied by cattle, or usually occupied by cattle raisers, as to render such statute repugnant to the constitutional guaranty of due process of law, although it fails to provide for the ascertainment of the boundaries of a range, or for determining what length of time is necessary to constitute a prior occupation a usual one within the meaning of the statute—especially since it is provided by section 6314, that in any crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence. *Omaechevarria v. Idaho*, (1918) 246 U. S. 343, 38 S. Ct. 323, 62 U. S. (L. ed.) 763, *affirming* (1915) 27 Idaho, 797, 152 Pac. 280.

#### 97. Municipal Wood and Coal Yards (p. 858)

**Municipal taxation to raise the money necessary to enable the municipality to establish and maintain a permanent coal and fuel yard for the purpose of selling wood, coal and fuel to its inhabitants without financial profit, conformably to state legislation purporting to be passed in the public interest, and so declared to be by the highest court of the state, cannot be said to deny the taxpayers the protection which the constitutional guaranty of due process of law affords against the taking of their property for uses that are private.** *Jones v. Portland*, (1917) 245 U. S. 217, 38 S. Ct. 112, 62 U. S. (L. ed.) 252, *Ann. Cas.* 1918E 660, *L. R. A.* 1918C 765, *affirming* (1915) 113 Me. 123, 93 Atl. 41.

#### 99. Change in Location of Oil Plant (p. 858)

**An ordinance prohibiting the storing of petroleum, gasoline, etc., within 300 feet of any dwelling, beyond small quantities specified, is within the police power of a state to authorize, and it is immaterial that a person having a tank within the prohibited area was formerly elsewhere but returned to that location at the request of the municipality. Such request does not import a contract not to legislate if the public welfare should require it and such a contract if made would have no effect.** *Pierce Oil Corp. v. Hope*, (1919) 248 U. S. 498, 63 U. S. (L. ed.) —, *affirming* (1917) 127 Ark. 38, 191 S. W. 405, *Ann. Cas.* 1918E 143.

#### p (1) In General (p. 866)

**Foreign corporation.**—State statutes imposing a tax as a condition of admitting a foreign corporation engaged in interstate commerce to do business within the state, based upon the amount of its authorized capital stock, and a franchise tax based upon capital, surplus and undivided profits, exert the taxing authority of the state over property and rights wholly beyond its confines and not subject to its jurisdiction, and therefore constitute a taking without due process of law. *Looney v. Crane Co.*, (1917) 245 U. S. 178, 38 S. Ct. 85, 62 U. S. (L. ed.) 230, *affirming* (N. D. Tex. 1914) 218 Fed. 260.

A state statute imposing a tax as a condition of admitting a foreign corporation engaged in local and interstate commerce to do business within the state, based upon the amount of its authorized capital stock, without any limitation of the amount of such tax, exerts the taxing authority of the state over property located and used beyond its jurisdiction, and therefore constitutes a taking without due process of law. *International Paper Co. v. Massachusetts*, (1918) 246 U. S. 135, 38 S. Ct. 292, 62 U. S. (L. ed.) 624, *reversing* (1917) 228 Mass. 101, 117 N. E. 246; *Locomobile Co. v. Massachusetts*, (1918) 246 U. S. 146, 38 S. Ct. 298, 62 U. S. (L. ed.) —, *reversing* (1917) 228 Mass. 117, 117 N. E. 5.

**Bank Deposits.**—Deposits in a bank in the city in which the depositor carried on a business from which such deposits are derived, but belonging absolutely to him, and not used in the business, are subject to a tax upon the person against him in the city of his residence, in another state, whether or not they are subject to tax in the state where the business is carried on. *Fidelity, etc., Trust Co. v. Louisville*, (1917) 245 U. S. 54, 38 S. Ct. 40, 62 U. S. (L. ed.) 145, *L. R. A.* 1918C 124, *affirming* (1916) 168 Ky. 71, 181 S. W. 1095, (1916) 171 Ky. 509, 188 S. W. 652, (1916) 172 Ky. 451, 189 S. W. 438), wherein the court said: "The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the state so chooses, may be measured more or less by reference to the riches of the person taxed. Unless it is declared unlawful by authority, we see nothing to hinder the state from taking a man's credits into account. But so far from being declared unlawful, it has been decided by this court that whether a state shall measure the contribution by the value of such credits and chooses in action, not exempted by superior authority, is the state's affair, not to be interfered with by the United States, and therefore that a state may tax a man for a debt due from a resident of another state. *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558. See also *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L.

ed. 189. It is true that decision in *Kirtland v. Hotchkiss* concerned Illinois bonds, and that if they were physically present in the taxing state, Connecticut, a special principle might apply, as explained in *Wheeler v. Sohmer*, 233 U. S. 434, 438, 58 L. ed. 1030, 1036, 34 Sup. Ct. Rep. 607. See *Stamps Comr. v. Hope*, [1891] A. C. 476, 484, 60 L. J. F. C. N. S. 44, 65 L. T. N. S. 268; *Dacey*, Conf. L. 2d ed. 312. But the decision was not made to turn upon such considerations; indeed, its reasoning hardly is reconcilable with them or with anything short of a general rule for all debts. It is argued that in a later case this court has held the power of taxation not to extend to chattels permanently situated outside the jurisdiction although the owner was within it (*Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493); and that the power ought equally to be denied as to debts depending for their validity and enforcement upon a jurisdiction other than that levying the tax. But this court has not attempted to press the principle so far, and there is opposed to it the long-established practice of considering the debts due to a man in determining his wealth at his domicile for the purposes of this sort of tax."

**Privilege tax on manufacturing business.**—A tax is not imposed upon the property or the business transactions of a foreign corporation outside the state so as to take the property of the corporation without due process of law by a municipal license tax upon the conduct by such corporation of a manufacturing business in the city, measured by the amount of sales of the goods manufactured in the local factory, whether sold within or without the state, either in domestic or interstate commerce. *American Mfg. Co. v. St. Louis*, (1919) 250 U. S. 459, 39 S. Ct. 522, 63 U. S. (L. ed.) —, *affirming* (Mo. 1917) 198 S. W. 1183.

#### q (1) On a Mileage Basis (p. 869)

**Mileage basis.**—Making the ratio that the miles of railway in the state over which move the oil tank cars of a foreign equipment company (not carrying on business within the state and having no office there) bear to the total mileage so traversed by its cars in all the states the sole basis of an assessment for state taxation of the property of such corporation is a method so arbitrary and produces results so unreasonable that to enforce the tax will take property without due process of law, and unduly burden interstate commerce, where the valuation thus arrived at is nearly \$300,000, and the value of the average number of tank cars within the state during the year, the only property that the corporation had in the state, is less than \$50,000. *Union Tank Line v. Wright*, (1919) 249 U. S. 275, 39 S. Ct. 276, 63 U. S. (L. ed.) —, (*reversing* (1915) 143 Ga. 765, (1917) 146 Ga. 489, 91 S. E. 680), and *disapproving obiter dictum*

in *Pullman's Palace Car Co. v. Pennsylvania*, (1891) 141 U. S. 18, 11 S. Ct. 876, 35 U. S. (L. ed.) 613, wherein the court said: "A state may not tax property belonging to a foreign corporation which has never come within its borders—to do so under any formula would violate the due process clause of the Fourteenth Amendment. In so far, however, as movables are regularly and habitually used and employed therein, they may be taxed by the state according to their fair value along with other property subject to its jurisdiction, although devoted to interstate commerce. While the valuation must be just it need not be limited to mere worth of the articles considered separately but may include as well 'the intangible value due to what we have called the organic relation of the property in the state to the whole system.' How to appraise them fairly when the tangibles constitute part of a going concern operating in many states often presents grave difficulties; and absolute accuracy is generally impossible. We have accordingly sustained methods of appraisement producing results approximately correct—for example, the mileage basis in case of a telegraph company (*Western Union Telegraph Co. v. Massachusetts*), [(1888) 125 U. S. 530, 8 S. Ct. 961, 31 U. S. (L. ed.) 790], and the average amount of property habitually brought in and carried out by a car company (*American Refrigerator Transit Co. v. Hall*, [(1899) 174 U. S. 70, 19 S. Ct. 599, 43 U. S. (L. ed.) 899]). But if the plan pursued is arbitrary and the consequent valuation grossly excessive it must be condemned because of conflict with the commerce clause or the Fourteenth Amendment or both.

"We think plaintiff in error's property was appraised according to an arbitrary method which produced results wholly unreasonable and that to permit enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce.

"*Pullman's Palace Car Co. v. Pennsylvania*, [(1891) 141 U. S. 18, 11 S. Ct. 876, 35 U. S. (L. ed.) 613], relied on by defendant in error, contains the following passage which seems to uphold the Georgia rule: 'The mode which the state of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that state was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles, in that and other states, over which its cars were run. This was a just and equitable method of assessment; and if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more.' But the point therein spoken of was unnecessary to determination of the cause; and so far as the quoted pas-

sage sanctions the specified rule for ascertaining values as generally appropriate, just, unobjectionable and productive of conclusive results, it must be regarded as *obiter dictum*, and we cannot now approve or follow it."

#### 11 (1) In General (p. 879)

**Assessment for highway purposes.**—Subjecting railroad property properly to highway taxation is not a denial of due process unless there is such an absence of benefits as to amount to confiscation. *Bush v. Branson*, (C. C. A. 8th Cir. 1918) 248 Fed. 377, 160 C. C. A. 387.

#### (2) According to Area (p. 881)

**Test of constitutionality of area method.**—Whether the area method of assessment is constitutional depends on the results. If it has produced results palpably arbitrary or grossly unequal it is unconstitutional. *Gast Realty, etc., Co. v. Schneider Granite Co.*, (1916) 240 U. S. 55, 36 S. Ct. 254, 60 U. S. (L. ed.) 523. But in the absence of such a showing it will be deemed to be constitutional. *Withnell v. Ruecking Constr. Co.*, (1919) 249 U. S. 63, 39 S. Ct. 200, 63 U. S. (L. ed.) —, *affirming* (1917) 269 Mo. 546, 191 S. W. 685.

#### (3) Taxing District in Legislative Discretion (p. 885)

To the same effect as the original annotation, see *Mt. St. Mary's Cemetery Ass'n v. Mullins*, (1919) 248 U. S. 501, 39 S. Ct. 173, 63 U. S. (L. ed.) —, *affirming* (1916) 268 Mo. 691, 187 S. W. 1169.

Whether the entire amount or a part only of the cost of a local improvement shall be imposed as a special tax upon the property benefited, and whether the tax shall be distributed upon a consideration of the particular benefit to particular lots, or apportioned according to their frontage upon the streets, their values, or their area, are matters of legislative discretion, subject, of course, to judicial relief in cases of actual abuse of power or of substantial error in executing it. *Hancock v. Muskogee*, (1919) 250 U. S. 454, 39 S. Ct. 528, 63 U. S. (L. ed.) —, *affirming* (Okla. 1917) 168 Pac. 445.

#### (3) (a) In General (p. 890)

**Hearing in advance.**—When the assessment is made in accordance with a fixed rule adopted by a legislative act, a property owner is not entitled to be heard in advance on the question of the amount and extent of the assessment and the benefits conferred. *Withnell v. Ruecking Constr. Co.*, (1919) 249 U. S. 63, 39 S. Ct. 200, 63 U. S. (L. ed.) —, *affirming* (1917) 269 Mo. 546, 191 S. W. 685.

#### Creation of taxing district by statute (p. 892)

A municipal ordinance determining that a district sewer shall be constructed, and establishing the boundaries of the district for

the purpose of determining what property shall be subjected to the special cost of construction, is not wanting in due process of law merely because there was no previous notice to the property owners nor opportunity to be heard, where full legislative power over the subject-matter has been conferred by the state legislature upon the municipality, since in such case a legislative determination by the local legislative body is of the same effect as though made by the general legislature. *Hancock v. Muskogee*, (1919) 250 U. S. 454, 39 S. Ct. 528, 63 U. S. (L. ed.) —, *affirming* (Okla. 1917) 168 Pac. 445.

#### (3) Judicial Proceeding Not Essential (p. 894)

To same effect as original annotation, see *Chicago, etc., R. Co. v. Drainage Dist. No. 8*, (S. D. Ia. 1917) 253 Fed. 491.

**Assessments for local improvements.**—The state legislature having prescribed that the entire cost of a district sewer shall be apportioned against the lots in the district in proportion to area, disregarding improvements, and excluding the public highways, there is no occasion for a hearing with respect to the mode in which the assessment shall be apportioned, since this is resolved into a mere mathematical calculation. *Hancock v. Muskogee*, (1919) 250 U. S. 454, 39 S. Ct. 528, 63 U. S. (L. ed.) —, *affirming* (Okla. 1917) 168 Pac. 445.

#### (4) Opportunity to Be Heard at Some Stage of Proceedings (p. 894)

**Hearing in enforcement of tax.**—Opportunity to be heard in judicial proceedings to enforce the tax constitutes due process of law. *Mt. St. Mary's Cemetery Ass'n v. Mullins*, (1919) 248 U. S. 501, 39 S. Ct. 173, 63 U. S. (L. ed.) —, *affirming* (1916) 268 Mo. 691, 187 S. W. 1169.

**Laws relative to taxation for road purposes** are not invalid because no notice is given to property owners before the creation of the taxing district if there is ample notice of every step in the proceedings thereafter and an opportunity is afforded to test the validity of the proceedings in court. *Lancaster v. Police Jury*, (W. D. La. 1917) 254 Fed. 179.

### Vol. XI, p. 904, Amend. 14, sec. 1.

#### (f) Regulation of Prostitution (p. 930)

**Abatement of houses of prostitution.**—A state statute providing for the suppression of houses of prostitution as a nuisance, the sale of personal property therein and proceedings against the owner of the premises as well as against the lessees, is constitutional as within the police power of the state. *Chase v. Revere House*, (Mass. 1919) 122 N. E. 162, wherein the court said: "It may be conceded that neither the real nor personal property enumerated in section 6 comes within the classification of property

which is inherently dangerous or offensive to the public health or morality. But the police power includes all necessary measures for the promotion of the good order of the community and the public morals. It embraces the suppression of nuisances whether injurious to the public health like unwholesome trades, slaughterhouses, and rendering establishments, or to the public morals like gambling houses and houses of prostitution and ill fame. . . . The power to prescribe a limitation carries with it the power to discriminate against one citizen in favor of another, and the unlawful use of such property may be enjoined. It is a judicial proceeding against the property which is being devoted to an unlawful use after notice to the parties interested, and the decree may under the statute include a forfeiture of the personal property which the court finds has been used in connection with and for the purpose of maintaining the place unlawfuly."

**(d) In Action on Mechanic's Lien (p. 943)**

In *Union Terminal Co. v. Turner Constr. Co.*, (C. C. A. 5th Cir. 1918) 247 Fed. 727, 159 C. C. A. 585, the Florida statute allowing costs to the successful plaintiff in a suit to enforce a mechanic's lien, though he does not recover the full amount sued for, was held to deny the equal protection of the laws.

**(c) When Authorized to Do Business in the State (p. 970)**

A change in a statute imposing an excise tax on foreign corporations doing business within the state, based on the amount of their capital stock, making it more onerous, without any corresponding change being made in the law relating to domestic corporations, does not operate to deny the equal protection of the laws to a foreign corporation which has acquired real estate within the state for the purpose of an automobile service station and garage. *Cheney Bros. Co. v. Massachusetts*, (1918) 246 U. S. 147, 38 S. Ct. 295, 62 U. S. (L. ed.) 632, reversing in part and affirming in part (1914) 218 Mass. 558, 106 N. E. 310.

**m (1) (a) Must Admit of Just Compensation (p. 973)**

**Commutation rates.**—Intrastate rates for commutation tickets may be fixed by a state through a duly authorized Public Service Commission at less than the legally established normal one-way single passenger fare without taking the carrier's property in violation of due process of law, or denying to it the equal protection of the laws, where a system of commutation rates has already voluntarily been established by the carrier. *Pennsylvania R. Co. v. Towers*, (1917) 245 U. S. 6, 38 S. Ct. 2, 62 U. S. (L. ed.) 117, L. R. A. 1918C 475, affirming (1915) 126 Md. 59, 94 Atl. 330, Ann. Cas. 1917B 1144.

**No discrimination shown.**—Carriers are not unconstitutionally discriminated against by a freight tariff prescribed by a state commission which gives the benefit of low rough-material rates on lumber only where the shipper transports over the same line that brought in the rough material a certain percentage of the manufactured product. *Arkadelphia Milling Co. v. St. Louis, etc., R. Co.*, (1919) 249 U. S. 134, 39 S. Ct. 237, 63 U. S. (L. ed.) —.

**Railroad injuriously affected by legislation.**—Before a railroad company may be heard to strike down state legislation affecting rates upon the ground of its repugnancy to the Federal Constitution he must bring himself within the class affected by the unconstitutional feature. *Arkadelphia Milling Co. v. St. Louis, etc., R. Co.*, (1919) 249 U. S. 134, 39 S. Ct. 237, 63 U. S. (L. ed.) —.

**(36) Requiring Railroads to Bear Expense of Alterations to Crossings (p. 991)**

**Sidewalks at railroad crossing.**—Neither due process of law nor the equal protection of the laws is denied by requiring a railway company to construct at its expense a sidewalk upon its right of way at a highway crossing to connect in either direction the planking extending the full length of the ties and between the tracks for the full width of the street with the sidewalks constructed or installed by the municipality or by the owners of abutting property. *Great Northern R. Co. v. Minnesota*, (1918) 246 U. S. 434, 38 S. Ct. 346, 62 U. S. (L. ed.) 817, affirming (1916) 132 Minn. 474, 157 N. W. 1069.

**(14) Food Laws Generally (p. 1016)**

**Labeling and branding.**—No denial of the equal protection of the laws is involved in the regulation of a state board of health, sanctioned by a state Food and Drugs Law, under which sales of a proprietary table syrup are forbidden unless the principal label discloses the ingredients and their proportions. *Corn Products Refining Co. v. Eddy*, (1919) 249 U. S. 427, 39 S. Ct. 325, 63 U. S. (L. ed.) —, affirming (1916) 99 Kan. 63, 163 Pac. 615.

**c1 (1) Rights of Municipal Corporations (p. 1020)**

**Discriminating between municipal and private owners of timber land.**—No unconstitutional discrimination in favor of a municipal owner of timber lands or timber as against individual owners results from a state statute which provides that any person who owns land or standing timber on land within 400 feet of any watershed held or owned by any city or town for the purpose of furnishing the city or town water supply, upon cutting or removing the timber or permitting either, within 400 feet of the watershed, shall, within three months after cutting, or earlier, upon written notice by the



city or town, remove or cause to be burned under proper supervision all tree tops, boughs, laps and other portions not desired to be taken for commercial or other purposes, within 400 feet of the boundary line of the watershed, so as to leave such space of 400 feet free and clear of the designated parts required to be removed or burned and other inflammable material caused by or left from cutting the standing timber, so as to prevent the spread of fire from such cut-over area, and the consequent damage to the watershed. *Perley v. North Carolina*, (1919) 249 U. S. 510, 39 S. Ct. 357, 63 U. S. (L. ed.) —, *affirming* (1917) 173 N. C. 783, 92 S. E. 504, wherein the court said: "Nor do we find illegal discrimination in the statute. The charge is based upon the contention that the statute condemns acts committed by individuals 'when if like and similar acts be done by municipalities there is no violation of the statute.' Counsel again insists too much upon the abstract. We conceded the aphorism upon which counsel relies that 'the equal protection of the laws is a pledge of the protection of equal laws.' We, on March 24th last, by an almost prescience of the contention now based on it, defined its extent and declared that the Fourteenth Amendment, which is the foundation of the aphorism, does not regard the impracticable, and that distinction may be made by legislation between objects or persons, and that the power of the state 'may be determined by degrees of evil or exercised in cases where detriment is specially experienced.' *Armour v. North Dakota*, (1916) 240 U. S. 510, 517 [36 S. Ct. 440, 60 U. S. (L. ed.) 771, 776, Ann. Cas. 1916D 548]. Moreover, we pointed out that 'the deference due to the judgment of the legislature on the matter' had 'been emphasized again and again. *Hebe Co. v. Shaw*, (1919) 248 U. S. 297, 303,' [39 S. Ct. 125, 63 U. S. (L. ed.) —]; *Dominion Hotel v. Arizona*, (1919) 249 U. S. 265, [39 S. Ct. 273, 63 U. S. (L. ed.) —]. Necessarily the legislature of the state did not think, and the courts below did not think, that individuals and municipalities stood in the same relation to the evil aimed at or that a public body charged with the care of the interests and welfare of the people would need the same restraint upon its action as an individual, or be induced to detrimental conduct."

#### (b) For Women (p. 1029)

A statute allowing railroad restaurants and eating houses operated by railroad companies.—The exemption of railway restaurants or eating houses located upon railway rights of way and operated by or under contract with any railway company from the provisions of Arizona Penal Code, par. 717, that the eight hours' daily work permitted to women workers shall be performed within a period of twelve hours, is not such an arbitrary discrimination against hotels and other restaurants or eating houses as to render the

statute invalid as denying the equal protection of the laws. *Dominion Hotel Co. v. Arizona*, (1919) 249 U. S. 265, 39 S. Ct. 273, 63 U. S. (L. ed.) —, *affirming* (1916) 18 Ariz. 345, 161 Pac. 682, wherein the court said: "The Fourteenth Amendment is not a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the state 'may be determined by degrees of evil or exercised in cases where detriment is specially experienced.' *Armour v. North Dakota*, (1916) 240 U. S. 510, 517 [36 S. Ct. 440, 60 U. S. (L. ed.) 771, 776, Ann. Cas. 1916D 548]. It may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact. The only question is whether we can say on our judicial knowledge that the legislature of Arizona could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. The deference due to the judgment of the legislature on the matter has been emphasized again and again. *Hebe Co. v. Shaw*, (1919) 248 U. S. 297, 303 [39 S. Ct. 125, 63 U. S. (L. ed.) —]. Of course, this is especially true when local conditions may affect the answer, conditions that the legislature does but that we cannot know. *Thomas Cusack Co. v. Chicago*, (1917) 242 U. S. 526, 530, 531 [37 S. Ct. 190, 61 U. S. (L. ed.) 472, 476]. Presumably, or at least possibly, the main custom of restaurants upon railroad rights of way comes from the passengers upon trains that stop to allow them to eat. The work must be adjusted to the hours of the trains. This fact makes a practical and, it may be, an important distinction between such restaurants and others. If in its theory the distinction is justifiable, as for all that we know it is, the fact that some cases, including the plaintiff's, are very near to the line makes it none the worse. That is the inevitable result of drawing a line where the distinctions are distinctions of degree; and the constant business of the law is to draw such lines. 'Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things.' *Louisville, etc., R. Co. v. Barber Asphalt Pav. Co.*, (1905) 197 U. S. 430, 434 [25 S. Ct. 466, 49 U. S. (L. ed.) 819, 821]. We cannot pronounce the statute void."

#### (3) Employer's Liability Act (p. 1033)

Constitutionality by whom raised.—Employers in hazardous industries may not raise the question whether a state Employers' Liability Act, confined on its face to

certain industries, denominated hazardous, is unconstitutional if it be extended by construction to nonhazardous occupations. *Arizona Employers' Liability Cases*, (1919) 250 U. S. 400, 39 S. Ct. 553, 63 U. S. (L. ed.) —, *affirming* (1919) 19 Ariz. 151, 182, 166 Pac. 278, 1183, 165 Pac. 1101, 1185.

**Liability of employer made independent of fault.**—Neither due process of law nor the equal protection of the laws is denied by the Arizona Employers' Liability Act which imposes upon employers in respect of certain specified hazardous employments, without regard to the question of their fault or that of any person for whose conduct they are responsible, a liability in compensatory damages, excluding all such as are speculative or punitive, to be awarded in a judicial proceeding according to the ordinary process of law for accidental personal injury or death of an employee arising out of and in the course of the employment, and due to its inherent conditions in cases where such injury or death shall not have been caused by the employee's own negligence, and declares void all contracts and regulations exempting the employer from such liability. *Arizona Employers' Liability Cases*, (1919) 250 U. S. 400, 39 S. Ct. 553, 63 U. S. (L. ed.) —, *affirming* (1919) 19 Ariz. 151, 182, 166 Pac. 278, 1183, 165 Pac. 1101, 1185.

**Election of remedies allowed employee.**—Employers are not deprived of property without due process of law, nor denied the equal protection of the laws merely because, under the laws of the state, an employee injured in the course of his employment has open to him three avenues of redress, any one of which he may pursue according to the facts of the case; viz., (1) the common-law liability relieved of the fellow-servant defense, and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury; (2) the Employers' Liability Law, which applies to hazardous occupations where the injury or death is not caused by his own negligence; (3) the Compulsory Compensation Law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer. *Arizona Employers' Liability Cases*, (1919) 250 U. S. 400, 39 S. Ct. 553, 63 U. S. (L. ed.) —, *affirming* (1919) 19 Ariz. 151, 182, 166 Pac. 278, 1183, 165 Pac. 1101, 1185.

**Assumption of risk.**—The common-law rules governing the assumption, respectively, by employer and employee, of the risk of employment and the consequences to flow therefrom, were not, by the Fourteenth Amendment to the Constitution, placed beyond the reach of the state's power to alter them as rules of future conduct and tests of responsibility through legislation designed to promote the general welfare, so long as it does not interfere arbitrarily and unreasonably, and in defiance of natural justice, with the right of employers and employees to agree

between themselves respecting the terms and conditions of employment. *Arizona Employers' Liability Cases*, (1919) 250 U. S. 400, 39 S. Ct. 553, 63 U. S. (L. ed.) —, *affirming* (1919) 19 Ariz. 151, 182, 166 Pac. 278, 1183, 165 Pac. 1101, 1185.

#### (4) (a) In General (p. 1033)

**Exclusion of class.**—A workmen's compensation act excluding railroad employees from its provisions is not for that reason unconstitutional. *Middleton v. Texas Power, etc., Co.*, (1919) 249 U. S. 152, *affirming* (1916) 108 Tex. 96, 185 S. W. 556, wherein the court said: "As to the exclusion of railroad employees, the existence of the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65; c. 143, 36 Stat. 291, applying exclusively as to employees of common carriers by rail injured while employed in interstate commerce, establishing liability for negligence and exempting from liability in the absence of negligence in all cases within its reach . . . and the difficulty that so often arises in determining in particular instances whether the employee was employed in interstate commerce at the time of the injury . . . reasonably may have led the legislature to the view that it would be unwise to attempt to apply the new system to railroad employees, in whatever kind of commerce employed, and that they might better be left to common-law actions with statutory modifications already in force (*Vernon's Sayles' Tex. Civ. Stats. 1914, Arts. 6640-6652*), and such others as experience might show to be called for."

**When elective.**—To the same effect as the original annotation, see *Middleton v. Texas Power, etc., Co.*, (1919) 249 U. S. 152, 39 S. Ct. 227, 63 U. S. (L. ed.) —, *affirming* (1916) 108 Tex. 96, 185 S. W. 556, wherein the court said: "In recent years many of the states have passed elective workmen's compensation laws not differing essentially from the one here in question, and they have been sustained by well-considered opinions of the state courts of last resort against attacks based upon all kinds of constitutional objections, including alleged denial of the equal protection of the laws; usually, however, from the standpoint of the employer. *Sexton v. Newark Dist. Tel. Co.*, (1913) 84 N. J. L. 85 [86 Atl. 451], (1914) 86 N. J. L. 701 [91 Atl. 1070]; *In re Opinion of Justices*, (1911) 209 Mass. 607 [96 N. E. 308]; *Young v. Duncan*, (1914) 218 Mass. 346 [106 N. E. 1]; *Borgnis v. Falk Co.*, (1911) 147 Wis. 327 [33 N. W. 209, 37 L. R. A. (N. S.) 489]; *State v. Creamer*, (1912) 85 Ohio St. 349 [97 N. E. 602, 39 L. R. A. (N. S. 694)]; *Deibeikis v. Link-Belt Co.*, (1914) 261 Ill. 454 [104 N. E. 211, Ann. Cas. 1915A 241]; *Crooks v. Tazewell Coal Co.*, (1914) 263 Ill. 343 [105 N. E. 132, Ann. Cas. 1915C 304]; *Victor Chemical Works v. Industrial Board*, (1916) 274 Ill. 11 [113 N. E. 173,

Ann. Cas. 1918B 627]; *Mathison v. Minneapolis St. R. Co.*, (1914) 126 Minn. 286 [148 N. W. 71, L. R. A. 1916D 412]; *Shade v. Ash Grove, etc., Cement Co.*, (1914) 93 Kan. 257 [144 Pac. 249]; *Sayles v. Foley*, (1916) 38 R. I. 484 [96 Atl. 340]; *Greene v. Caldwell*, (1916) 170 Ky. 571, 186 S. W. 648, Ann. Cas. 1918B 604]; *Hunter v. Colfax Consol. Coal Co.*, (1916) 175 Ia. 245 [154 N. W. 1037, 157 N. W. 145, Ann. Cas. 1917E 803, L. R. A. 1917D 15]. The Ohio law was sustained by this court against special attacks in *Jeffrey Mfg. Co. v. Blagg*, (1915) 235 U. S. 571, 576 [35 S. Ct. 167, 59 U. S. (L. ed.) 364, 369], and the Iowa law in *Hawkins v. Bleakly*, (1917) 243 U. S. 210, 213 [37 S. Ct. 255, 61 U. S. (L. ed.) 678, 683, Ann. Cas. 1917D 637] et seq.

"Streas is laid upon the point that the Texas act, while optional to the employer, is compulsory as to the employee of a subscribing employer. Our attention is not called to any express provision prohibiting a voluntary agreement between a subscribing employer and one or more of his employees taking them out of the operation of the act; but probably such an agreement might be held by the courts of the state to be inconsistent with the general policy of the act; the supreme court, in the case before us, did not intimate that such special agreements would be permissible; and hence it is fair to assume that all who remain in the employ of a subscribing employer, with notice that he has provided for payment of compensation by the association or by an authorized insurance company, will be bound by the provisions of the act.

"But a moment's reflection will show the impossibility of giving an option both to the employer and to the employee and enabling them to exercise it in diverse ways. The provisions of the act show that the legislative purpose is that it shall take effect only upon acceptance by both employer and employee. The former accepts by becoming a subscriber; the latter by remaining in the service of the employer after notice of such acceptance. And we see in this no ground for holding that there is a denial of the equal protection of the laws as between employer and employee. They stand in different relations to the common undertaking, and it was permissible to recognize this in determining how they should accept or reject the new system. The employer provides the plant, the organization, the capital, the credit, and necessarily must control and manage the operation. In the nature of things his contribution has less mobility than that of the employee, who may go from place to place seeking satisfactory employment, while the employer's plant and business are comparatively, even if not absolutely, fixed in position. Again, in order that the new scheme of compensation should be a success, the legislature deemed it proper, if not essential, that the payment of compensation to

the injured employees or their dependents should be rendered secure, and the losses to individual employers distributed, by a system of compensation insurance, in which it was deemed important that all employees of a given employer should be treated alike. Still further, there are reasons affecting the contentment of the employees and the discipline of the force, rendering it desirable that all serving under a common employer should be subject to a single rule as to compensation in the event of injury or death arising in the course of the employment. These and other considerations that might be suggested fully justified the legislative body of the state in determining that acceptance of the new system should rest upon the initiative of the employer, and that any particular employee who with notice of the employer's acceptance dissented from the resulting arrangement should be required to exercise his option by withdrawing from the employment. The relation of employer and employee being a voluntary relation, it was well within the power of the state to permit employers to accept or reject the new plan of compensation, each for himself, as a part of the terms of employment; and in doing this there was no denial to employees of the equal protection of the laws within the meaning of the Fourteenth Amendment."

Question of constitutionality by whom raised.—An employee who is a member of a class included within the terms of a Workmen's Compensation Act may attack its constitutionality in an action brought by him in a state court for damages for personal injuries received while employed by the defendant. *Middleton v. Texas Power, etc., Co.*, (1919) 249 U. S. 152, 39 S. Ct. 227, 63 U. S. (L. ed.) —, *affirming* (1916) 108 Tex. 96, 185 S. W. 556.

#### (b) As Dependent on Number of Employees (p. 1034)

To the same effect as the original annotation, see *Middleton v. Texas Power, etc., Co.*, (1919) 249 U. S. 152, 39 S. Ct. 227, 63 U. S. (L. ed.) —, *affirming* (1916) 108 Tex. 96, 185 S. W. 556, wherein the court said: "The exclusion of employees where not more than four or five are under a single employer is common in legislation of this character, and evidently permissible upon the ground that the conditions of the industry are different and the hazards fewer, simpler, and more easily avoided where so few are employed together; the legislature, of course, being the proper judges to determine precisely where the line should be drawn. Classification on this basis was upheld in *Jeffrey Mfg. Co. v. Blagg*, (1915) 235 U. S. 571, 576-577 [35 S. Ct. 167, 59 U. S. (L. ed.) 364, 369], and has been sustained repeatedly by the state courts. *State v. Creamer*, (1912) 85 Ohio St. 349, 404-405 [97 N. E. 602, 39 L. R. A. (N. S.) 694]; *Borgnis v. Falk Co.*, (1911)

147 Wis. 327, 355 [133 N. W. 209, 37 L. R. A. (N. S.) 489]; *Shade v. Ash Grove, etc., Cement Co.*, (1914) 93 Kan. 257, 259 [144 Pac. 249]; *Sayles v. Foley*, (1916) 38 R. I. 484, 491, 493 [96 Atl. 340]."

**(c) Exclusion of Farm Laborers and Domestic Servants (p. 1034)**

To the same effect as the original annotation, see *Middleton v. Texas Power, etc., Co.*, (1919) 249 U. S. 152, 39 S. Ct. 227, 63 U. S. (L. ed.) —, *affirming* (1916) 108 Tex. 96, 185 S. W. 556.

**g2. Billboard Ordinance Valid (p. 1053)**

Rights under the Fourteenth Amendment are not unconstitutionally abridged by a municipal ordinance under which no billboard of 25 square feet or more may be erected without a permit (costing \$1 for every 5 lineal feet), and no such structure may exceed 400 square feet in area, or extend more than 14 feet above the ground, and under which an open space of 4 feet must be left between the lower edge and the ground, and the billboard must not approach nearer than 6 feet to any building or to the side of the lot, or nearer than 2 feet to any other billboard, or than 15 feet to the street line, and must, with certain qualifications, conform to the building line; nor is it material that the complaining billboard owner has eliminated dangers from fire and wind, or that the restrictions as to size will not permit the display of posters of the standard size, or that such owner has contracts binding it to maintain advertising upon its boards. *St. Louis Poster Advertising Co. v. St. Louis*, (1919) 249 U. S. 269, 39 S. Ct. 274, 63 U. S. (L. ed.) —, *affirming* (Mo. 1917) 195 S. W. 717, wherein the court said: "Of course, the several restrictions that have been mentioned are said to be unreasonable and unconstitutional limitations of the liberty of the individual and of rights of property in land. But the argument comes too late. This court has recognized the correctness of the decision in *St. Louis Gunning Advertising Co. v. St. Louis*, (1911) 235 Mo. 99 [137 S. W. 929], followed in this case, that billboards properly may be put in a class by themselves and prohibited 'in residence districts of a city in the interest of the safety, morality, health and decency of the community.' *Thomas Cusack Co. v. Chicago*, (1917) 242 U. S. 526, 529, 530 [37 S. Ct. 190, 61 U. S. (L. ed.) 472, 474]. It is true that according to the bill the plaintiff has done away with dangers from fire and wind, but apart from the question whether those dangers do not remain sufficient to justify the general rule, they are or may be the least of the objections adverted to in the cases. 235 Mo. 99. *Kansas City Gunning Advertising Co. v. Kansas City*, (1912) 240 Mo. 659, 671 [144 S. W. 1099]. Possibly one or two details, especially the requirement of

conformity to the building line, have æsthetic considerations in view more obviously than anything else. But as the main burdens imposed stand on other ground, we should not be prepared to deny the validity of relatively trifling requirements that did not look solely to the satisfaction of rudimentary wants that alone we generally recognize as necessary. *Hubbard v. Taunton*, (1886) 140 Mass. 467, 468 [5 N. E. 157].

"If the city desired to discourage billboards by a high tax we know of nothing to hinder, even apart from the right to prohibit them altogether asserted in the *Thomas Cusack Co.'s Case*. *Citizens' Telephone Co. v. Fuller*, (1913) 229 U. S. 322, 329 [33 S. Ct. 833, 57 U. S. (L. ed.) 1206, 1213]. As to the plaintiff's contracts, so far as appears they were made after the ordinance was passed, but if made before it they were subject to legislation not invalid otherwise than for its incidental effect upon them. *Atlantic Coast Line R. Co. v. Goldsboro*, (1914) 232 U. S. 548, 558 [34 S. Ct. 364, 58 U. S. (L. ed.) 721]. The same thing may be said, apart from other answers, with regard to the alleged standardizing of the size of posters. In view of our recent decision we think further argument unnecessary to show that the ordinance must be upheld."

**12. Regulating Grazing of Sheep on Public Domain (p. 1054)**

Cattle owners are not given an arbitrary and unreasonable preference over sheep owners, contrary to the constitutional guaranty of the equal protection of the laws, by the provisions of Idaho Rev. Codes, 1908, § 6872, under which grazing sheep on the federal public domain is forbidden upon ranges previously occupied by cattle, without providing for a like preference to sheep owners in prior occupancy. *Amaechevarria v. Idaho*, (1918) 246 U. S. 343, 38 S. Ct. 323, 62 U. S. (L. ed.) 763, *affirming* (1915) 27 Idaho 797, 152 Pac. 280.

**x2 (1) (a) In General (p. 1057)**

**Intentional violation of essential principle.** — An intentional violation of the essential principle of practical uniformity is necessary to support the claim of a mining corporation that it has been denied the equal protection of the laws by having its property assessed at full value while other taxable property in the same class is greatly undervalued by the taxing officers. *Sunday Lake Iron Co. v. Wakefield*, (1918) 247 U. S. 350, 38 S. Ct. 495, 62 U. S. (L. ed.) 1154, *affirming* (1915) 186 Mich. 626, 153 N. W. 14.

**(b) Power of Classification (p. 1058)**

**Uniformity of taxation in particular class.** — A state may classify property within its borders and impose unequal taxation, provided the taxes are uniform on all property

in each class, without violating the provisions of this amendment. *Union Sulphur Co. v. Reed*, (E. D. La. 1918) 249 Fed. 172.

(d) aa. Maximum and Minimum Amount of Sales (p. 1083)

**Commission merchants in farm products.**—A Kansas statute requiring commission merchants in farm products to pay an annual license was held not to be unconstitutional. *Payne v. Kansas*, (1918) 248 U. S. 112, 39 S. Ct. 32, 63 U. S. (L. ed.) —, *affirming* (1916) 98 Kan. 465, 158 Pac. 408.

**Discrimination in favor of manufacturers who sell.**—A statute imposing an annual license fee upon all persons or corporations carrying on a merchandise business in the state, the amount of which is determined by the sum of the merchant's purchases during the year, is not, because of its exclusion of "manufacturers taxed on capital by this state, who offer for sale at the place of manufacture goods, wares, and merchandise manufactured by them," violative of the constitutional protection against the abridgment of privileges or immunities, or the denial of the equal protection of the laws. *Armour v. Virginia*, (1918) 246 U. S. 1, 38 S. Ct. 267, 62 U. S. (L. ed.) 547, *affirming* (1916) 118 Va. 242, 87 S. E. 610.

Vol. XI, p. 1110, amend. 16.

Purpose of Amendment (p. 1110)

**Purpose and scope of amendment.**—This amendment merely removes all occasion which otherwise might exist for an apportionment among the states of taxes laid on income, from whatever source derived. The taxing power is not extended to new or excepted subjects. *Peck v. Lowe*, (1918) 247 U. S. 165, 38 S. Ct. 432, 62 U. S. (L. ed.) 1049, *affirming* (S. D. N. Y. 1916) 234 Fed. 125.

**Taxation of dividends.**—Congress was at liberty, under this amendment, to tax as income without apportionment everything that became income in the ordinary sense of the word after the adoption of the amendment, including dividends received in the ordinary course by a stockholder from a corporation, even though they were extraordinary in amount and might appear upon analysis to be a mere realization in possession of an inchoate and contingent interest that the stockholder had in a surplus of corporate assets previously existing. *Lynch v. Hornby*, (1918) 247 U. S. 339, 38 S. Ct. 543, 62 U. S. (L. ed.) 1149, *reversing* (C. C. A. 8th Cir. 1916) 236 Fed. 661, 149 C. C. A. 657.



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